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

AB-9475
File: 20-424311 Reg: 14080399

7-ELEVEN, INC. and ARVEEDEE, INC.,
dba 7-Eleven Store #2172-26766C
13541 Beach Boulevard, Westminster, CA 92683,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 7, 2015
Los Angeles, CA

ISSUED MAY 20, 2015

7-Eleven, Inc. and Arveedee, Inc., doing business as 7-Eleven Store #2172-26766C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days, with all 10 days conditionally stayed, because their clerk sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants 7-Eleven, Inc. and Arveedee, Inc., through their 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 October 2, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 2, 2005. Mr. and Mrs. Bernabe, the officers of appellant corporation Arveedee, Inc., have been licensed at the premises since May 3, 1994 with no record of discipline. On April 25, 2014, the Department filed an accusation against appellants charging that, on January 24, 2014, appellants' clerk, Lemuel Caberto (the clerk), sold an alcoholic beverage to 18-year-old Helen Vu. Although not noted in the accusation, Vu was working as a minor decoy in a joint operation between the Westminster Police Department (WPD) and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on August 28, 2014, documentary evidence was received, and testimony concerning the sale was presented by Helen Vu (the decoy) and Benjamin Jaipream, a detective with the WPD.

Testimony established that on the date of the operation, the decoy entered the licensed premises and walked to the beer coolers. She took out a six-pack of Heineken beer bottles from the cooler, took the beer to the sales counter, and placed the beer on the counter. The clerk asked the decoy for identification, and the decoy handed her California driver's license to the clerk. The license contained the decoy's correct date of birth — 06/10/1995 — and a red stripe indicating "AGE 21 IN 2016." The clerk looked at the identification, gave it back to the decoy without asking any age-related questions, stated the price, took the money tendered by the decoy, provided the decoy with change, and bagged the beer. The decoy took the beer and exited the premises.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. The Department imposed a penalty of 10 days' suspension with all 10 days stayed subject to one year of discipline-free

operation.

Appellants then filed an appeal contending: (1) the Department's determination that there was compliance with rule 141(b)(2)[2] is not supported by the findings, and (2) the Board must view the decoy in person in order to correctly review the sufficiency of the Administrative Law Judge's (ALJ) rule 141(b)(2) findings.

DISCUSSION

I

Appellants contend the Department's determination that there was compliance with rule 141(b)(2) is not supported by the findings. Specifically, appellants argue that the decoy's success rate during the instant operation, her mature physical appearance, and her extensive law enforcement training experience suggest that she did not display the appearance which would generally be expected of a person under 21 years of age. (App.Br. at pp. 4-6.)

Rule 141 states, in relevant part:

> (a) 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.
>
> (b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage.
>
> [¶ . . .¶]
>
> (2) 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.

[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 scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. (See Cal. Const., art. XX, § 22; Bus. & Prof. Code §§ 23084 and 23085; and *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d. 85 [84 Cal.Rptr. 113].) In reviewing the Department's decision, the Board must determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Bus. & Prof. Code § 23084.)

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. [Citations.] 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. [Citations.]

(*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 found as follows regarding the decoy's physical and non-physical appearance, including her success as a decoy during the instant operation and her law enforcement experience:

> 9. The decoy's overall appearance including her demeanor, her poise, her mannerisms, her maturity, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that her hair had blond highlights and she was approximately four pounds heavier on the day of the hearing. The decoy is a very youthful looking young lady who was five feet two

> inches in height and who weighed one hundred ten pounds on the day of the sale. On that day, the decoy was wearing a little bit of concealer and her clothing consisted of a black and white[ ]T-shirt, a black hoodie, black leggings and black boots. The only jewelry worn by the decoy was a small silver cross and small stud earrings. She was also wearing the same glasses that she wore to the hearing. Exhibit A is a photograph of the decoy that was taken at the premises and Exhibits 2 and 3 are photographs of the decoy that were taken on the day of the sale before going to the premises. All three of these photographs show how the decoy looked and what she was wearing on the day of the sale.
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> 10. The decoy had not participated in any prior decoy operations, but she had participated in one prior shoulder tap operation. She had also served as an Explorer with the Westminster Police Department for two and one half years and she had gone from Explorer to Corporal as of the day of the subject sale. On the day of the subject sale, the decoy visited three licensed locations and she was able to purchase an alcoholic beverage at two locations.
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> 11. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about her speech, her mannerisms or her demeanor that made her look older than her actual age. After considering the photographs depicted in Exhibits 2, 3 and A, the decoy's overall appearance when she testified and the way she conducted himself [*sic*] at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

(Findings of Fact, ¶¶ 9-11.) The ALJ ultimately determined that there was compliance with rule 141(b)(2) in this case. (See Determination of Issues, ¶ 2.)

Appellants challenge the weight — or lack thereof — the ALJ assigned to the decoy's success rate on the date of the subject operation when viewed in concert with her law enforcement experience, jewelry, and makeup. (App.Br. at pp. 5-6.) Appellants rely heavily on a previous decision of the Board, *7-Eleven, Inc./Dianne Corp.* (2002) AB-7835, and claim "[u]nder the actual circumstances presented to sellers on January 24, 2015 [*sic*], 66% of sellers believed she did not display the apparent age required by Rule 141(b)(2)." (App.Br. at p. 5.) The Board is not convinced that *Dianne*, *supra*, is

availing to appellants' case.

