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

AB-9521
File: 20-448270 Reg: 10481634

7-ELEVEN, INC., SIMERPREET KAUR SAMRA, and RUPINDER SINGH SAMRA,
dba 7-Eleven #2136-33959A
19666 Ventura Boulevard, Tarzana, CA 91356-2970,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 3, 2015
Los Angeles, CA

ISSUED DECEMBER 21, 2015

Appearances: *Appellants*: Melissa Gelbart, of Solomon Saltsman & Jamieson, for 7-Eleven, Inc., Simerpreet Kaur Samra, and Rupinder Singh Samra.
Respondent: Kerry Winters, for the 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 in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

[1]The decision of the Department, dated May 22, 2015, is set forth in the appendix.

Appellants' off-sale beer and wine license was issued on January 23, 2007. On November 20, 2014, the Department filed an accusation against appellants charging that, on June 6, 2014, appellants' clerk, Gurvinder Singh (the clerk), sold an alcoholic beverage to 18-year-old Adalton Santamaria. Although not noted in the accusation, Santamaria was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing on March 24, 2015, documentary evidence was received and testimony concerning the sale was presented by Santamaria (the decoy), and by Jose Fernandez and Nicholas Sinclair, officers with the LAPD. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises, followed a few seconds later by Officer Fernandez. The decoy went to the coolers and grabbed a can of Bud Light beer which he took to the sales counter. The clerk greeted the decoy and asked to see the decoy's ID. The decoy handed the clerk his California driver's license, and the clerk glanced at it. The clerk handed the ID back to the decoy and told the decoy the price of the beer. The decoy paid for the beer and began to exit the licensed premises. The clerk stopped the decoy and asked him to come back. The clerk then bagged the beer, and the decoy exited the premises.

The Department's decision determined that the violation charged was proved and no defense was established. The administrative law judge (ALJ) noted that appellants' license had been disciplined on June 8, 2009 for a violation of section 25658, subdivision (a), and proposed a penalty of 15 days' suspension. The Department adopted the ALJ's proposed penalty.

Appellants then filed an appeal contending that the ALJ failed to proceed in the manner required by law and abused his discretion when he disregarded appellants' rule 141(b)(2)[2] arguments and considered improper facts outside of the record.

DISCUSSION

Appellants maintain that the ALJ improperly disregarded the arguments they raised during the administrative hearing. Appellants claim they argued before the ALJ that the decoy's confident demeanor, his burly stature, and his high "success rate" gave him the appearance of a person over the age of 21. (App.Br. at p. 5.) Despite their arguments, appellants claim the ALJ misstated testimony from the record, and found that the decoy testified that he was never *confident* while acting as a minor decoy. (*Id*. at p. 6, citing Conclusions of Law, ¶ 5, emphasis added.) This finding is, appellants allege, contrary to the testimony in the record because the decoy actually testified that he did not become *comfortable* in his role as a decoy. (*Ibid*., citing RT at p. 31, emphasis in original.)

Additionally, appellants contend that the ALJ mischaracterized the decoy's law enforcement experience as the decoy's merely having learned about the penal codes and performed community service. (*Id*. at p. 7.) This mischaracterization, appellants claim, when coupled with the ALJ's failure to consider the observable effect of the decoy's law enforcement experience, establishes that the ALJ did not properly evaluate the decoy's appearance under rule 141(b)(2). (See *id*. at pp. 6-7.)

Rule 141(a) requires "fairness" in the use of minor decoys:

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[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.

> 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.

Meanwhile, rule 141(b)(2) provides, in pertinent part: "[t]he 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 requirements of rule 141 must be strictly obeyed: “The Department’s increasing reliance on decoys demands strict adherence to the rules adopted for the protection for the licensees, the public, and the decoys themselves.” (*Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126].) However, non-compliance with rule 141 is an affirmative defense, and the burden of proof is on 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 if 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].)

The ALJ here made the following findings of fact concerning the decoy's appearance:

> 5. Santamaria appeared and testified at the hearing. On June 6, 2014 he was 5'8" tall and weighed 180 pounds. He wore a gray shirt, black tennis shoes, and jeans. He had a watch on one of his wrists. (Exibits 3, 4 & 6). His appearance at the hearing was the same.
>
> [¶ . . . ¶]
>
> 8. Santamaria had been a decoy approximately three times before June 6, 2014. He learned of the decoy program through the LAPD cadet program. He had been a cadet for approximately one year as of the date of this operation. As a cadet, he learned about the penal codes and performed community service. Santamaria was not comfortable during any of the decoy operations. Of the 15 locations he visited on June 6, 2014, seven (including the Licensed Premises) sold alcoholic beverages to him. The clerks at each of the seven locations asked to see his ID before selling to him.
>
> 9. Santamaria 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 June 6, 2014, Santamaria displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to [the clerk].

(Findings of Fact, ¶¶ 5, 8-9.)

The ALJ concluded

> 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Santamaria's confidence gave him the appearance of a person over the age of 21, as evidenced by the fact that nearly half of the licenses [*sic*] who saw him during this operation sold alcoholic beverages to him. This argument is rejected. Santamaria testified credibly that he was never confident while acting as a decoy. As noted above, Santamaria had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 9.)

