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

AB-9505
File: 20-487742; Reg: 14081494

7-ELEVEN, INC. and RED SAYEGH CORPORATION,
dba 7-Eleven Store #2171-33656
15264 Summit Avenue, Fontana, CA 92336,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 3, 2015
San Diego, CA

ISSUED DECEMBER 7, 2015

Appearances: *Appellants*: Ralph Barat Saltsman and Jennifer L. Oden, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Red Sayegh Corporation.
Respondents: Jonathan Nguyen, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Red Sayegh Corporation, doing business as 7-Eleven Store #2171-33656 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days (with all 10 days stayed provided appellants complete one year of discipline-free operation) because their clerk

[1]The decision of the Department, dated April 2, 2015, is set forth in the appendix.

sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 23, 2010. On October 27, 2014, the Department filed an accusation against appellants charging that, on May 29, 2014, appellants' clerk, Joseph Shahien (the clerk), sold an alcoholic beverage to 19-year-old Christina De La Cruz. Although not noted in the accusation, De La Cruz was working as a minor decoy for the Fontana Police Department at the time.

At the February 19, 2015 administrative hearing, documentary evidence was received and testimony concerning the sale was presented by De La Cruz (the decoy); by Valerie Gutierrez, a Fontana Police officer; and by Adel Sayegh, franchisee of 7-Eleven Store #2171-33656 and president of appellant Red Sayegh Corporation.

Testimony established that on the day of the operation, the decoy entered the licensed premises and went to the coolers where she selected a 25-ounce can of Bud Light beer. She went to the counter where the clerk scanned the beer and completed the sale without asking for identification. The clerk did not ask any age-related questions or make any conversation. The decoy exited the store with the beer after paying for her purchase. Officer Gutierrez observed the transaction from inside the store, posing as a customer.

The decoy rejoined law enforcement personnel outside, then went back into the store where she was asked to point to the person who sold her the beer. The decoy pointed her finger at the clerk. The two of them were standing approximately four feet apart and facing each other during the face-to-face identification. A photo was then

taken of the decoy and clerk together.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed a timely appeal contending: (1) the Department failed to proceed in the manner required by law by omitting reference to and failing to analyze the decoy's nonphysical characteristics supporting appellants' rule 141(b)(2)[2] defense, and (2) the findings of the administrative law judge (ALJ) regarding the face-to-face identification of the clerk are not supported by substantial evidence.

DISCUSSION

I

Appellants contend that the Department failed to proceed in the manner required by law because the ALJ omitted analysis of the decoy's nonphysical characteristics from his proposed decision that supported their rule 141(b)(2) defense. Appellants claim the ALJ failed to analyze the effect of the decoy's experience as an Explorer, the comfort level she achieved by participating in prior decoy operations, and the volume of locations the decoy had visited prior to the instant operation. (App.Br. at p. 7.) Appellants further claim that these factors, if properly considered, suggest that the decoy operation was conducted in an unfair manner in violation of rule 141(a). (See *id*. at p. 9.)

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." Ambiguity abounds in the phrase "display the appearance which could generally be expected of a person under 21 years of age." What factors account for one having the appearance of a certain age? Dress? Height? Weight? Calmness

[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.

or nervousness? Facial hair for males? Make-up for females? The list is enormous. Understandably licensees in numerous appeals besides this have sought refuge in the vagueness of this umbrella-like phrase; indeed, it is fast becoming a standard defense in most challenges to minor decoy sting operations. The Board has sought to provide guidance to licensees and ALJs in our decisions applying rule 141 to various factual permutations, mostly rejecting arguments that failure by an ALJ to mention every possible factor bearing on age requires reversal of their decisions. We mention here some of the more salient factors the Board considers and does not consider in determining whether rule 141 has been violated so as to better inform future licensees and their counsel what to bear in mind when asserting such a defense.

