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

AB-9500
File: 20-539782 Reg: 14080926

7-ELEVEN, INC. and WATSONVILLE PETROLEUM, INC.,
dba 7-Eleven Store #2368-38689A
1455 Freedom Boulevard, Watsonville, CA 95076,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 1, 2015
Sacramento, CA

ISSUED OCTOBER 22, 2015

Appearances: Melissa Gelbart of the law firm Solomon Saltsman & Jamieson, for appellants 7-Eleven, Inc. and Watsonville Petroleum, Inc, doing business as 7-Eleven Store #2368-38689A. Sean Klein for respondent Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control[1] suspending appellants' license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

[1]The decision of the Department, dated March 12, 2015, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 11, 2014. On August 6, 2014, the Department filed an accusation against appellants charging that, on May 23, 2014, one of appellants' clerks sold an alcoholic beverage to 19-year-old Juan Lopez. Although not noted in the accusation, Lopez was working as a minor decoy for the Watsonville Police Department at the time.

At the administrative hearing held on January 29, 2015, documentary evidence was received and testimony concerning the sale was presented by Lopez (the decoy). Appellants presented no witnesses.

Testimony established that, on the day of the operation, the clerk sold a can of Bud Light beer to the decoy. Before the sale, however, the clerk asked to see the decoy's identification. The decoy handed his California identification card to the clerk. The clerk took the card, scanned it, looked at the cash register for approximately thirty seconds, and then looked at the identification card. The identification card contained the words "AGE 21 IN 2016."

After the sale, the decoy exited the store with the beer. He returned to the store approximately five minutes later. One of the Watsonville police officers — who was already in the store when the decoy returned — asked the decoy to identify the person who had sold him the beer. The decoy pointed to the clerk and said "It was her." During the identification, the clerk was giving change to a customer and looking at the decoy, and the decoy was looking at the clerk. The clerk and the decoy were approximately five feet from each other. Following the identification, one of the officers took a photograph of the decoy and the clerk standing next to each other. In the

photograph, the decoy is holding the beer the clerk had sold to him and pointing to the clerk.

The Department's decision determined that the violation charged was proved and no defense was established. The Department imposed a penalty of 15 days' suspension.

Appellants then filed an appeal contending: (1) The Department did not proceed in the manner required by law by omitting consideration of key evidence supporting appellants' rule 141(b)(2) defense; (2) the decoy operation did not promote fairness because the decoy used identification which showed him with visible facial hair; and (3) the operation failed to adhere to rule 141(b)(5) because the identification took place while the seller was helping another customer.

DISCUSSION

I

Appellants contend that the administrative law judge (ALJ) omitted consideration of key evidence in their rule 141(b)(2) defense. They claim "the ALJ "fails to mention and/or address the actual law enforcement training that [the decoy] received, his award for being the most dedicated cadet, and his involvement within the Academy." (App.Br. at p. 5.) Moreover, they take issue with the ALJ's failure to acknowledge that the decoy's identification featured a picture of him with "a mustache and mature facial characteristics." (*Ibid*.) Appellants claim that the "true and full evidence of [the decoy's] law enforcement experiences, in combination with the mustache evident on his identification, were facts that should have been considered by the Department" (*id*. at p. 6), and they submit that these omissions from the Department's decision establish

that the Department did not proceed in the manner required by law.

Rule 141, subdivision (b)(2),[2] states:

> 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 the party asserting it. (*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. [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.] 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].)

In this case, the ALJ made the following findings of fact concerning the decoy's appearance:

V

[2]All references to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations.