(Conclusions of Law, ¶ 5.)

Appellants dedicate a substantial portion of their brief to quibbling over the difference between the words "confidence" and "comfort" as used in the ALJ's findings and conclusions. They claim it was improper for the ALJ to have found that the decoy testified that he was never *confident* while acting as a decoy, when, in fact, his testimony proceeded as follows:

> MS. ROSE:
>
> Q. OKAY. NOW YOU TESTIFIED THAT YOU HAD PARTICIPATED IN APPROXIMATELY THREE PRIOR OPERATIONS BEFORE JUNE 6, 2014, AND YOU VISITED ANY [*sic*] 10 TO 15 LOCATIONS DURING EACH ONE.
> DID YOU BECOME MORE *COMFORTABLE* IN YOUR ROLE AS A DECOY THROUGHOUT THESE OPERATIONS?
>
> [THE DECOY:]
>
> A. NO.
>
> Q. YOU STATED THAT YOU DIDN'T BECOME MORE *COMFORTABLE* AS A ROLE AS A DECOY THROUGHOUT THESE OPERATIONS. WERE YOU COMFORTABLE IN YOUR ROLE AS A DECOY?
>
> A. NO.

(RT at p. 31, emphasis added.)

Appellants are attempting to construct a mountain out of a molehill with their emphasis on the distinction between the decoy's confidence and comfort levels. As the Department observes, while the ALJ's conclusion of law may have been technically inaccurate in that it was not a verbatim recitation of the decoy's testimony, his finding the fact — which, we assume, was the basis of his conclusion — was not so. (See Findings of Fact, ¶ 8, "Santamaria was not *comfortable* during any of the decoy

operations.", emphasis added.) Moreover, the ALJ appropriately summarized appellants' closing argument in his conclusion of law, and thus was apparently aware of the point appellants were trying to convey regarding the decoy's confidence. Altogether, it seems as though the ALJ simply disagreed with appellants regarding this one aspect of the decoy's overall appearance — be it considered the decoy's "confidence" level or his "comfort" level. Without more to support their contentions, appellants have failed to provide a sufficient basis to overturn the ALJ's decision on this ground. To the extent that the ALJ's use of the word "confidence" in place of the word "comfort" can be deemed error, that error was harmless.

Appellants next allege that the ALJ abused his discretion with his treatment of the decoy's cadet experience. They claim it was improper for the ALJ to "mischaracterize" the decoy's experience as a cadet for the LAPD as having learned about the penal codes and performed customer service. (App.Br. at p. 7.) Additionally, appellants contend the ALJ erroneously found that the decoy had been a cadet for approximately one year when the decoy did not testify as to how long he had been a cadet. (*Ibid.*) Finally, appellants claim that it was improper for the ALJ to mention the decoy's previous experience as a minor decoy without considering the number of locations he had visited. (*Ibid.*) These shortcomings in the proposed decision, appellants argue, establish that the ALJ abused his discretion by ignoring aspects of the decoy's overall experience that supported appellants' rule 141(b)(2) defense, by considering evidence outside of the record, and by failing to consider the observable effect of the decoy's law enforcement experience and success rate. (*Ibid*.)

Once again, appellants' arguments simply fail to hold water. First, with regard to

the decoy's cadet experience, the decoy testified as follows on cross examination:

> [MS. ROSE:]
>
> Q. AND COULD YOU PLEASE DESCRIBE FOR US YOU'RE [*sic*] DUTIES OR THE ACTIVITY THAT YOU CONDUCTED WITH THE CADET PROGRAM?
>
> [THE DECOY:] YES. I WOULD WORK MARATHON DETAILS, AND WATER, POLICE SERVICE, TRASH.
>
> Q. AND DID YOU HAVE ANY KIND OF TRAINING WITH THE CADET PROGRAM THAT RELATED TO LAW ENFORCEMENT?
>
> A. YES.
>
> Q. COULD YOU BRIEFLY DESCRIBE THAT FOR US?
>
> A. SUCH AS SECTIONS ABOUT THE PENAL CODES, KEEPING UP BEARING.
>
> Q. WHAT DOES KEEPING UP BEARING MEAN?
>
> A. WHICH MEANS STAND AT ATTENTION.
>
> Q. DID YOU HAVE ANY KIND OF TRAINING RELATED TO UNDERCOVER OPERATION WITH YOUR INVOLVEMENT IN THE CADET PROGRAM.
>
> A. NO.

(RT at pp. 29-30.) Contrary to appellants' contention, we find nothing improper about the ALJ's labeling of the decoy's cadet-related duties; it was perfectly reasonable for the ALJ to characterize the decoy's service during marathons as "community service." Thus, appellants' concern over this point is simply without merit.

As to the decoy's law enforcement experience as a whole, appellants have provided an insufficient basis for this Board to overturn the proposed decision. As we have stated many times over:

> 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.

