BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9403
File: 20-446201 Reg: 13078019

7-ELEVEN, INC. and JOHAL STORES, INC.,
dba 7-Eleven Store #2133-21483D
14104 Foothill Boulevard, Sylmar, CA 91342-1516,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: September 4, 2014
Los Angeles, CA

ISSUED OCTOBER 1, 2014

7-Eleven, Inc. and Johal Stores, Inc., doing business as 7-Eleven Store #2133-21483D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, all stayed provided appellants complete one year of discipline-free operation, for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Johal Stores, Inc., appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated January 9, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 21, 2006. On February 13, 2013, the Department filed an accusation against appellants charging that, on December 14, 2012, appellants' clerk, Harbhajan Singh (the clerk), sold an alcoholic beverage to 17-year-old Jamie T. Although not noted in the accusation, Jamie was working as a minor decoy for the Department of Alcoholic Beverage Control (ABC) at the time.

At the administrative hearing held on December 6, 2013, documentary evidence was received and testimony concerning the sale was presented by Jamie (the decoy) and by David Duran, an ABC agent. Appellants moved to bifurcate and continue the hearing to allow appellant Mohinder Singh Johal to appear and testify. This motion was denied. Appellants presented no other witnesses.

Testimony established that on December 14, 2012, the decoy entered the licensed premises and went to the cooler where she selected a 24-ounce can of Bud Light beer. She took the beer to the counter and waited in line. When it was her turn, she placed the beer on the counter, and the clerk asked for her identification. The decoy handed the clerk her California driver’s license. The clerk observed it for 5 to 10 seconds, then handed it back to the decoy. The clerk said “oh, you are so young” and the decoy nodded and laughed a little, but no age-related questions were asked. The clerk then completed the sale and the decoy exited the premises. Agent Duran was in the store and witnessed the transaction. Later, the decoy re-entered the premises and identified the clerk who had sold her the beer.

The Department's decision determined that the violation charged had been proven and that no defense had been established.

Appellants then filed an appeal contending: (1) the decoy did not display the appearance required by rule 141(b)(2);[2] (2) the store was unusually busy, in violation of rule 141(a); (3) rule 141(b)(4) was violated when the decoy failed to speak up about her age — making the decoy operation unfair; and (4) the ALJ abused his discretion by refusing to bifurcate the hearing, thereby excluding mitigating evidence.

DISCUSSION

I

Appellants contend that the decoy did not display the appearance required by rule 141(b)(2).

Rule 141(b)(2) provides: "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." Appellants maintain that the decoy appeared older than 21 because of her physical appearance — in particular, her weight, her wearing of bulky clothes that made her appear even heavier, and the fact that she wore makeup — as well as her training as a police Explorer, which made her appear confident.

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our judgment on the evidence, and we must accept as conclusive the Department's findings of fact. *CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.4th 1250, 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.4th 364, 367 [3 Cal.Rptr.2d 770]; . . . We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn

[2]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

> the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd*. (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*).)

The administrative law judge (ALJ) described the decoy as follows:

> ¶ 4. Jamie T[.] was born November 20, 1995. She served as a minor decoy during an operation conducted by Department Agents on December 14, 2012. On that day [she] was 17 years old.
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> ¶ 5. [The decoy] appeared and testified at the hearing. She stood about 5 feet 1 inch tall and weighed approximately 150 pounds. When she visited Respondents' store on December 14, 2012, she wore a white jacket, green scarf, blue jeans, blue sweater and brown boots. Her hair was in a "side braid". (See Exhibits 2, 3 and 5). [The decoy's] height and weight have remained approximately the same since the date of the operation. At Respondents' Licensed Premises on the date of the decoy operation, [she] looked substantially the same as she did at the hearing.
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> ¶ 9. Decoy Jamie T[.] appears her age, 17 years of age at the time of the decoy operation. Based on her overall appearance, *i.e.*, her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance/conduct in front of the clerk at the Licensed Premises on December 14, 2012, [the decoy] displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to clerk Singh. [The decoy] appeared her true age.
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> ¶ 10. This was decoy T[.]'s first time operating as a decoy. This was the very first store at which she attempted to purchase an alcoholic beverage. Decoy T[.] admitted to being nervous during this time.

(Findings of Fact ¶¶ 4, 5, 9, and 10.)