> The decoy was 5' 5" tall and weighed approximately 170 pounds on the day of the decoy operation. His hair was cut short. He wore a hoodie jacket, blue jeans, sneakers, and no jewelry. He did not have any facial hair.
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> VI
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> The decoy had been a police cadet for approximately two year [*sic*]. During that time, he participated in approximately three or four decoy operations, visiting between fifteen to twenty licensed businesses on each operation. His experience as a decoy made him less nervous on May 23 compared to how he felt on his prior decoy operations. There is no evidence that the decoy's experience as a cadet and as a decoy made him appear older, or younger, than his age when he purchased the beer at Respondents' store.
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> VII
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> The decoy was 5' 6" tall and weighed approximately 170 pounds on the day of the hearing. His appearance was similar to his appearance in the photograph taken at Respondents' store. He spoke softly, with his hands folded. He appeared nervous and admitted to being so.
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> VIII
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> The photograph of the decoy, the testimony about his appearance on the day of the decoy operation, and his appearance (including his poise, demeanor, and mannerism [*sic*]) at the hearing show that the decoy displayed the appearance of a person under twenty-one years old when he bought the beer at Respondents' store.

(Findings of Fact ¶¶ V-VIII.) The ALJ then reached the following conclusion: "Based on the findings in Paragraphs V, VI, VII, and VIII in the Findings of Fact, there was no violation of Rule 141(b)(2)." (Determination of Issues ¶ III.)

Appellants acknowledge that the ALJ expressly considered the decoy's service as a cadet and previous experience as a decoy, and even considered the fact that such experience made the decoy appear less nervous over time. Appellants disagree, however, with the ALJ's failure to expressly consider various other factors, and cite *7-Eleven, Inc./Azzam* (2001) AB-7631 to support their contention that the ALJ "should consider *all aspects* of the decoy, which can include the past experience of the decoy

and the observable effect that experience has on the decoy's appearance." (App.Br. at p. 5, emphasis added.)

Appellants' argument on this point simply fails to hold water. The record reflects that the ALJ considered a vast array of indicia of the decoy's apparent age — including his height, weight, haircut, clothing, jewelry (or lack thereof), lack of facial hair, law enforcement experience and prior experience as a decoy, confidence, poise, and demeanor — and nevertheless found that the decoy displayed the appearance which could generally be expected of a person under twenty-one years of age. The fact that the ALJ did not delineate every single factor that *could* lend itself to an age assessment is irrelevant. Indeed, as the Board has stated many times, an ALJ is not required to provide a "laundry list" of factors he found inconsequential. (See, e.g., *7-Eleven, Inc./Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080.) "It is not the Appeals Board's expectation that the Department, and the ALJ's [*sic*], be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered." (*Circle K Stores*, *supra*, at p. 4.)

Additionally, appellants misapply the language from *Azzam*, *supra*, in an attempt to shift the burden of rationalizing their affirmative defense under rule 141(b)(2) to the ALJ. A look at the entire passage from *Azzam* appellants allude to in their brief reveals their mistake:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. 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. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that

> is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. 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.

(*Azzam*, *supra*, at p. 5, emphasis in original.) As the bearers of the burden of establishing their affirmative defense, it is appellants who must offer evidence that the decoy's physical and nonphysical characteristics actually resulted in the decoy displaying the appearance of a person 21 years or older. Appellants offered no such evidence in this case. The selling clerk did not testify at the administrative hearing, so any argument that she was somehow lulled into selling the decoy alcohol, especially after viewing his California identification card, is merely conjectural.

Finally, the fact that the decoy had a mustache when his California identification card photo was taken must be rejected as a basis for claiming the decoy appeared to be older than 21. This Board is only concerned with how the decoy appeared to the clerk on the day of the sale — and he was clean shaven on that day. (See Findings of Fact ¶ V.)

All in all, 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 time and again rejected invitations to substitute its judgment for that of the ALJ on questions of fact, and we must do so here as well.

As we have repeated again and again, the ALJ is the trier of fact, and has the opportunity, which the Board does not, of observing the decoy as he testifies and making the determination whether the decoy's appearance met the requirements of rule 141. We must decline appellants' proposition to re-weigh the evidence — particularly

when, as here, the ALJ has made extensive findings on both the physical and nonphysical characteristics of the decoy.

II

Appellants contend that the decoy operation did not promote fairness because the decoy used identification showing him with a mustache while he was clean shaven on the day of the operation. (App.Br. at p. 6.)

