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

**AB-9517**
File: 20-373851; Reg: 14080541

7-ELEVEN, INC. and JNRISHI K INC.,
dba 7-Eleven Store #2172-25954
8491 Westminster Boulevard, Westminster, CA 92683,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

**ISSUED DECEMBER 7, 2015**

Appearances: *Appellants*: Ralph Barat Saltsman and Melissa Gelbart, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Jnrishi K Inc.
*Respondent*: Jonathan Nguyen, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Jnrishi K Inc., doing business as 7-Eleven Store #2172-25954 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1]

[1]The Revised Proposed Decision of the Department, dated April 28, 2015, is set forth in the appendix, in addition to the original Proposed Decision, dated November 2, 2014, which was rejected by the Department pursuant to Government Code section 11517(c)(2)(D) and remanded to the administrative law judge (ALJ) for clarification of the penalty.

suspending their license for 10 days (with all 10 days stayed provided appellants complete one year of discipline-free operation) because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 9, 2001. On May 27, 2014, the Department filed an accusation against appellants charging that, on February 7, 2014, appellants' clerk, Jesse Francis (the clerk), sold an alcoholic beverage to 19-year-old Elvis Nguyen. Although not noted in the accusation, Nguyen was working at the time as a minor decoy for the Westminster Police Department.

At the administrative hearing held on October 14, 2014, documentary evidence was received and testimony concerning the sale was presented by Nguyen (the decoy); by Benjamin Jaipream, a Westminster Police officer; and by Harjeet Kapil, franchisee of 7-Eleven Store #2172-25954 and president of appellant Jnrishi K Inc.

Testimony established that on February 7, 2014, the decoy entered the licensed premises alone and went to the coolers where he selected a 6-pack of Heineken beer. He took the beer to the counter, and the clerk asked for his identification. The decoy handed the clerk his California driver’s license which contained his correct date of birth and a red stripe indicating “AGE 21 IN 2015.” The clerk looked at the ID, handed it back to the decoy, then completed the sale.

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 in omitting reference to and failing to analyze the decoy's nonphysical characteristics supporting appellants' rule 141(b)(2)[2] defense; (2) the ALJ failed to address the effect of the decoy's prior visits to the store; and (3) the decision is not supported by substantial evidence.

DISCUSSION

I

Appellants contend that the Department failed to proceed in the manner required by law in omitting reference to and failing to analyze the decoy's nonphysical characteristics supporting appellants' rule 141(b)(2) defense. This issue was not raised at the administrative hearing. In fact, counsel for appellants specifically stated in his closing argument, "I'm not going to argue 141B2." (RT at p. 91.)

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) An issue that might have been raised at the administrative hearing, but was not, may be considered waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, p. 458.)

[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.

Appellants waived this issue during closing arguments.

II

Appellants contend the ALJ failed to address the effect of the decoy's prior visits to the licensed premises, and the fact that these visits made the operation unfair.

Rule 141(a) provides:

> 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 (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a *fashion that promotes fairness*.

(Emphasis added.) The rule provides an affirmative defense. The burden is therefore on the appellants to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellants argue:

> Decoy operations are designed to simply create an opportunity for licensees to sell alcohol to a minor in violation of Business and Professions Code section 25658, subdivision (a). They should be benign and present a typical underage purchasing scenario to the licensee, not be designed to catch all licensees. The Board's own framing of the purpose behind decoy operations is to fairly test for the licensee who "is lax, or does not care, or sells to whoever is in front of that seller." (*Saif Assaedi v. Department of Alcoholic Beverage Control* (1999) AB-7144, pp. 3-4.)

(App.Br. at p. 12.) They maintain that the fact that the decoy worked in the vicinity of the licensed premises, that he had visited the store approximately five times since 2009 — approximately once a year (RT at p. 33) — and was therefore familiar with the store's layout, would have given him a level of confidence which made the decoy operation unfair. Appellants describe the effect as follows: "Mr. Nguyen's prior visits in Appellants' store and the fact that he worked in the same neighborhood created a level

of comfort and authoritative persona typically seen when a police officer walks into an establishment. Simply put, the confidence and behavior of an alpha male." (App.Br. at p. 13.)

Appellants go on to assert, "the clerk likely recognized the decoy, which caused him to sell alcohol to a minor, when he normally would not have." (App.Br. at p. 14.) The clerk did not testify, so appellants' assertion that he likely recognized the decoy is pure speculation. The decoy, on the other hand, testified that he did *not* recognize the clerk.

> [MR. SALTSMAN]
>
> Q Looking at Exhibit 2, before you walked in the store in February of 2014, did you recognize the shorter fellow with the mustache, gray hair, and glasses wearing a red shirt?
>
> A No, sir.
>
> Q To your recollection you had not seen him before?
>
> A No, sir.

(RT at p. 36.) The speculation that the clerk must have recognized the decoy is not supported by the record.

Appellants contend that the decoy's testimony should not be sufficient to deny their defense "because of the inherent likelihood of the decoy being recognized by people in areas the decoy works and frequents." (App.Br. at p. 14.) We might agree if the visits had been more frequent than once a year, or if the decoy and his friends had attempted to purchase alcohol, or had been successful in purchasing alcohol on these visits — such actions may have lulled the clerk into believing the decoy was over the age of 21. No such evidence, however, is in the record.

The ALJ reached the following conclusion on this issue:

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(a)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that it was inappropriate and unfair for a decoy to visit a premises which he previously visited as a customer.
>
> While this may be true in some circumstances, it is not true in this case. Nguyen only went to the Licensed Premises a handful of times over the course of five years. These visits were sporadic, at best, and did not involve Francis in any way. There is no indication that any of these visits had any impact whatsoever on this operation or on the sale at issue.