Appellants maintain the ALJ abused his discretion when determining that the decoy complied with the requirements of rule 141(b)(2). They allege this decoy was

larger than the average individual over the age of 20 and that she wore extra clothes which made her appear even larger. Appellants also maintain the decoy wore heavy makeup which made her appear older, and carried herself with the poise and confidence of a person over the age of 21 as a result of her Explorer training. (See App.Br. at p. 6.)

First, large stature is not dispositive. This Board has repeatedly declined to substitute its judgment for that of the ALJ on this question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *Garfield Beach CVS, LLC* (2013) AB-9261, at p. 4.)

The Appeals Board has also rejected the "experienced decoy" argument many times before. As the Board said in *Azzam* (2001) AB-7631:

> A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . .There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

Appellants offered no evidence to prove that this decoy's experience made her appear confident to the clerk.

Similarly, the fact that the decoy wore makeup has never been found by this Board to be justification for claiming the decoy appeared to be older than 21. The ALJ considered this argument and found it lacking:

> ¶ 5. Respondents argue that the decoy Jamie T[.] appeared older than 21 thereby violating Rule 141(b)(2). That argument is rejected. Jamie T[.] appeared and acted her true age. (Findings of Fact, ¶ 4, 5, 9 and 10). Jamie T[.] was wearing mascara and foundation on the day of the operation. She was also wearing it when she testified at the hearing. The minimal amount of make-up did nothing to alter her appearance or cause

her to look older than her true age.

(Conclusions of Law ¶ 5.)

Appellants have provided no valid reason for the Board to question the ALJ's determination that the decoy's appearance complied with rule 141(b)(2). This Board has time and again rejected invitations to substitute its judgment for that of the ALJ on questions of fact, and must do so here as well. As this Board has said on countless occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as she testifies, and making the determination whether her appearance met the requirements of the rule. We see no reason to question the ALJ's factual determination in this case.

II

Appellants contend that the decoy operation was not conducted in a fashion that promotes fairness, in violation of rule 141(a), because the store was unusually busy and this was, they maintain, a likely cause of the clerk's confusion. (App.Br. at p. 8.)

Rule 141(a) requires "fairness" in the use of minor decoys:

> A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors . . . and to reduce sales of alcoholic beverages to minors in a *fashion that promotes fairness*.

(Emphasis added.) As appellants note, the requirements of rule 141 must be strictly obeyed: "The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection for the licensees, the public, and the decoys themselves." (*Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 580 [79 Cal.Rptr.2d 126, 129].)

The ALJ considered appellants' contention that the operation was unfair because

the store was busy and rejected it:

> ¶ 6. Respondents also argue that the store was busy and therefore the decoy operation was unfair and violated Rule 141a. That argument is also rejected. Agent Duran testified that there were about 15 people inside the store during the time of [the decoy's] purchase. However, there was no evidence presented by Respondents to prove that this somehow caused the operation to be unfair. The clerk did not testify. Any inference regarding his state of mind would be pure speculation. This is a convenience store. Customers normally run in for one or two items and run right out. There were three customers in front of [the decoy] when she went to the counter. Respondents have the burden of proving up this affirmative defense and they failed to do so.

(Conclusions of Law ¶ 6.)

Appellants disagree, tendering their own interpretation of the law: that "A busy premise may constitute a violation of Rule 141(a) . . . when the level of patron activity unfairly interjects itself into the operation." (App.Br. at p. 8.) This argument construes the law too broadly. The language on which they rely is actually quite narrow:

> It is conceivable that in a situation which involved an unusual level of patron activity that truly interjected itself into a decoy operation *to such an extent that a seller was legitimately distracted or confused, and the law enforcement officials sought to take advantage of such distraction or confusion*, relief would be appropriate.

(*Tang* (2000) AB-7454, at p. 5, emphasis added; see also *Equilon Enterprises* (2001) AB-7765, at p. 4.)

Appellants presented no evidence whatsoever that officers acted improperly or took advantage of the circumstances. Indeed, the number of customers seems to have had absolutely no effect on the course of the transaction beyond the decoy's relatively short wait in line. It is undisputed that the clerk took the time to request and examine the decoy's identification. Moreover, the clerk did not testify; any claim that the clerk was "legitimately distracted or confused" is just speculation. Appellants' arguments on this point are therefore unsupported by any evidence, and the ALJ was entitled to reject

them.

This Board has had little sympathy for the "rush hour" defense in the past because the policy concerns weighing against it are too great:

> When commerce reaches the point where the desire not to inconvenience customers overrides the importance of preventing sales of alcoholic beverages to minors, the public safety and morals of the people of the State of California will be irreparably injured. Such an unacceptable result will not occur on this Board's watch.