Rule 141(a) provides that a law enforcement agency may only use a person under the age of 21 to attempt to purchase alcoholic beverages "in a fashion that promotes fairness."

Appellants claim "the difference in the decoy's appearance in the identification and on the date of the minor decoy operation raises concerns over whether this clerk was 'tricked' into selling him alcoholic beverages based on the image presented on the identification." (App.Br. at p. 6.) We are not convinced.

Appellants ignore several pertinent findings by the ALJ which suggest that the clerk had ample time to view the decoy's California identification and to assess his true age, particularly since the identification contained a red stripe indicating "AGE 21 IN 2016." Those findings include that the clerk took possession of the decoy's identification, scanned it, looked at the register for approximately thirty seconds, and then looked at the identification again before handing it back to the decoy. (Findings of Fact ¶ IV.)

Also, the Department is correct that the crux of rule 141, inasmuch as it speaks to a decoy's appearance, centers around the decoy's appearance *at the time of the*

operation, not at some random time in the past when the decoy had his or her picture taken for their valid, government-issued identification. (See Dept.Br. at p. 3.) The cases in which this Board has wrestled with a decoy's facial hair and its supposed effect on the fairness of the decoy operation involve either facial hair apparent at the time of the operation, or a change in the decoy's appearance that occurred *after* the decoy operation but *before* the ALJ had a chance to assess the decoy's apparent age.[3] Whether the decoy had facial hair at the time he was photographed for his government-issued identification is irrelevant. Common sense would indicate that, when confronted with identification depicting a photograph of a person who purportedly looks much older than the person attempting to purchase alcohol, a diligent clerk would look more closely at the identification handed to her — not the other way around. This is especially true in a case such as this where the clerk is confronted with identification that clearly establishes the decoy is too young to purchase alcohol,[4] compares the picture on the identification with the appearance of the decoy before her, determines, as appellants contend, that the decoy actually appears *younger* than the age shown on his identification, and nevertheless makes the sale.

III

[3]See, e.g., *7-Eleven, Inc./Haven Petroleum, Inc.* (2015) AB-9465, at pp. 7-8 [decision of the Department was affirmed because the ALJ adequately considered the decoy's five o'clock shadow — which he wore on the date of the operation — and nevertheless found compliance with rule 141(b)(2)]; see also *Southland Corp./Samra* (1999) AB-7320, at pp. 4-5 [reversing the Department's decision because the decoy's height and facial hair during the operation were suspect, and the decoy had shaved his goatee by the time of the administrative hearing making it difficult for the ALJ to make findings on the appearance of the decoy as he had appeared during the sale].

[4]The decoy's identification card contained the words "AGE 21IN 2016" [*sic*]. (Findings of Fact, ¶ II.)

Appellants contend that the face-to-face identification did not comply with rule 141(b)(5).

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.

Just as above, the rule provides an affirmative defense. The burden is therefore on the appellants to show non-compliance. (*Chevron Stations*, *supra*; *Lo*, *supra*.)

The ALJ made the following factual findings pertinent to appellants' rule 141(b)(5) defense:

> III
>
> After purchasing the beer, the decoy exited the store with it. He returned to the store approximately five minutes later. One of the Watsonville police officers, who was already in the store, asked the decoy to identify the person who sold the beer to him. The decoy then pointed to the clerk who had sold him the beer and said "It was her." During the identification, the clerk was giving change to a customer and looking at the decoy, and the decoy was looking at the clerk. The decoy and the clerk were approximately five feet from each other.

(Findings of Fact ¶ III.) Based on these findings, the ALJ found that appellants did not meet their burden of proving a violation of rule 141(b)(5). (Determination of Issues ¶ IV.)

Appellants argue that the decoy's testimony reflected that he did nothing more than point out the seller from somewhere in the premises. (App.Br. at p. 8.) They claim that, while the decoy testified that he identified the seller, the record shows that the clerk was helping another customer at the time and, as such, was not reasonably

aware that she was being identified as the seller of alcohol. (*Ibid*.) Appellants' argument, while not quite stated as such, is that the Department's finding that there was compliance with rule 141(b)(5) is not supported by substantial evidence.

