

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

AB-9554

File: 20-214384; Reg: 15082354

7-ELEVEN, INC. and WILLIAM HUGH HOLMES,
dba 7-Eleven #2136-18788
17710 Saticoy Street,
Reseda, CA 91335,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 4, 2016
Los Angeles, CA

ISSUED AUGUST 24, 2016

Appearances: *Appellants:* Melissa H. Gelbart, of Solomon, Saltsman & Jamieson, as counsel for appellants 7-Eleven, Inc. and William Hugh Holmes. *Respondent:* Jennifer M. Casey, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and William Hugh Holmes, doing business as 7-Eleven #2136-18788, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending² their license because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated November 18, 2015, is set forth in the appendix.

²The suspension was for 5 days, all conditionally stayed, subject to one year of discipline-free operation by the licensee.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. On May 1, 2015, the Department filed an accusation against appellants charging that, on December 31, 2014, appellants' clerk, Hamitashav Khanna (the clerk), sold an alcoholic beverage to 19-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.

On May 19, 2015, appellants filed and served a Request for Discovery on the Department pursuant to Government Code section 11507.6 demanding, inter alia, the names and addresses of all witnesses. The Department submitted a response on June 11, 2015, providing the address and phone number of the West Valley Vice Unit of the LAPD in lieu of decoy's personal information. Appellants attempted to call the decoy at the telephone number provided but were unable to contact him at that number. The Department also provided a copy of the decoy's identification card with his home address redacted.

On June 25, 2015, appellants sent a letter to the Department asking to meet and confer on the basis that the Department's response was incomplete. Specifically, appellants requested the decoy's home address. The Department responded on June 30, 2015, declining appellants' request. Appellants filed a Motion to Compel Discovery on June 30, 2015, the Department filed a motion in opposition, and oral argument was heard on the issue. On July 20, 2015, the motion was denied. The administrative law judge (ALJ) found that the statute requires only an "address" and not necessarily a home address, and further, that this Board's decision in *Mauri Restaurant Group* (1999) AB-7276 was on point and mandated denial of the motion.

An administrative hearing was held on September 15, 2015. Documentary evidence was received and testimony concerning the sale was presented by Santamaria (the decoy); by LAPD Officer Jose Fernandez; and by Ashwani Kumar, a manager at the licensed premises.

Testimony established that on the day of the operation, Officer Fernandez entered the premises followed shortly thereafter by the decoy. The decoy went to the cooler where he selected a 25-ounce can of Bud Light beer. He took the beer to the register and the clerk asked for his identification. The decoy handed the clerk his California Identification Card (Exh. 5) which had a vertical orientation, showed his correct date of birth — 07/04/1995 — and which contained a red stripe indicating “AGE 21 IN 2016.” The clerk looked at the identification, handed it back to the decoy, told him the price of the beer, then completed the sale. The decoy exited the store with the beer.

The decoy and Officer Fernandez subsequently reentered the premises with several other LAPD officers and conducted a face-to-face identification of the clerk. Officer Sinclair asked the decoy who sold him the beer and the decoy pointed to the clerk. The two of them were standing approximately three feet apart and facing each other at the time. A photograph was taken of the decoy and clerk together (Exh. 4) and the clerk was later cited.

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 ALJ abused his discretion by denying appellants' motion to compel disclosure of the decoy's personal contact information; (2) the Department failed to comply with Government Code section

11507.6 when it provided only the address of the LAPD vice unit when it was in possession of the decoy's home address; and (3) the ALJ failed to proceed in the manner required by law when he failed to analyze the decoy's physical and non-physical characteristics supporting appellants' 141(b)(2)³ defense. Issues one and two will be discussed together.

DISCUSSION

I

Appellants contend that the ALJ abused his discretion by denying appellants' motion to compel disclosure of the decoy's personal contact information. (App.Br. at p. 6.) Appellants contend the Department's refusal to provide the decoy's home address, coupled with the ALJ's denial of their motion to compel, deprived them of the ability to meaningfully defend themselves. (*Id.* at p. 8.)

Appellants also contend the Department failed to comply with Government Code section 11507.6 when it provided only the address of the LAPD vice unit when it was in possession of the decoy's home address. (*Ibid.*)

Government Code section 11507.6 provides in pertinent part:

After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after the service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party . . .

(Gov. Code, § 11507.6.) Appellants favor a plain-language interpretation of this provision that would require the Department to provide the decoy's home address "to

³References 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 extent known” by the Department. (App.Br. at p. 8.)

This Board has recently addressed a number of cases raising this legal issue. In *7-Eleven, Inc./Joe* (2016) AB-9544⁴ we held that the decoy’s personal address is protected under section 832.7 of the Penal Code. (*Id.* at pp. 6-10.) We follow our *Joe* decision here and refer the parties to that case for a full discussion of the legal issues.

In a similar case, *7-Eleven, Inc./Nagra* (2016) AB-9551, the Board emphasized that the decoy must *actually be reachable* at the address provided. (*Id.* at p. 5, citing *7-Eleven, Inc./Joe, supra*, at p. 11.) We wrote:

While the Penal Code protects the personal contact information of certain peace officers, it does not permit the Department to supply a sham address; the decoy must *actually be reachable* at the address provided. If a licensee establishes that it attempted to reach a decoy at the address provided by the Department,^[fn.] and the law enforcement agency at that address indicated it could not or would not forward the licensee’s communications to the decoy, then the Department is in violation of the statute until it supplies a valid address, and the licensee may seek recourse through a motion to compel.

