

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

AB-9662

File: 20-543089; Reg: 17085200

7-ELEVEN, INC. and 3MRANA CORP.,
dba 7-Eleven Store #36035A
599 North Mountain Avenue, Upland, CA 91786-5016,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: August 2, 2018
Los Angeles, CA

ISSUED AUGUST 20, 2018

Appearances: *Appellants:* Brian Washburn, of Solomon, Saltsman & Jamieson, as
counsel for 7-Eleven, Inc. and 3Mrana Corp,

Respondent: Jennifer M. Casey, as counsel for Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and 3Mrana Corp., doing business as 7-Eleven Store #36035A,
appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending
their 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).

¹The decision of the Department, dated July 25, 2017, is set forth in the
appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 16, 2014, and there is no record of prior Department discipline against the license.

On January 5, 2017, the Department filed an accusation against appellants charging that, on September 23, 2016, appellants' clerk, Hanaa Bekhet (the clerk), sold an alcoholic beverage to 19-year-old Dominique Soto. Although not noted in the accusation, Soto was working as a minor decoy in a joint operation between the Upland Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on May 23, 2017, documentary evidence was received and testimony concerning the sale was presented by Soto (the decoy); by Department Agent Eric Burlingame; and by Upland Police Officers, Gabriel Garcia and George Hajj.

Testimony established that on September 23, 2016, the decoy entered the licensed premises alone, followed shortly thereafter by Officer Garcia. The decoy went to the coolers and selected a 12-pack² of Bud Light beer in cans. She took the beer to the sales counter and waited in line behind two people. When it was her turn, the decoy set the beer down and offered a \$20 bill to the clerk. The clerk did not take the money, but asked the decoy for her identification.

The decoy handed the clerk her California driver's license which had a vertical

²Although not significant, there is some discrepancy in the record regarding the number of cans. During the administrative hearing there were references to both a 20-pack (RT at pp. 38; 92) as well as a 12-pack (RT at pp. 19; 78). Exhibit 2 is not dispositive regarding the number of cans. However, the administrative law judge (ALJ) determined that it was a 12-pack, so we use that figure here.

orientation, contained her correct date of birth (showing her to be 19 years of age) and contained a red stripe indicating "AGE 21 IN 2017." The clerk swiped the ID in the register and handed it back to the decoy. She then completed the sale without asking any age-related questions. Officer Garcia observed the transaction from inside the store. The decoy then exited the store, followed by Officer Garcia.

The decoy re-entered the premises with Officers Garcia, Hajj and McClullough, and Agent Burlingame. The clerk was assisting other customers so Agent Burlingame spoke first to the store manager. Burlingame identified himself to the clerk and explained the violation to her. He then asked the decoy to identify the person who sold her the alcohol. The decoy pointed at the clerk and said "she's the one who sold me the alcohol." He also asked her how old she was and she replied, "19." The decoy and clerk were standing approximately five feet apart at the time and facing each other. A photograph of the two of them was taken (exh. 2) and the decoy exited the store.

The clerk was issued a citation after the face-to-face identification. Agent Burlingame and the store manager explained the violation again to the clerk, who was distraught and crying. Agent Burlingame testified that the clerk insisted that she had scanned the identification through the system and that the cash register had permitted the sale. (RT at pp. 77; 79.) The clerk, however, did not testify.

Agent Burlingame asked the manager to scan the beer. The manager did so and an age-restricted warning popped up on the screen — asking either for the customer's date of birth or for the identification to be scanned. The manager told Agent Burlingame that if an under-aged ID is scanned, the register does not permit the sale. The decoy was no longer in the premises so Burlingame scanned his own driver's

license and the register permitted the sale. No evidence was presented that the cash register was not functioning properly on the day of the decoy operation.

The ALJ submitted a proposed decision on June 12, 2017, sustaining the accusation and recommending a penalty of 15-days' suspension. Thereafter, on June 22, 2017, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellants and Department counsel, inviting the submission of comments on the proposed decision and stating that the proposed decision and any comments submitted would be submitted to the Director of ABC in 14 days.

Appellants submitted comments to the Director, arguing that neither the Administrative Procedure Act (APA) nor the ABC Act authorize the Department to permit the parties in a disciplinary procedure to comment on a proposed decision, and that by requesting submission of these comments, the Department exceeded the authority granted to it by the APA. The Department did not submit comments.

On July 17, 2017, the Department adopted the decision in its entirety and on July 25, 2017 it issued its Certificate of Decision.

