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

AB-9564
File: 20-385529; Reg: 15082928

7-ELEVEN, INC. and MANN CONVENIENCE STORES, INC.,
dba 7-Eleven #2121-19663
3090 Clairemont Drive, San Diego, CA 92117,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED SEPTEMBER 29, 2016

Appearances: *Appellants:* Saranya Kalai, of Solomon, Saltsman & Jamieson, as counsel for appellants 7-Eleven, Inc. and Mann Convenience Stores, Inc.
Respondent: John P. Newton, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Mann Convenience Stores, Inc., doing business as 7-Eleven #2121-19663, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days (all stayed provided appellant completes 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).

[1]The decision of the Department, dated January 6, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 1, 2002. On August 19, 2015, the Department filed an accusation against appellants charging that, on March 6, 2015, appellants' clerk, Steve Vang (the clerk), sold an alcoholic beverage to 18-year-old Ryan Blouin. Although not noted in the accusation, Blouin was working as a minor decoy in a joint operation between the San Diego Police Department and Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on November 17, 2015, documentary evidence was received and testimony concerning the sale was presented by Blouin (the decoy); by Steve Schnick, a San Diego Police detective; and by Luis Madriz, a Department agent.

Testimony established that on the date of the operation the decoy entered the licensed premises alone. He went to the coolers where he selected a six-pack of Bud Light beer in 12-ounce bottles. The decoy took the beer to the counter and the clerk asked for his identification. The decoy handed the clerk his California driver's license. The clerk took the license, looked at it briefly, then handed it back to the decoy without asking any age-related questions. The decoy paid for the beer and exited the store. Steve Schnick, an undercover San Diego Police detective, observed the transaction from inside the premises.

The decoy re-entered the store with law enforcement personnel and Department Agent Luis Madriz advised the clerk of the violation. Agent Madriz asked the decoy who sold him the beer and the decoy pointed at the clerk and said "he did" — or words to that effect. The decoy and clerk were facing each other and approximated three feet apart at this time. Agent Madriz then asked the clerk if he understood that he was

being identified as the person who sold beer to the decoy and the clerk said that he understood. A photo was then taken of the clerk and decoy together. (Exh. 3.) 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 administrative law judge (ALJ) failed to consider the decoy's nonphysical characteristics supporting appellants' rule 141(b)(2)[2] defense, and (2) improperly considered evidence outside the record.

DISCUSSION

I

Appellants contend that the ALJ failed to consider the decoy's non-physical characteristics supporting appellants' rule 141(b)(2) defense — to wit, "his confidence during the operation and his prior experience as a cadet." (App.Br. at p. 4.)

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

[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.

> 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. Blouin appeared and testified at the hearing. He stood about 5 feet 9 inches tall and weighed approximately 135 pounds. When he visited Respondents' store on March 6, 2016, he wore black pants, a white Hurley t-shirt and gray Vans shoes. He also wore a black plastic watch. (See Exhibits 3, 4 and 5). Blouin has grown about 2 inches since the date of the operation. His weight has remained about the same. At Respondents' Licensed Premises on the date of the decoy operation, Ryan Blouin looked substantially the same as he did at the hearing.
>
> [¶ . . . ¶]
>
> 9. Decoy Ryan Blouin appears his age, 18 years of 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/conduct in front of the clerk at the Licensed Premises on March 6, 2015, Blouin displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to clerk Vang. Blouin appeared his true age.
>
> 10. This was the first time that Blouin has served as a minor decoy. During this operation on March 6, 2015, decoy Blouin attempted to purchase beer at 14 different stores. He was only able to purchase beer

at three other locations besides this one.

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

> 6. Respondents argue that because Blouin is a cadet with the San Diego Police Department that this experience somehow causes him to appear older than his true age. Given the very brief time that this transaction took place, probably one to two minutes at the very most, it cannot be said that the fact that Blouin was a cadet somehow caused him to appear over the age of 21 to clerk Vang. Respondents presented no evidence to support their argument. At best it is pure speculation and it is rejected.

(Conclusions of Law, ¶ 6.)

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 maintain that the ALJ's failure to mention the decoy's comfort level during the operation, his failure to mention the decoy's work experience, and his failure to examine the effect of that work experience on his non-physical appearance, results in a decision which must be reversed. (App.Br. at pp. 5-6.)

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, however, the ALJ specifically acknowledged the decoy's employment experience, and rejected the contention that it made him appear over the age of 21. (See Conclusions of Law, ¶ 6, *supra*.) The fact that the ALJ did not explain his reasoning does not render his 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, and both his physical and non-physical appearance. 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.

II

Appellants contend the ALJ improperly considered evidence outside the record when he rejected appellants' 141(b)(2) defense based on the fact that the decoy's interaction with the clerk was so brief. (App.Br. at p. 7.) Appellants maintain the record contains no evidence regarding the length of the transaction. (*Ibid*.)

Appellants rely on the first sentence of Government Code section 11425.50, subdivision (c), for their position that the ALJ considered evidence not in the record. It states: "[t]he statement of the factual basis for the decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding." (Gov. Code §11425.50(c).) Appellants maintain that the record contains no evidence regarding the length of the transaction between the decoy and the clerk and that therefore it was error for the ALJ to consider this information in his Conclusions of Law. (See Conclusions of Law, ¶ 6, *supra*.)

Appellants, however, fail to quote the second sentence of section 11425.50(c) which goes on to say: "[t]he presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence." (Gov. Code §11425.50(c).) As the Department correctly points out, "[a]lthough there is no direct testimony as to the actual duration of the transaction, the CALJ drew a reasonable and logical inference from the testimonies of the decoy and Detective Schnick." (Reply Br. at p. 6.) The second sentence of section 11425.50(c) permits the evaluation of evidence, and by extension, the drawing of inferences. Furthermore, the record contains nothing to rebut the inference drawn by the ALJ.

Evidence Code section 600, subdivision (b) defines an inference as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts

found or otherwise established in the action." (Evid. Code, §600(b).) "An inference, while not in itself evidence, is the result of reasoning from evidence." (*Oak Knoll Broadcasting Corp. v. Hudgings* (1969) 275 Cal.App.2d 563, 568 [80 Cal.Rptr. 175].) Both the decoy and Detective Schnick testified about the events which transpired in the licensed premises — i.e., what was said and done during the decoy operation. From that information, the ALJ deduced that the interaction between the decoy and clerk was relatively brief. This is a permissible inference to be drawn from their testimonies — and not, as appellants suggest, the consideration of evidence outside the record.

We must reject this argument.

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.