(*7-Eleven, Inc./Azzam* (2001) AB-7631, at p. 5, emphasis in original.) It is the burden of the appellants, and not the ALJ, to produce evidence that the decoy's experience actually resulted in him displaying the appearance of a person 21 years old or older. Appellants simply failed to meet their burden in this case, and their failure is unsurprising considering the fact that the clerk — the only witness who could credibly testify as to his own impressions of the decoy's apparent age — did not testify at the administrative hearing.

Moreover, the fact that the ALJ failed to mention the observable effect that the decoy's experience had on his overall appearance is irrelevant, especially when an "ALJ is not required to provide a laundry list of factors he found inconsequential." (*7-Eleven, Inc./Samra* (2014) AB-9387, at p. 9, citing 7-*Eleven, Inc./Convenience Group, Inc.* (2014) AB-9350, at p. 4.) The record establishes that the ALJ considered a vast array of indicia of age when assessing the decoy's overall appearance, and simply came to a different conclusion than did the appellants.

The board is similarly unmoved by appellants' contention that the ALJ's finding that the decoy had been a cadet for approximately one year was based on evidence

outside of the record. The record establishes that the decoy was born on July 4, 1995, was 18 years old on June 6, 2014, the date of the subject operation, and was 19 years old on the date of the administrative hearing. (See RT at p. 16.) On cross examination, the decoy testified as follows:

> [MS. ROSE:]
>
> Q. OKAY. SO GOING BACK TO — I ASKED YOU ABOUT THE PRIOR OPERATIONS, AND PRIOR TO JUNE 16, 2014 [*sic*], THESE, APPROXIMATELY, THREE PRIOR OPERATIONS YOU CONDUCTED, I SUPPOSE AT WHO AGE [*sic*] DID YOU START BECOMING A MINOR DECOY?
> [THE DECOY:] AROUND THE AGE OF 18.
>
> Q. AND YOU WERE 18 YEARS OLD ON JUNE 26, 2014 [*sic*]; CORRECT?
>
> A. YES.
>
> Q. AND SO YOU HAD CONDUCTED THESE PRIOR OPERATIONS IN THE SPAN OF THAT PRIOR YEAR?
>
> A. YES.
>
> Q. AND HOW DID YOU BECOME INVOLVED IN THE MINOR DECOY PROGRAM?
>
> A. WITH THE LOS ANGELES CADET PROGRAM.
>
> Q. AND PRIOR TO JUNE 6, 2014, HOW LONG WERE YOU INVOLVED WITH THE LA PD CADET PROGRAM?
>
> A. FOR ABOUT —
>
> Q. AND COULD YOU PLEASE DESCRIBE FOR US YOU'RE [*sic*] DUTIES OR THE ACTIVITY THAT YOU CONDUCTED WITH THE CADET PROGRAM?

(RT at p. 29.) Interestingly, as the Department notes, it was counsel for appellants who cut the decoy off before he could answer the question regarding his tenure as a cadet.

The ALJ's finding that the decoy had served as a cadet for approximately one year seems to have been based on the following facts: the decoy was 19 on the date of the hearing, 18 on the day of the operation, started serving as a minor decoy "around the age of 18" (see RT at p. 29), and learned about the decoy program through the cadet program. While the ALJ's finding could have been based on an assumption drawn from the foregoing facts which may or may not have been accurate, appellants have not established that the assumption, to the extent one was made, was fatal to their case. As the party asserting the affirmative defense under rule 141(b)(2), the burden was on appellants to make a clear record by seeking testimony concerning the rule's many facets — including the duration of the decoy's law enforcement experience as well as his confidence or comfort with acting as a minor decoy — and the failure to do so rests on nobody's shoulders but their own. Thus, even if we were to consider the ALJ's finding concerning the decoy's experience to be erroneous, that error, too, would be harmless and insufficient to warrant reversal in this case.

As to the decoy's "success rate" — i.e., his ability to purchase alcoholic beverages at seven out of fifteen locations — on the evening in question, while an unusually high success rate may trigger suspicion that the decoy's appearance does not comply with rule 141(b)(2), a per se standard where a high success rate inevitably leads to a finding of non-compliance with the rule would be inappropriate. The sales could be attributable to any number of reasons other than a belief that the decoy appeared over the age of 21. (*7-Eleven, Inc./Aziz* (2010) AB-8980, at p. 3, quoting *7-Eleven, Inc./Jain* (2004) AB-8082.) Appellants have offered no evidence beyond their own mere speculation that the success rate in this case was specifically attributable to the decoy's

appearance.

Finally, appellants once again raise an attack on the ALJ's findings — or lack thereof, in some instances — regarding their defenses, and claims that they constitute an abuse of discretion. As we explained in a very recent opinion addressing the same attack on an ALJ's findings that appellants make here:

> [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 here. The record establishes that the ALJ considered the decoy's physical and nonphysical appearance, as well as his law enforcement experience and "success rate" in purchasing alcoholic beverages when assessing the decoy's apparent age. While appellants no doubt disagree with the ALJ's conclusion, their discontent is simply not enough to merit reversal.

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.