Appellants then filed a timely appeal contending that law enforcement failed to conduct the operation in a manner that promotes fairness, in violation of rule 141(a).³

DISCUSSION

Appellants contend that law enforcement failed to conduct the operation in a manner that promotes fairness, in violation of rule 141(a), when they failed to investigate the clerk's assertion that she scanned the decoy's identification and that the

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.

cash register permitted the sale. (AOB at pp. 4-9.) Appellants contend it was incumbent upon law enforcement to test the decoy's ID in the point of sale system to verify whether the system was working properly and to test whether the magnetic strip on the decoy's ID might be defective. (*Ibid.*)

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.**

(Cal. Code Regs., tit. 4, § 141(a), emphasis added.) Appellants maintain that the facts in this case indicate unfairness in that law enforcement failed to conduct a thorough investigation into the functionality of appellants' point of sale system utilizing the actual ID offered by the decoy.

This Board is bound by the factual findings in the Department's decision so long as those findings are 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].)

In her decision the ALJ found as follows on this issue:

If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (Evidence Code, section 412.)

The undersigned disbelieves and finds incredulous both Respondents' contention and clerk Bekhet's hearsay statement that when clerk Bekhet swiped decoy Soto's driver license on the cash register on September 23, 2016, the cash register allowed the said sale of alcohol to go through; inferring the cash register was malfunctioning. It was within the Respondents' power to produce stronger more satisfactory evidence of this fact than relying on clerk Bekhet's hearsay statement as introduced through the testimony of agent Burlingame. Respondents failed to present any credible evidence that the cash register was not functioning properly on September 23, 2016. Respondents could have produced the point of sale receipt or testimony from its store manager to say whether the cash register was not working properly and/or was allowing alcohol sales transactions to proceed despite the swiping of a minor's identification. Agent Burlingame credibly testified that Respondent's store manager indicated that the alcohol sales transaction would have been stopped by swiping a minor's identification. It is more probable clerk Bekhet was trying to preserve her employment by making said claim. Regardless, clerk Bekhet had in her hand decoy Soto's valid California Driver License which was in the vertical format and had a red stripe indicating "Age 21 in 2017," both of which are clear red flags she was still a minor. If for any reason clerk Bekhet was confused when seeing the identification, which the record does not indicate she was, she could easily have asked decoy Soto her age.

(Conclusions of Law, at pp. 8-9.)

Even though the clerk did not testify, appellants would have this Board accept her hearsay statements to Agent Burlingame as evidence that she actually swiped the decoy's ID through the register and that the register gave her the go-ahead to make a sale. It is the province of the ALJ, as trier of fact, to make determinations as to credibility. (*Lorimore v. State Personnel Board* (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].) Here, since the clerk did not testify, it was the ALJ's prerogative to assess the credibility of her statements to the agent — and, as seen in the decision, the ALJ found her statements to be self-serving and not credible. The Appeals Board cannot interfere with that determination.

In a recent case, the Court of Appeals rejected this Board's contention that rule 141 was ambiguous because it failed to define fairness — citing *Nava v. Mercury Casualty Co.* (2004) 118 Cal.App.4th 803, 805 [13 Cal.Rptr.3d 816] for the proposition that lack of definition does not render a term ambiguous. The Court found:

Contrary to the Appeals Board's contention, Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141, subd. (b)(1)–(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation. [Citation.] Consequently, Rule 141's use of the word “fairness” does not render the rule ambiguous or confusing.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd./ Garfield Beach* (2017) 7 Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130].) In other words, the Court made it very clear that the word “fairness” in rule 141(a) is not subject to enlargement, allowing the Appeals Board to add fairness requirements to decoy operations. Rather, the five factors enumerated in rule 141(b) lay out specifically what is required to make a decoy operation “fair.”

Here, appellants would have this Board go against the holding in *Garfield Beach, supra*, and have us find unfairness in how law enforcement personnel executed their

job, as well as asking us to impose new and additional fairness requirements on this decoy operation. This the Board cannot do. The scope of this Board's review is clearly defined:

The power of the appeals board in reviewing license decisions of the department is 'limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.' (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085.)

(*Rice v. Alcoholic Bev. Control Appeals Bd.* (1978) 79 Cal.App.3d 372, 374 [144 Cal.Rptr. 851].)

Disagreement with the Department's decision constitutes neither error nor an abuse of discretion. Here, the Department made its case — that alcohol was sold to a minor in violation of Business and Professions Code section 25658(a) — and having failed to rebut that case at the administrative hearing, appellants would like this Board to reweigh the evidence and reach a different conclusion. This we cannot do.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
 PETER J. RODDY, MEMBER
 MEGAN McGUINNESS, MEMBER
 ALCOHOLIC BEVERAGE CONTROL
 APPEALS BOARD

⁴This 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.