To begin with, Rule 141 is an affirmative defense, and the burden of proof lies with the party asserting it both at the administrative level and on appeal. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Next, if one challenges the ALJ's factual findings respecting the rule 141 defense, this Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The "substantial evidence" 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 factual findings concerning the decoy's overall appearance:

> 1. Decoy De La Cruz appeared and testified at the hearing. She stood about 5 feet, 5 inches tall and weighed approximately 150 pounds. Her hair was long and pulled back in a ponytail. When she visited Respondents' store on May 29, 2014, decoy De La Cruz wore a striped tank top, blue jeans and sandals. (See Exhibit 2). Her hair was just straight during the decoy operation, not in a ponytail. De La Cruz' height has remained the same. She has lost ten pounds since the decoy operation. At Respondents' Licensed Premises on the date of the decoy operation, decoy De La Cruz looked substantially the same as she did at the hearing.
>
> [¶ . . . ¶]
>
> 9. Decoy De La Cruz appears her age, 19 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 clerk Shahien at the Licensed Premises on May 29, 2014, decoy De La Cruz displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to clerk Shahien. Decoy De La Cruz appeared her true age.
>
> 10. De La Cruz has operated as a decoy on five prior operations. She was admittedly nervous as she testified.
>
> 11. De La Cruz attempted to purchase alcoholic beverages at fifteen different businesses on May 29, 2014. She was asked for identification at twelve of those businesses. Only three of the fifteen businesses she visited sold her an alcoholic beverage.

(Findings of Fact, ¶¶ 5, 9-11.) These findings prompted the ALJ to reach the following conclusion regarding appellants' rule 141 defenses:

> 5. Respondents argue that the decoy De La Cruz appeared older than 21 thereby violating Rule 141(b)(2). That argument is rejected. Decoy De La Cruz appeared and acted her true age. (Findings of Fact, ¶¶ 4

through 11)

(Conclusions of Law, ¶ 5.)

The record here shows that the ALJ expressly considered a great many aspects of the decoy's physical and nonphysical appearance — including her success rate as a minor decoy, and her dress, poise, demeanor, maturity, and mannerisms — and found that the decoy displayed the appearance which could generally be expected of a person under the age of 21.

As we have said many times:

> 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* (2001) AB-7631, at p. 5, emphasis added.)

Appellants offered no *evidence* that the decoy's experience *actually resulted* in her displaying the appearance of a person 21 years old or older in this case. Indeed, evidence of how the decoy appeared from the clerk's perspective would be nearly impossible to ascertain since the clerk did not testify at the administrative hearing. In the end, all the Board is left with is a difference of opinion — appellants' versus that of the ALJ — as to the conclusion that the evidence supports. Without more, this is simply an insufficient basis upon which to overturn the determination by the ALJ. As

we have stated many times, the ALJ is the trier of fact, and has the opportunity to observe the decoy as she testifies, and make the determination whether the decoy's appearance met the requirement of rule 141 that she possess 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.

That the ALJ did not expressly articulate each and every facet of the decoy's appearance that could potentially play into an assessment of her apparent age, or analyze the effect the decoy's experience may have had on her apparent age, does not render the ALJ's determination an abuse of discretion. An ALJ is not required to provide a "laundry list" of factors he deems inconsequential. (See, e.g., *Lee* (2014) AB-9359, at p. 8; *7-Eleven/Patel* (2013) AB-9237, at p. 9; accord *Circle K Stores* (1999) AB-7080.) Indeed, "[i]t 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.) An ALJ's failure to explain *all* of his reasons for a decision does not invalidate his determination or constitute an abuse of discretion. (See *Garfield Beach* (2014) AB-9430.)

As we explained recently:

> [T]his Board is entitled to review whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. (Cal. Const. art. XX, § 22; Bus. & Prof. Code. § 23084, subd. (c) and (d).) If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or she reached those findings, this Board will not hesitate to reverse. This

> should not be read to require an explanation or analysis to bridge any sort of "gap"; typically, the evidence an appellant insists is essential and dispositive is either irrelevant or has no bearing whatsoever on the findings of fact. While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach CVS, LLC/Longs Drug Stores, LLC* (2015) AB-9501, at pp. 5-6.) Nothing in this case suggests that these principles were violated, or that this decoy operation was in any way unfair.

In order to claim an unfairness defense under rule 141(a), appellants must put forth more than their opinion that the operation was unfair. The rule requires solid, credible evidence that a reasonable person would have been influenced by certain facts to sell alcohol to a minor. It is not incumbent upon the Department to demonstrate compliance with the rule; rather, it is appellants' burden to establish the affirmative defense of rule 141 by showing that the rule was not complied with. They have not done so here.

II

Appellants contend that the ALJ's findings on the face-to-face identification of the clerk are not supported by substantial evidence and are inadequate to show compliance with rule 141(b)(5). Appellants also maintain that the record lacks substantial evidence to support a finding that a face-to-face identification took place prior to the issuance of a citation.