(*Id.* at p. 11.)

While section 832.7 of the Penal Code prevents release of the decoy’s personal information, including his home address, it does not eliminate the licensee’s discovery rights under section 11507.6 of the Government Code. The Board has made clear it will offer relief in the form of reversal if “we are presented with a well-established record showing that a decoy was legitimately unreachable at the address the Department provided during discovery, and the Department took no steps to provide an address at which the decoy could actually be reached.” (*Id.* at p. 8.)

⁴Cert. den., *7-Eleven, Inc. et al v. ABC Appeals Bd.* (July 6, 2016) 2nd App. Dist. B275900.

In the instant case, appellants maintain they attempted to reach the decoy by telephone at the LAPD Vice Unit but they received no response. (App.Br. at p. 2.) Without written documentation of appellants' request and law enforcement's response, however, appellants have failed to present the Board with a sufficiently well-established record to establish that the decoy was legitimately unreachable.

It is the licensee's burden to establish a violation of section 11507.6. (See Gov. Code, § 11507.7; see also *Joe, supra*, at p. 11). Appellants have not met this burden.

II

Appellants contend that the ALJ failed to proceed in the manner required by law when he failed to analyze the decoy's physical and non-physical characteristics supporting appellants' 141(b)(2) defense — namely, appellants' contention that the decoy's training and experience caused him to appear over the age of 21. (App.Br. at pp. 12-13.)

Rule 141, subdivision (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.

The rule provides an affirmative defense, and the burden of proof lies with appellants. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

This Board has rejected the "experienced decoy" argument many times. As we noted in *Azzam* (2001) AB-7631:

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. . . . 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.

(*Id.* at p. 5, emphasis in original.)

This Board has further noted that:

An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.)

In the decision below, the ALJ made the following findings of fact regarding the decoy's appearance:

5. Santamaria appeared and testified at the hearing. On December 31, 2014 he was 5' 8" tall and weighed 180 pounds. He wore a gray sweatshirt, jeans, and black sneakers. The sweatshirt had a hood which was down at all times he was inside the Licensed Premises. His hair was short on all sides. (Exhibits 4 & 6-7.) His appearance at the hearing was the same.

[¶ . . . ¶]

9. Sinclair [*sic*] had been a decoy five times before December 31, 2014, visiting ten to fifteen locations each time. He was [a] cadet with LAPD, having joined the cadet program approximately two years before December 3, 2014. He worked out at the gym six days a week and was a registered security guard at the time. On December 31, 2014, three of the eleven locations Sinclair [*sic*] visited sold alcoholic beverages to him.

10. 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 mannerism shown at the hearing, and his appearance and conduct in front of Khanna at the Licensed Premises on December 31, 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 [*sic*] Khanna.

(Findings of Fact, ¶¶ 5-10.) Based on these findings, he reached the following conclusion:

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2)^[fn.] and 141(b)(5). Accordingly, in the Respondents' view, the accusation should be dismissed pursuant to rule 141(c). With respect to Rule 141(b)(2), the Respondents argued that Santamaria's extensive experience as a decoy as well as his employment as a security guard gave him the demeanor of a person over the age of 21. This argument is rejected—as noted above, Santamaria had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

(Conclusions of Law, ¶ 5 .)

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.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; see also *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628].)

Appellants take issue with what they characterize as “conclusory” language referring to the decoy's “poise, demeanor, maturity, and mannerisms” in the ALJ's conclusion. Appellants allege this conclusion fails “to set forth findings to bridge the gap between the raw evidence and his decision to reject Appellants' Rule 141(b)(2) argument.” (App.Br. at p. 13.)

This Board has indeed held that an ALJ should not focus his analysis solely on a decoy's *physical* appearance and thereby give insufficient consideration to relevant *non-physical* attributes such as poise, demeanor, maturity, and mannerisms. (See, e.g., *Circle K Stores, Inc.* (2004) AB-8169; *7-Eleven, Inc./Sahni Enterprises* (2004)

AB-8083; *Circle K Stores* (1999) AB-7080.) This should not, however, be interpreted to require that the ALJ provide a “laundry list” of factors he or she found inconsequential. (*Lee* (2014) AB-9359; *7-Eleven, Inc./Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080.)

In this case, the ALJ specifically acknowledged the decoy's training and experience and rejected the contention that this made him appear over the age of 21. The fact that the ALJ did not explain his reasoning does not render the ALJ's determination an abuse of discretion as appellants allege. The clerk did not testify, so any “observable effect” of the decoy's training and experience is mere conjecture.

The ALJ made ample findings regarding the decoy's age, physical appearance, and experience, and we cannot interfere with the ALJ's factual determinations in the absence of a clear showing of an abuse of discretion. No such showing was made in this case.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies, and make the determination whether the decoy's appearance met the requirement of rule 141 that he 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.

We see no flaw in the ALJ's findings or determinations. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This we cannot do.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This 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.