(*The Vons Company, Inc.* (2001) AB-7788, at p. 4.) Appellants have certainly given us no cause to look beyond those concerns in this case.

III

Appellants also contend the decoy operation was not conducted in a fashion that promotes fairness, in violation of rule 141(a), because the decoy failed to speak up when the clerk said "Oh, you are so young." Appellants maintain this failure to speak violated rule 141(b)(4).[3]

The ALJ made the following observations about appellants' argument:

> ¶ 7. Finally, Respondents argue that rule 141b4 was violated because decoy T[.] did not verbally respond to clerk Singh when he said she was so young. This argument is rejected. Rule 141b4 states "A decoy shall answer truthfully any questions about his or her age". Clerk Singh did not ask the decoy any questions about her age, or any questions at all for that matter. Clerk Singh made a statement "Oh, you are so young" as he handed [the decoy's] driver license back to her. Contrary to Respondents' contentions, no response was required. There was no evidence presented by Respondents that would cause anyone to turn that statement into a question.

(Conclusions of Law ¶ 7.)

The Board has, in other cases involving rule 141(b)(4), addressed issues similar

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[3]Rule 141(b)(4) provides: "A decoy shall answer truthfully any questions about his or her age."

to the issue in this case, and its reasoning as expressed in those decisions gives us some guidance.

In *Thrifty Payless, Inc*. (1998) AB-7050, the Board reversed a Department decision — which rejected a proposed decision finding non-compliance with rule 141(b)(4) — when the decoy, after being asked if she was 21, simply offered the clerk her driver's license. The Department deemed the offer a "truthful answer" within the meaning of the rule. The Board described the response," as "borderline misleading." (*Id*. at p. 5.) "[H]er explanation for her non-responsive offer of her driver's license suggests that her objective was not to test whether the clerk would sell to a minor, but, instead, actually to make a purchase of an alcoholic beverage." (*Ibid*.)

> The offer of a driver's license instead of an answer to the question which was asked had the potential of creating a distraction. The clerk could well have thought, as appellant contends, that she was being told, in substance, "of course I'm old enough to purchase liquor; go ahead and check my identification." By analogy, a person attempting to cash a check who tenders a driver's license which would show he is not the payee must believe he will fool the merchant to whom the check is presented. Not that he or she will necessarily succeed, but certainly the possibility of confusion or distraction has been created.

(*Thrifty Payless, Inc., supra*, at pp. 6-7.)

In *The Southland Corp*./*Dandona* (1999) AB-7099, the Board reversed a decision of the Department where the decoy did not respond to the clerk's remark, "1978. You're 21." The decoy testified she understood the clerk's remark to be a statement rather than a question, but also testified that she had been instructed by the police that if she presented her driver's license, she did not have to answer a question about her age. (*Id*. at pp. 4-6.) The Board stated:

> It is clear from the testimony of the decoy that it would have meant little to her whether [the clerk's] remark was a question or a statement. . . . Consequently, to accept her after-the-fact characterization of the clerk's

> remark as a mere statement is too charitable. There can be a very fine line between a remark that is a mere statement and a remark that is really a question. Delegating that determination to one who believed she should not have answered in either case tacitly ignores the requirement of fairness.

(*Id*. at pp. 7-8.)

In *Lucky Stores, Inc.* (1999) AB-7227, the Board reversed a decision of the Department where the decoy made no response when the clerk said "1978. You are just 21" (per the decoy) or "1978. You are 21" (per the clerk). The clerk testified he intended what he said to be a question, and got only a grin in response, while the decoy testified he understood it to be a statement, to which no reply was necessary. (*Id.* at p.4.)The Board stated:

> Our concern is that it is asking too much of a decoy to leave it to him or to her to make that critical judgment whether a remark about age is intended to elicit from them either a confirmation or a correction, or is simply conversation. If fairness of the decoy operation is an important goal, as the Rule proclaims, then, in its implementation, it ought to be the case that where the clerk's remark about age is such that an honest clarification from the decoy may prevent a sale from occurring, the decoy has the obligation to offer such clarification by saying "No, I am not 21," or words to that effect.

(*Id*. at p. 6.)

In *Equilon Enterprises, LLC* (2002) AB-7845, the Board reversed a decision of the Department where the decoy remained silent after the clerk examined the decoy's driver's license, which showed he would be 21 in 2003, and said, "Born in 1981. You check out okay."

