

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

AB-9404

File: 20-315709 Reg: 13078922

7-ELEVEN, INC. and SYED ARSHAD H. GILANI,
dba 7-Eleven #2171 24483
703 East Palmdale Boulevard, Palmdale, CA 93550,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 6, 2014
San Diego, CA

ISSUED DECEMBER 3, 2014

7-Eleven, Inc. and Syed Arshad H. Gilani, doing business as 7-Eleven #2171 24483 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 5 days, because their clerk sold an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a). The suspension was, however, stayed on condition appellants complete one year of discipline-free operation.

Appearances include appellants 7-Eleven, Inc. and Syed Arshad H. Gilani, through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, of the law firm of Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Kerry K. Winters.

¹The decision of the Department, dated January 17, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 26, 1996. On July 19, 2013, the Department filed an accusation against appellants charging that, on April 13, 2013, appellants' clerk, Ali Anwar² (the clerk), sold an alcoholic beverage to 17-year-old Jamie T. (the decoy). Although not noted in the accusation, Jamie T. was working as a minor decoy for the Department of Alcoholic Beverage Control (Department) at the time.

At the December 6, 2013 administrative hearing concerning the sale, documentary evidence and testimony was presented by the decoy, and by Charlotte Clark, a Department agent.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to the coolers where she selected a 24-ounce can of Bud Light beer and took it to the sales counter. The clerk asked for her identification and the decoy handed him her California driver's license. (Exhibit 4.) The license had a portrait format and contained a red stripe indicating "AGE 21 IN 2016." The clerk swiped the license through the cash register, looked at the license again, then entered something on the screen before handing the license back saying, "don't drink and drive." He did not ask the decoy any age-related questions. The decoy paid for the beer and exited the premises. Department Agent Clark observed the transaction from inside the premises.

The decoy re-entered the premises with Department agents who identified

²Both the accusation and the Department's decision refer to the clerk as Ali Anwar, but during her testimony Agent Clark identifies the clerk throughout as Ali Ahmed. (RT at pp. 26-36.) Appellants do not raise this as an issue.

themselves to the clerk and advised him that he had sold an alcoholic beverage to a minor. They asked him to step to the side of the register. Agent Clark asked the decoy if this was the clerk who had sold her the beer. The decoy said yes, then pointed at the clerk saying “he did.” The decoy and clerk were standing approximately 3 to 4 feet apart and facing each other during the identification. A photo of the clerk and decoy was then taken. (Exhibit 5.)

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

Appellants then filed a timely appeal contending: (1) The decoy did not display the appearance required by rule 141(b)(2),³ and (2) the face-to-face identification did not comply with rule 141(b)(5).

DISCUSSION

I

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, the fact that she wore makeup — her training and experience as a decoy and as a Sheriff’s Explorer, and the fact that five out of ten locations visited on the day of this operation sold her an alcoholic beverage. (App.Br. at p. 5.)

This Board is bound by the factual findings in the Department’s decision as long

³References 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.

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 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 Appeals Board has 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.

(*Id.* at p. 5, emphasis in original.) The decoy in this matter had only been a decoy one or two times before the date of this operation, and had been a Sheriff's Explorer for two years. Appellants fail to demonstrate how this minimal experience resulted in anything observable to the clerk which would have made him believe the decoy was over the age of 21. Without such evidence this argument must fail.

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

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 April 13, 2013, [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 Anwar. [The decoy] appeared her true age.

(Findings of Fact ¶ 9 .)

The ALJ reaches the following conclusions about the decoy's appearance and her success rate:

5. Respondents argue that the decoy Jamie T[.] appeared older than 21 thereby violating Rule 141(b)(2). That argument is rejected. [The decoy] appeared and acted her true age. (Findings of Fact , ¶ 4, 5, and 9). [The decoy] 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. There was no evidence presented by Respondents to suggest otherwise.

Respondents also argue that evidence [*sic*] that [the decoy] appeared older than 21 because she purchased alcoholic beverages at 5 of the 10 stores she visited on April 13, 2013. Although this is a factor to be considered, it is not the only factor. Taking into account all of the other factors previously mentioned, [the decoy] appears her true age.

(Conclusions of Law ¶ 5.)

Appellants have provided no valid basis for the Board to question the ALJ's determination that the decoy's appearance complied with rule 141. This Board has repeatedly declined to substitute its judgment for that of the ALJ on questions of fact unless they lack support in the record, and we must do so here as well.

As this Board has said on many 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 the decoy's appearance met the requirements of rule 141. We must decline appellants' invitation to re-weigh the evidence.

II

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Appellants contend the face-to-face identification was unduly suggestive, and failed to comply with rule 141(b)(5), because the agents made the initial contact with the clerk and informed him that he had sold an alcoholic beverage to a minor — prior to the decoy making a face-to-face identification. They contend that the identification was therefore actually made by the agents, rather than by the decoy, and thus failed to comply with rule 141(b)(5). They argue that the face-to-face identification failed to strictly comply with this Board's decision in *Chun* (1999) AB-7287, which defined face-to-face identification as:

The decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

Appellants fail to support their argument, and as the ALJ found, the face-to-face identification complied with rule 141(b)(5):

6. Respondents argue that Rule 141b5 [*sic*] was violated because the face to face identification was "overly suggestive". This argument is rejected. This is not a criminal show-up or line-up. This is not a situation where only decoy T[.] knows who sold her the beer. Agent Clark witnessed the whole transaction. Rule 141(b)(5) ensures that the seller will be given the opportunity, soon after the sale, to come face-to-face with the decoy. *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* 109 Cal.App. 4th 1897. In this case clerk Anwar was given the opportunity to come face-to-face with the decoy. In

other words, clerk Anwar was shown the minor to whom he sold the beer.

(Conclusions of Law ¶ 6.)

The Board has addressed variations of the "face-to-face" argument many times before, and rejected the same argument appellants make here:

The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.) ¶ . . . ¶ As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, at pp. 7-8.)

Appellants' contentions are not supported by the evidence. While an "unduly suggestive" identification is impermissible, appellants have presented no evidence that the identification in this instance was unduly suggestive.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.