When an appellant contends that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Masani*, *supra*, at p. 1437.) "Substantial evidence" is relevant evidence which reasonable minds would accept as support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Ct.* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

In their brief, appellants heavily rely on a previous decision of this Board, *Chun* (1999) AB-7287. In *Chun*, the decoy's testimony concerning the events surrounding the alleged identification was speculative and in conflict with other testimony in the record, and "[t]he findings [did] not suggest a face to face identification, but only allude[d] to a pointing out of the seller from somewhere within the premises." (*Id*. at pp. 4-5.)

The Board reversed the Department's decision, finding that there was insufficient testimonial evidence to show that there was compliance with rule 141(b)(5). (*Id.*) The Board reasoned as follows:

> The phrase "face to face" means that the two, 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.

(*Ibid.*)

In this case, the decoy's testimony regarding the face to face identification proceeded thus:

> [BY MS. ODEN:]
> Q. When you later re-entered the location approximately being — after being outside for about five minutes, did you see Officer Rodriguez and Officer Fulgoni inside the store?
>
> [THE DECOY:] Yes.
>
> Q. And what were they doing when you immediately re-entered the store?
>
> A. What were they doing? They were speaking to the clerk who sold the beverage to me.
>
> Q. And upon seeing the officer speaking with the clerk who sold you the alcohol, did you approach the location where the three of them were located?
>
> A. Yes.
>
> Q. And did you hear a conversation, if there was one, taking place between the officers and the clerk?
>
> A. Not that I remember.
>
> Q. Prior to the officers entering the location, did you give any of the officers any sort of description of the person who had sold you the alcohol?

A. No.

Q. And when you re-entered, did you see the person who had sold you the alcohol?

A. Yes.

Q. Did you also see that second male clerk that you had testified to?

A. Yes.

Q. And where was that male clerk at that location?

A. He was still in the same place. Looked a bit confused.

Q. He was still attending to the hot foods area?

A. Yeah.

Q. And once you joined Officer Rodriguez and Officer Fulgoni, were you then asked to identify the clerk?

A. Yes.

Q. And you mention that you pointed to the clerk; is that right?

A. Yes.

Q. Besides pointing, did you verbally say anything at that time?

A. Other than saying, “It was her.”

Q. And you mentioned you were about five feet away from the clerk?

A. Yeah.

Q. Were you looking at her?

A. Yes.

Q. Was she looking at you?

A. Yes.

Q. Was she helping any customers at that time?

A. Just the same customer I was talking about who I believe he was asking for change.

(RT at pp. 26-28.)

In light of the decoy's testimony, the ALJ made the following findings concerning the face-to-face identification:

III

After purchasing the beer, the decoy exited the store with it. He returned to the store approximately five minutes later. One of the Watsonville police officers, who was already in the store, asked the decoy to identify the person who sold the beer to him. The decoy then pointed to the clerk who had sold him the beer and said "It was her." During the identification, the clerk was giving change to a customer and looking at the decoy, and the decoy was looking at the clerk. The decoy and the clerk were approximately five feet from each other.

(Findings of Fact ¶ III.) In light of these findings, the ALJ determined that appellants had not met their burden of proving their rule 141(b)(5) defense. (See Determination of Issues ¶ IV.)

The Board finds nothing wrong with the ALJ's determination. The decoy was the only witness to testify at the administrative hearing, and the ALJ's findings are in accordance with his testimony. The decoy's testimony establishes that, not only was he within reasonable proximity — approximately five feet — of the clerk when he made the identification, but also that he and the clerk looked at one another when the identification was made. Thus, the facts establish that the clerk was, or reasonably ought to have been, knowledgeable that she was being accused and pointed out as the seller of alcoholic beverages to the minor decoy, and the Department's decision denying appellants' rule 141(b)(5) defense is supported by substantial evidence.

ORDER

The decision of the Department is affirmed.[5]

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

[5]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.