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

**AB-9460**
File: 20-505804 Reg: 14080231

RESEDA OIL CORP.,
dba Reseda Mobil
19248 Victory Boulevard, Tarzana, CA 91335,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: March 5, 2015
Los Angeles, CA

**ISSUED MARCH 24, 2015**

Reseda Oil Corp., doing business as Reseda Mobil (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 15 days because its clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellant Reseda Oil Corp., through its counsel, Ralph Barat Saltsman and Margaret Warner Rose of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated July 24, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on February 2, 2011. On March 28, 2014, the Department filed an accusation charging that appellant's clerk, Yassa Mina (the clerk), sold an alcoholic beverage to 18-year-old Everardo Renteria on December 10, 2013. Although not noted in the accusation, Renteria was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on June 26, 2014, documentary evidence was received, and testimony concerning the sale was presented by Renteria (the decoy) and by Hugo Fuentes, an LAPD officer. Appellant presented no witnesses.

Testimony established that on the date of the operation, LAPD Officer Nicholas Sinclair entered the licensed premises, followed shortly thereafter by the decoy. The decoy proceeded to the area containing alcohol. He selected a can of Bud Light beer, which he took to the counter. The clerk rang up the beer. The decoy paid, then exited with the beer.

After the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed an appeal contending (1) due process requires that the decoy appear before the Appeals Board, and (2) the Administrative Law Judge (ALJ) failed to properly consider evidence of the decoy's law enforcement experience, his physique and workout schedule, his "success rate" during this and previous operations, and his apparent age relative to the 22-year-old clerk.

DISCUSSION

I

Appellant contends that for this Board to conduct a proper review of the Department's decision, the decoy must appear at oral argument. Appellant argues the decoy's physical person is evidence to be reviewed on appeal, and "[t]he Board cannot shy away from its statutory and constitutional mandate to review the Rule 141(b)(2) findings simply because the duty requires the unusual step of viewing a living piece of evidence." (App.Br. at p. 7.)

Appellant is simply raising the same decoy-as-evidence argument we addressed at length — and firmly rejected — in *Chevron Stations* (2015) AB-9415. (See also *7-Eleven, Inc./Niaz* (2015) AB-9427; *7-Eleven, Inc./Jamreonvit* (2015) AB-9424; *7-Eleven, Inc./Assefa* (2015) AB-9416.) We offer only a summary of our reasoning here, and refer appellant to that case for a more comprehensive analysis.

Section 23083 limits our review to evidence included in the administrative record. (Bus. & Prof. Code § 23083; see also *7-Eleven, Inc./Grover* (2007) AB-8558, at p. 3.) Section 1038(a) of the California Code of Regulations defines the items to be included in the administrative record — none of which conceivably allows for an actual human being. (See Cal. Code Regs., tit. 1, § 1038(a).) The properly compiled record — including testimony, arguments, photographs of the decoy, and the Department's decision containing the ALJ's firsthand impressions — is both legally and practically sufficient for the Board to determine whether the conclusions reached regarding the decoy's appearance are supported by the evidence.

As we noted in *Chevron Stations*, *supra*, we find this argument has no merit. In our previous decisions addressing this issue, we strongly encouraged the appellants to

seek a writ of appeal if they disagree. It is our understanding that counsel for appellant is presently pursuing a writ on this issue in an unrelated case. Until an ultimate decision from an appellate court resolves this issue, we shall reject it for the reasons we have previously explained in numerous decisions.

II

Appellant contends the ALJ failed to properly consider evidence of the decoy's law enforcement experience, his physical stature, his workout regimen, his so-called "success rate" in purchasing alcoholic beverages during this and previous decoy operations, and his apparent age relative to that of the 22-year-old clerk. Appellant insists that, had the ALJ properly considered these factors "in combination," he would have concluded the decoy appeared over 21. Finally, appellant argues the ALJ was required to explain his reasons for holding otherwise.

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." The rule provides an affirmative defense, and the burden of proof lies with appellant. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

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

> We cannot interpose our independent 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.App.4th 1250, 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; . . . ) 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. Alcoholic Bev. Control* (*Lacabanne*) (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].) 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.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The ALJ made the following findings of fact regarding the decoy's experience, physique, workout regimen, and "success rate":

> 5. Renteria appeared and testified at the hearing. On December 10, 2013, he was 5'10" tall and weighed 220 pounds. He wore a black flannel shirt with a gray t-shirt underneath it, gray pants, and tennis shoes. His hair was long on the top and shaved on the sides. (Exhibits 2-3.) His appearance at the hearing was the same, except that he was five pounds heavier.
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> [¶ . . . ¶]
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> 9. Renteria had been a decoy approximately five times before this operation. During those earlier operations, he visited approximately 50 locations, of which approximately 24 sold alcohol to him. On December 10, 2013, he visited ten locations, four of which sold alcohol to him (including the Licensed Premises). Renteria learned of the decoy program through his involvement in LAPD's cadet program. As a cadet, he attended an academy (once a week for two months), engaged in physical training, and assisted with traffic and crowd control. Outside of the cadet program, he worked out to stay in shape and ride BMX bikes.
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> 10. Renteria appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of [the clerk] at the Licensed Premises on December 10, 2013, Renteria displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Mina.