In *Dianne*, the Board was concerned not only with the decoy's high success rate during the subject operation, but also some inherent flaws in the ALJ's reasoning throughout the Proposed Decision. Specifically, the decoy was able to purchase at eight of ten locations during the subject operation, and was not even asked for identification at any of the premises that sold to him. (*Dianne*, *supra*, at pp. 3-5.) Moreover, the Board observed that the ALJ in *Dianne* had made inconsistent findings that warranted heightened scrutiny of his proposed decision. Specifically, the ALJ found:

> If, while at [appellants'] store, the decoy wore the uniform, badge and sidearm which he wore at the hearing, he clearly would not have displayed the appearance which could generally be expected of someone under twenty-one years old. However, he did not wear these items at [appellants'] store.

(*Id*. at p. 3, internal quotation marks omitted.) By that statement, the Board concluded the ALJ had made "an implicit finding that, at the hearing, the decoy, who was still just 19 years old, clearly had the appearance of a person over 21 years of age." (*Ibid*.) Regardless, the ALJ relied on photographs of the decoy taken just before the operation as "the best evidence of how [the decoy] appeared that day," and determined that the decoy's appearance at the time of the sale was that of a person under the age of 21. (*Ibid.*)

On appeal, the Board reasoned:

> the ALJ based his finding that the decoy appeared to be under 21 at the time of the sale on photographs of the decoy and on the decoy's mannerisms and demeanor at the hearing. He did so even though the physical and non-physical appearance of the decoy at the hearing was not comparable to his physical and non-physical appearance at the time of the sale. We cannot say that this finding has a reasonable basis.

(*Dianne*, *supra*, at p. 8.) The Board ultimately reversed based on "[t]he highly suggestive 'success rate' of this decoy *and* the unreliable basis used to find the decoy's apparent age." (*Ibid*., emphasis added.)

The circumstances meriting reversal in *Dianne* are wholly absent from this case. First, while appellants make much ado about the decoy's "success rate" of 66% during the subject operation to support their contention that "most clerks who actually saw [the decoy] on the night of the sale believed her to be over 21" (App.Br. at p. 5), they conveniently fail to mention that the decoy only visited a total of three stores that evening. (RT at p. 46.) While this Board has traditionally declined to offer statistical guidelines with regard to when a minor decoy's purchase success rate becomes suspect (see, e.g., *7-Eleven, Inc./Patel* (2013) AB-9237 at p. 6), one thing that is certain is that, logically, an appellant should offer a sample size of more than three licensed premises to support an argument that the sales rate suggests the decoy did not display the appearance which could generally be expected of someone over 21. (See *id.* at pp. 5-6 [affirming the Department's decision even though the decoy was able to purchase alcohol at 5 of 6 stores visited]; *Dianne*, *supra* [reversing where the decoy was able to purchase at 8 of 10 stores]; *7-Eleven, Inc./Aziz* (2010) AB-8980 [ALJ's failure to discuss the decoy's "success rate" of 3 out of 4 stores was not sufficient to warrant reversal].)

Also, because the clerk in the instant case did not testify at the administrative hearing, any claim that he must have believed the decoy to be over 21 is mere conjecture, particularly in light of the fact that he requested and was shown proof that the decoy was 18 years old on the date of the sale.

Finally, unlike *Dianne*, there are no inherent inconsistencies in the ALJ's findings in this case. He commenced his analysis by claiming that the decoy's appearance on

the date of the hearing was similar to what it was on the date of the sale, except that she had blond highlights and was four pounds heavier at the hearing. (See Findings of Fact, ¶ 9.) He also expressly considered the decoy's clothing, jewelry, makeup, speech, mannerisms, demeanor, and law enforcement experience, and nevertheless found that her overall appearance complied with rule 141(b)(2). (*Id*. at ¶¶ 10-11.) Appellants have provided nothing but a mere difference in opinion to support their contention that the ALJ reached the wrong conclusion in his proposed decision. Hence, they are simply asking this Board to reweigh the evidence by considering the same set of facts and reaching the opposite conclusion. This Board has on countless occasions rejected similar invitations from appellants in the past, and we must do so here as well.

II

Appellants contend that in order for the Board to correctly review the sufficiency of the ALJ's rule 141(b)(2) findings, the Board must view the decoy in person. (App.Br. at p. 6.)

Appellants are simply raising the same decoy-as-evidence argument we addressed at length — and firmly rejected — in *Chevron Stations* (2015) AB-9415 and numerous subsequent cases. On or about February 9, 2015, counsel for appellants petitioned the Second District Court of Appeal for a writ of review of our decision in *Chevron* specifically as it pertained to this issue. On April 2, 2015, following a brief stay, the court entered a final order summarily denying the petition.

Since the Court's April 2, 2015 order, counsel for appellants has filed four additional petitions for writ of review on this issue— two in the Fourth District Court of Appeal, and two more in the Second District. Both petitions for writ in the Fourth District were summarily denied by the Court on April 30, 2015. One of the two petitions

for writ in the Second District was summarily denied on May 12, 2015, and we are confident that the second will soon suffer the same fate. As such, we are convinced that this argument is without merit, and counsel for appellants' repeated insistence on raising it on appeal is nothing more than a frivolous delay tactic and an all-out assault on already strained public resources. We therefore strongly urge counsel for appellants to cease this fruitless and wasteful venture.

ORDER

The decision of the Department is affirmed.[3]

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

[3]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.