

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

AB-9562

File: 20-214422; Reg: 15082099

7-ELEVEN, INC., ABDULLAH MAMOUN ALALAMI, and MELINDA MARIE ALALAMI,
dba 7-Eleven #2175-27679
5800 Atlantic Boulevard, Maywood, CA 90270,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 1, 2016
Los Angeles, CA

ISSUED SEPTEMBER 29, 2016

Appearances: *Appellants:* Melissa H. Gelbart, of Solomon, Saltsman &
Jamieson, as counsel for appellants 7-Eleven, Inc., Abdullah
Mamoun Alalami, and Melinda Marie Alalami.
Respondent: Jacob Rambo and Jonathan V. Nguyen, as counsel
for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Abdullah Mamoun Alalami, and Melinda Marie Alalami, doing
business as 7-Eleven #2175-27679, appeal from a decision of the Department of
Alcoholic Beverage Control¹ suspending their license for 5 days, all conditionally stayed
for one year, because their clerk sold an alcoholic beverage to a police minor decoy, in

¹The decision of the Department, dated December 14, 2015, is set forth in the
appendix.

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 1, 1988 and there is no record of prior discipline against appellants' license. On March 11, 2015, the Department filed an accusation against appellants charging that, on November 6, 2014, appellants' clerk, Luis Ochoa (the clerk), sold an alcoholic beverage to 18-year-old Jose Ramirez. Although not noted in the accusation, Ramirez was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

On March 30, 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. Appellants received the Department's response on April 9, 2015, providing the address and phone number of the ABC district office in Los Angeles, in lieu of decoy's personal information. The Department also provided a copy of the decoy's driver's license — with the address redacted.

On April 10, 2015, appellants sent a demand letter to the Department demanding that the Department furnish the decoy's personal contact information by April 15, 2015. Appellants received the Department's response on April 14, 2015, in which it refused to disclose the decoy's personal contact information.

Appellants filed a Motion to Compel Discovery and the motion was denied on May 15, 2015. In his order 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 October 14, 2015. Documentary evidence was received and testimony concerning the sale was presented by Ramirez (the decoy), by Department Agent Patrick Bullock, and by Caredaz² Rodriguez, the store manager of the licensed premises.

Testimony established that on the day of the operation, Department Agent Bullock entered the licensed premises followed shortly thereafter by the decoy. The decoy selected a six-pack of Bud Light beer which he took to the front counter. The clerk told him the price and completed the sale without asking for identification and without asking any age-related questions. The clerk bagged the beer and the decoy then exited the store, followed by Agent Bullock.

Agent Bullock re-entered the premises, identified himself to the clerk, and explained the violation that had occurred. The decoy joined the agent and clerk, and Agent Bullock asked the decoy to identify the person who had sold him the beer. The decoy pointed to the clerk — indicating that he was the one who sold him the beer. The decoy and clerk were facing each other and approximately five feet apart at the time. A photo was taken of the decoy and clerk together. (Exh. 2.) The clerk was subsequently fired.

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

²Variously identified as Caredaz Rodriguez (RT at p. 33) and as Caredad Rodriguez. (Findings of Fact, ¶ 9; Conclusions of Law, ¶ 5.)

contact information; (2) the Department failed to comply with Government Code section 11507.6 when it provided only the address of the Department's Los Angeles district office 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 Department's Los Angeles district office 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

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.

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 the extent known" by the Department. (App.Br. at p. 9.)

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.)

We suggest the Department prepare some type of form to be forwarded to the decoy — containing options to either accept or decline the request for an interview — and that they formulate a procedure for making the decoy's response a part of the

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

record. This would ensure that the decoy is *actually notified* of appellants' desire for an interview, and create the type of record which we have heretofore been lacking in cases presenting this issue.

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.) In the instant case, however, appellants have presented no evidence to show they attempted to reach the decoy by telephone or by mail at the Department's Los Angeles district office. We agree with the Department's assertion that "appellants cannot claim prejudice if they do not make a good faith attempt to contact the minor decoy at the address and phone number provided to them in discovery." (Dept.Br. at p. 7.)

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. 10-11.)

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. Ramirez appeared and testified at the hearing. On November 6, 2014 he was 5' 5" tall and weighed 185 pounds. He was wearing a black t-shirt,

black jeans, and Vans. His hair was short and parted to the side. (Exhibits 2-4.) His appearance at the hearing was similar except he was one-half inch taller, weighed 20 pounds more, and had slightly longer hair.

¶ . . . ¶

8. Ramirez had been on multiple decoy operations in the past, visiting a total of 25 to 30 locations. He learned of the decoy program through his role as an Explorer. He had been an Explorer for approximately ten months prior to November 6, 2014. As of the date of the hearing he held the rank of sergeant. On November 6, 2014, three of five locations sold alcoholic beverages to him.

11. Ramirez 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 Ochoa at the Licenses Premises on November 6, 2014, Ramirez 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, ¶¶ 5-11.) 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 rule 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Ramirez had the appearance of a person in his early twenties as indicated the testimony of Caredad [*sic*] Rodriguez and his ability to purchase alcohol at three of the five locations he visited. This argument is rejected. As noted above, Ramirez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 11.)

(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 allege:

[t]he ALJ made no reasonable attempt to consider Mr. Ramirez's explorer experience and its effect—although critical for a complete analysis of Appellants' Rule 141(b)(2) argument. As a result, the ALJ analyzed the decoy's appearance in a vacuum—contrary to what this Board has stated—thereby failing to consider an important aspect of the decoy that Appellants argued gave the decoy the appearance of someone over twenty-one.

(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 this Board 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.