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more

competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department. (See 6 Witkin, Cal. Procedure (2d ed. 1971) *Appeal*, § 245, pp. 4236-4238); (*Kirby v. Alcoholic Bev. Control Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815].)

The issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, 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].)

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.

This rule, as with 141 (a), provides an affirmative defense. The burden is, therefore, on appellants to show non-compliance. (*Chevron Stations, Inc.*, *supra*; *7-Eleven, Inc./Lo, supra*.)

The ALJ made the following findings on the issue of the face-to-face identification:

> 8. After making the purchase and leaving the store, decoy De La Cruz met outside the store with the law enforcement personnel. Decoy De La Cruz was taken back into Respondents' store. De La Cruz was asked to point to the person who sold her the beer. She then pointed her finger at clerk Shahien. They were standing about four feet apart and facing each other at the time of this identification. A photo of clerk Shahien and decoy De La Cruz holding the beer she purchased was taken after the face to

face identification. (See Exhibit 2).

(Findings of Fact ¶ 8.) He then reached the following conclusion:

> 6. Respondents also argue that the decoy operation violated Rule 141(b)(5). According to Respondents there was no evidence to establish that the clerk was cited after the face to face identification. Rule 141 is an affirmative defense. Respondent has the burden of establishing the affirmative defense. Officer Valorie [*sic*] Gutierrez cited the clerk. She does not remember exactly at what point in time the citation was issued. This does not establish a violation of Rule 141(b)(5). There was no evidence presented to prove when the citation was issued, either before or after the face to face identification. Respondents' argument that Rule 141(b)(5) was violated is rejected.

(Conclusions of Law ¶ 6.)

Appellants maintain "the evidence detracts from a finding that the citation was issued after the face-to-face because Officer Gutierrez was already speaking with the clerk—and likely issued the citation—when the decoy was outside the store." (App.Br. at pp. 14-15.) They offer no facts and point to no specific evidence to support this theory, and, in fact, the decoy's testimony contradicts it by placing a different officer — Officer Westman — in the store at the time the decoy reentered.

[MS. ODEN]

Q When you reentered with Officer Gutierrez, did Officer Westman[3] also enter with you?

A Officer Westman was ahead of us.
Q So Officer Westman went inside the location first, and you and Officer Gutierrez followed?

A Yes.

Q Approximately how long between the time that Officer Westman went inside the location, you and Officer Gutierrez follow? [sic]

[3]Spelled elsewhere as Wessman. (RT at p. 33.)

A I don't remember. We were right behind him.

(RT at p. 20.) In her subsequent testimony, the decoy makes it clear that she does not recall the sequence of events in regards to making the identification, having her photograph taken, and the clerk being issued a citation. (RT at pp. 22-25.) Likewise, Officer Gutierrez was unable to recall when the citation was issued. (RT at pp. 32, 39-40.)

Appellants speculate:

> In addition, if the citation had been issued after the face-to-face, the decoy would have had knowledge and likely remembered because she would have been present for the citation. However, because the decoy was not present for the citation, i.e. before the face-to-face, she did not have knowledge and could therefore not remember.

(*Id*. at p. 15.) This argument fails. Appellants have not established whether the decoy was present for the citation — only that she did not *recall* when it was issued.

If neither the decoy nor Officer Gutierrez could recall the sequence of events, the burden of proof does not shift to the Department. Appellants contend "The Department should have established—whether through testimony or documentary evidence—that it adhered to the minimum standards of 141(b)(5)." (App.Br. at p. 15.) This turns the rule on its head and attempts to shift the burden of proving an affirmative defense to the Department. As this Board stated previously,

> Rule 141 and its subdivisions constitute an affirmative defense. This Board has construed the language of rule 141, subdivision (c), to mean the licensee has the burden of establishing a prima facie case that there was no compliance.

(*7-Eleven, Inc./Samra* (2014) AB-9387, at p. 7.) "Statutory law, case law, and the Department's own interpretation of its rule mandate that the burden of proving a rule

141 violation falls on the licensee claiming the defense." (*Chevron Stations, Inc.*, *supra*, at p. 15.)

In light of appellants' failure to establish an affirmative defense, we believe the ALJ's findings are adequate to support the decision. Substantial evidence in the record supports a finding that a face-to-face identification of the clerk took place, in compliance with rule 141(b)(5). Appellants failed to establish that the citation was issued before the identification.

ORDER

The decision of the Department is affirmed.[4]

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

[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.