(Conclusions of Law ¶ 5.) We agree with this conclusion.

Appellants have offered no *evidence* that the decoy's occasional visits to these premises, or any familiarity he may have had with the premises, *actually resulted* in changing the clerk's perception of him. 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. Moreover, it is undisputed that the minor decoy presented his driver's license to the clerk, showing him to be underage, a fact that contradicts any impression the clerk may have had that the decoy was of the legal age to purchase alcohol. In the end, all the Board is left with is a difference of opinion — appellants' versus that of the ALJ — as to whether the operation was "unfair" under rule 141. Without more, this is simply an insufficient basis upon which to overturn the determination by the ALJ.

An affirmative defense requires that appellants put forth more than speculation that something *might* have happened. 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 it was violated. They have not done so here.

III

Appellants contend that the decision is not supported by substantial evidence because it is based on unreliable testimony. (App.Br. at p. 15.) In particular, appellants maintain that the testimony of the decoy and of Officer Jaipream was based on a "flawed police report" prepared one week after the decoy operation. (*Ibid*.)

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. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable 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].)

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]); *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627 [29 Cal.Rptr.2d 191] explains how the "substantial evidence" standard is applied.

> There are two aspects to a review of the legal sufficiency of the evidence. First, one must resolve all explicit conflicts in the evidence in favor of the respondent and presume in favor of the judgment all *reasonable* inferences.[fn.] [Citation.] Second, one must determine whether the evidence thus marshaled is substantial. While it is commonly stated that [an appellate court's] "power" begins and ends with a determination that there is substantial evidence [citation],[fn.] this does not mean that [it] must blindly seize any evidence in support of the respondent in order to affirm the judgment. The Court of Appeal "was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review." (*Bowman v. Board of Pension Commissioners* (1984) 155 Cal.App.3d 937, 944 [202 Cal.Rptr. 505].) "[I]f the word 'substantial' [is to mean] anything at all, it clearly implies that such evidence must be of ponderable legal significance. Obviously the word cannot be deemed synonymous with 'any' evidence. It must be reasonable . . . , credible, and of solid value . . . ." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644 [247 P.2d 54].) The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record. [Citations.] While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citations]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations].

(*Id.* at pp. 1632-1633, emphasis in original.)

The ALJ addressed appellants' contention as follows:

> 6. The Respondents argued that the testimony of Nguyen and Det. Benjamin Jaipream was not credible since they refreshed their memory from the police report—a report which contained a number of errors. This

> argument is rejected and the foregoing findings are based on the testimony of both of these witnesses. Each had an independent memory of the events surrounding the sale and, further, the errors in the report were minor, at most. Harjeet Kapil also testified credibly, and her testimony is the basis for the remaining findings.

(Conclusions of Law ¶ 6.) The errors complained of include the incorrect spelling of the clerk's name, the incorrect sex of the clerk, and the incorrect type of license possessed by appellants. (App.Br. at p.16.)

The question in this matter is whether findings which are predicated upon testimony based, in part, on memories refreshed by a police report containing errors can constitute "substantial evidence." We believe it can.

The Department argues that the factual findings are binding on the Board, that the ALJ in this case made extensive factual findings, and that the Board cannot disregard or overturn them merely because a contrary finding would have been equally or more reasonable. (Dept.Reply.Br. at p. 9, citing *Boreta*, *supra.*)

The Board has addressed the question of establishing a prima facie case many times before and found:

> The ultimate burden of persuasion at the administrative hearing is the preponderance of the evidence. The Department's initial burden of producing evidence, however, is merely to make a prima facie case, that is, *to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence*.

(*Vons* (2002) AB-7819, at p. 5, emphasis added.) We believe there was sufficient evidence produced in this case to establish a prima facie case.

Evidence of even one credible witness "is sufficient for proof of any fact."

> (Evid. Code, § 411.) And "questions as to the weight and sufficiency of the evidence, the construction to be put upon it, the inferences to be drawn therefrom, the credibility of witnesses . . . and the determination of [any] conflicts and inconsistencies in their testimony are matters for the trial court to resolve." [Citation.]

(*Sav-On Drug Stores, Inc. v. Superior Ct.* (2004) 34 Cal.4th 319, 334 [17 Cal.Rptr.3d 906].)

The Department was only required to make a prima facie case showing that appellants' clerk sold an alcoholic beverage to a person under the age of 21. (See *Vons*, *supra*, at p. 5.) The testimony of the decoy and Officer Jaipream, both of whom claimed independent memories of the decoy operation, established the facts necessary to make a prima facie case. Appellants presented no evidence that the sale occurred at some other location, or that the wrong clerk was charged. Indeed, the testimony of the franchisee confirms the finding that Jesse Francis was the clerk who sold the alcohol to the decoy.

> [MR. SALTSMAN]
>
> Q In February of 2014 what happened to Mr. Francis' employment at the store?
>
> A It was terminated.
>
> Q Who terminated it?
>
> A Well, he was a no-show after.
>
> Q I said who terminated him?
>
> A Who terminated? We did.

Q So after the incident did you conduct an investigation to determine whether you should maintain his employment?

A After the incident we did, yes.

Q And after he got the citation you conducted your investigation. Did you determine that you would terminate him?

A Yes.

(RT at p. 85.)

The ALJ believed the witnesses' testimony that the sale had occurred and that they had independent recollections of this event, apart from the police report. This credibility determination is entirely within the province of the ALJ. (See *Sav-On Drug Stores, Inc.*, *supra, at p. 334*.) Having reviewed the entire record, we believe there is sufficient, substantial evidence in the record to support the decision, in spite of the errors in the police report.

ORDER

The decision of the Department is affirmed.[3]

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

[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.