(Findings of Fact ¶¶ 5, 9-10.)

Based on these factual findings, the ALJ reached the following conclusions of law:

> 6. With respect to rule 141(b)(2), the respondent argued that Renteria's height, weight, build, and mannerisms gave him the appearance of a person over 21. In support of this argument, the Respondent noted that Renteria has been able to purchase alcohol at 40% of the locations he visited on December 10, 2013 and nearly 50% of the locations he visited overall.
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> Renteria's appearance on earlier dates was not placed into evidence, so there is no way to determine how old he looked during the earlier operations. In any event, his appearance on other dates is irrelevant to the case at hand. Only his appearance on December 10, 2013 matters. With respect to December 10, 2013, the mere fact that four of ten locations sold alcohol to him does not automatically establish that he appeared to be over the age of 21 — it might be a comment on the failures of the clerks involved in the other sales. Extrapolating back from Renteria's appearance at the hearing using the photos admitted into evidence and his testimony, Renteria had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

(Conclusions of Law ¶ 6.) A review of the decision below reveals that the ALJ thoroughly considered the elements of appearance appellant now raises and simply found them unpersuasive.

Appellant, however, objects that "[t]he nature of the decoy's characteristics in this case demanded an inquiry into what these traits meant *in combination*." (App.Br. at p. 10, emphasis in original.) According to appellant, the ALJ improperly considered each factor in isolation, and had he considered them in the aggregate, he would have reached the opposite conclusion.

We see nothing in the decision below to support appellant's claim that the ALJ failed to consider these factors in combination — a "gestalt" type argument that somehow the whole is different from the sum of its parts. Indeed, the decision shows he *did* evaluate the sum total of all these factors, and based his factual findings "on [the

decoy's] *overall appearance*, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of [the clerk] at the Licensed Premises." (Findings of Fact ¶ 10, emphasis added.)

Moreover, appellant insists that "[w]here unusual traits exist, such as tall height, large stature, and a high success rate, an explanation is required to ensure that the Department did consider them and to establish why those traits do not have an observable effect on the decoy's age." (App.Br. at p. 11.) Appellant cites no law requiring any such explanation, and we have found none either. In fact, this Board has repeatedly held the opposite — no explanation or reasoning is required, provided findings are made. (See, e.g., *7-Eleven, Inc./Gurpreet Singh* (2014) AB-9344, at p. 7; *Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2013) AB-9255, at pp. 3-4; *Garfield Beach CVS, LLC/Longs Drug Stores Cal., LLC* (2013) AB-9239, at pp. 3-4.) Indeed, appellant carried the burden of proving its rule 141(b)(2) defense; it was incumbent upon *appellant*, not the Department, to persuasively establish how these traits influenced the decoy's apparent age. (See *Chevron Stations, Inc.* (2015) AB-9445.)

Finally, appellant attempts to persuade this Board that the physical appearance of the *clerk* is relevant to a determination of the decoy's apparent age. They argue:

> Appellant contends that 5'10" height and 220 pounds is large-statured. That is especially true under the circumstances presented to [the clerk] because [the decoy] was much taller and more broad-shouldered than [the clerk] despite that [the decoy] was 18 and [the clerk] was 22. (Department's Exhibit 3.) [The decoy] therefore looked older and more imposing than an individual who was old enough to purchase alcohol, thus quite possibly misleading [the clerk] into believing he was selling to a person over 22 years of age.

(App.Br. at p. 10.)

We addressed a similar argument in *Garfield Beach CVS, LLC/Longs Drug Stores California* (2013) AB-9302. In that case, the appellants argued the ALJ "ought to have considered a photograph of the 21-year-old clerk, standing beside the decoy, as a 'measuring tape' by which to assess the decoy's apparent age." (*Id.* at p. 4.) We rejected that contention and held:

> [A] photograph of the clerk, offered as a point of comparison, is no more relevant to the facts of this case than a photograph of any other individual 21-year-old. The question of whether the *decoy's* appearance complied with rule 141(b)(2) in no way implicates the appearance of the clerk, who may or may not appear her actual age. The clerk's appearance in no way influenced the appearance of the decoy at the time of the sale.
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> Moreover, the clerk did not testify, so it would be mere speculation to suggest that her understanding of her own appearance influenced her decision to sell alcohol to the decoy. The appearance of the clerk is wholly irrelevant, and the ALJ properly ignored it.

(*Id.* at p. 5, emphasis in original.) The same reasoning applies in this case.

Ultimately, appellant is merely asking this Board to consider the same set of facts and reach the opposite conclusion — something we cannot do.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]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.