The Board explained why it thought the decision must be reversed:

> Rule 141 requires that a decoy shall answer truthfully questions about his or her age. There is nothing in the rule that requires a decoy to volunteer information about his or her age, or to clear up what may be a misconception about age where a seller is silent and simply goes ahead with the sale either without having requested proof of age or, upon

> request, having been provided identification. Since a decoy is engaged in a law enforcement process to determine the extent to which sellers are complying with the law regarding sales of alcoholic beverages to minors, it would seem unreasonable to expect that process to function if the decoy was obligated to clear up what might be a mistake or misconception on the part of the seller.
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> For example, many transactions involve a seller who requested identification, was furnished identification which showed the decoy to be a minor, yet proceeded with the sale. It could reasonably be assumed the seller was careless, or unable to interpret the information provided. It might also be assumed the seller really did not care, although this is undoubtedly much less frequent.
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> However, where there has been a verbalization of the seller's thought processes such as that in this case, a decoy may be expected to respond. Rule 141 says that a decoy is required to respond to a question. As the Board has said in an earlier case, there may be a thin line between what is a statement and what is a question. And when that line blurs, and the verbalization borders on the ambiguous, it may well be that a response is required.

(*Id*. at p. 5.)

In *Garfield Beach* (2013) AB-9271, the Board considered a case similar to the *Lucky Stores* case discussed above, and held that where there is a verbalization by a clerk or employee expressing the mistaken notion that the decoy is over the age of 21, that the decoy has a duty to respond, in the interest of fairness. In *Garfield Beach*, the clerk said "I know you are over 21 and this is only for the cameras." (*Id*. at p. 2.) The decoy said nothing. (*Ibid*.) In both *Lucky Stores* and *Garfield Beach*, the clerk uttered words which clearly expressed that a mistaken calculation had been made. Even though both cases involved statements, and not questions, the Board found in both cases that a response by the decoy was required in the interest of fairness.

It is apparent from the Board's prior cases involving this rule, that it considers an appropriate response — whether to a statement or a question by a clerk — to be one which is free of ambiguity, unlikely to cause confusion or distraction, and which errs on

the side of responding if the clerk has made a mistaken calculation as to age. An unspoken response or gesture, however, which leads a clerk to guess at what the decoy intended to say, is not in the spirit of the rule and will not suffice.

In the case before us, however, the clerk said nothing to indicate that he thought the decoy was over the age of 21. On the contrary, he said: "Oh, you are so young." The work "young" is a subjective term, and gives no indication that the clerk has made a miscalculation and as a result believes the decoy to be over 21. We decline to enlarge the holding of *Garfield Beach* to include a requirement that any and all statements by a clerk require a response from the decoy, or that the decoy in this case had a duty to speak when there was no ambiguity which required clarification and no miscalculation as to age by the clerk.

IV

Appellants contend that the ALJ abused his discretion by denying their motion for a bifurcation and continuation of the hearing to allow appellant Johal to appear and testify regarding mitigating evidence. Mr. Johal was unable to attend the administrative hearing because a friend's funeral was the same day. The ALJ found good cause was not shown and denied the request for bifurcation and continuance.

Pursuant to Government Code section 11524, the administrative law judge (ALJ) has the right to grant a request for continuance for good cause. There is no absolute right to a continuance; one is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*In re Mr. S Liquor Marts, Inc.* (2005) AB-8319; *Cooper v. Bd. of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Bd. of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198]; *Givens v.*

Dept. of Alcoholic Bev. Control (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)

The party requesting a continuance must show good cause for the continuance. The Government Code does not specify what will constitute "good cause," but guidance is provided by provisions in the Code of Civil Procedure dealing with continuances. Section 595.4 of the Code of Civil Procedure provides that a request for continuance "on the ground of the absence of evidence" must show "the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it." A party requesting a continuance in order to obtain evidence must show what it expects the evidence to prove. (*Johnson v. Fassett* (1955) 132 Cal.App.2d 871, 873 [283 P.2d 281].)

The ALJ denied the request for bifurcation and continuance because Mr. Johal was not a percipient witness to the decoy operation. The information that he wished to testify to, regarding factors in mitigation, was readily agreed to by the Department — such as the length of licensure without discipline, participation in the Come of Age program, and the use of secret shoppers — and the ALJ believed it was not necessary to hear it directly from the licensee. (RT at pp. 39-40.) In addition, the Department requested a mitigated penalty based on these factors and the ALJ agreed.

Under the circumstances, we do not believe the ALJ abused his discretion in denying appellants' request for a bifurcation and continuance.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.