

to a Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 16, 2004. On September 23, 2016, the Department filed an accusation charging that appellant's clerk, Jacob Madrid (the clerk), sold an alcoholic beverage to 17-year-old Ariana G. (the decoy) on July 30, 2016. Although not noted in the accusation, Ariana was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on February 8, 2017, documentary evidence was received and testimony concerning the sale was presented by the decoy, as well as by Department Agents David Duran and Charlotte Clark. Appellant presented no witnesses.

Testimony established that on July 30, 2016, Agent Duran entered the licensed premises, followed a short time later by the decoy. The decoy went to the coolers where she selected a can of Bud Light beer, then went to the register and set it down. The clerk was on the phone but he asked for her identification. The decoy handed him her California identification card which contained her correct date of birth — showing her to be 17 years of age — as well as a blue stripe indicating “AGE 18 IN 2017” and a red stripe indicating “AGE 21 IN 2020.” (Exh. 5.) The clerk looked at the ID and completed the sale without asking any age-related questions. The decoy exited the store.

The decoy joined Department agents at their vehicle and they were joined by Agent Duran. Agents Duran and Clark re-entered the premises with the decoy. The agents contacted the clerk and explained the violation. The clerk was asked to step

out from behind the register and the decoy was asked who sold her the beer. She pointed at the clerk. The two of them were facing each other at the time. A photo of the clerk and decoy together was taken (exh. 6) and the clerk was issued a citation.

Following the hearing, on March 10, 2017, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and suspending the license for a period of 10 days — with all 10 days stayed for one year, provided no further cause for discipline arises during that time. Thereafter, on March 22, 2017, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellant 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.

Appellant 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 May 1, 2017, the Department adopted the proposed decision in its entirety, and on May 22, 2017, the Department issued its Certificate of Decision.

Appellant then filed a timely appeal contending the ALJ failed to proceed in a manner required by law when he disregarded witness testimony that conflicted with his findings.

DISCUSSION

Appellant contends the ALJ failed to proceed in a manner required by law when

he disregarded witness testimony that conflicted with his findings, and improperly found that the face-to-face identification of the clerk complied with rule 141(b)(5).² Appellant maintains the decoy's testimony establishes that the clerk was not looking at her when he was being identified. (AOB at pp. 4-8.)

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

This rule provides an affirmative defense. The burden is, therefore, on appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) The rule requires "strict adherence." (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the clerk in that case].) The plain language of the rule in no way forbids the officers to first make contact with the suspected seller.

In *Chun* (1999) AB-7287, this Board made the following observation about the purpose of face-to-face identifications:

The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence

²References 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.

such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where, as here, an officer initiates contact with the clerk following the sale:

As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Morales* (2014) AB-9312; *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Keller)* (2003) 109 Cal.App.4th 1687, 1697 [3 Cal.Rptr.3d 339] [finding that the rule leaves the location of the identification to the discretion of the peace officer].)

More recently, the court found rule 41(b)(5) was not violated when:

the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor

and to object to any perceived misidentification. The rule requires identification, not confrontation.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (CVS)* (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527, 531].) The court explained that the exact moment of the identification could not be severed from the entire identification procedure, which included the decoy pointing out the clerk to the police, the decoy accompanying the police officer to the counter, the officer informing the clerk she had sold beer to the minor at his side, and the clerk and decoy being photographed together. (*Id.* at p. 532.) The court said. “The clerk in these circumstances certainly knew or reasonably ought to have known that she was being identified” because of the totality of the circumstances. (*Ibid.*)

The ALJ made the following findings on the face-to-face identification in this case:

9. Agent Duran re-entered the Licensed Premises accompanied by Agent Clark. They contacted the clerk, identified themselves, and explained the violation. Agent Duran asked Madrid to step out from behind the counter, which he did. Agent Duran asked Ariana to identify the person who sold her the beer. She pointed to Madrid. Ariana and Madrid were facing each other at the time and Madrid was not otherwise engaged. A photo of the two of them was taken (exhibit 6), after which Madrid was cited.

(Finding of Fact, ¶ 9.) Based on these findings, the ALJ reached the following conclusions:

5. All three witnesses testified credibly. Ariana, however, was less certain of some details than Agent David Duran and Agent Charlotte Clark were. Accordingly, to the extent Ariana’s testimony differs from that of the two agents, the agents’ testimony is relied upon.

6. [¶ . . . ¶]

Finally, the Respondent argued that the face-to-face identificaiton failed to comply with rule 141(b)(5) because the agents were talking to Madrid during the identification. This argument is rejected. Although the agents talked to Madrid during the entire identification and citation process, the testimony of the agents clearly established that they were not talking to him at the time Ariana identified him. (Finding of Fact ¶ .)

(Conclusions of Law, ¶¶ 5-6.)

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].)

Furthermore, the agents' testimony supports a finding that a proper face-to-face identification occurred, and it is the province of the ALJ, as trier of fact, to make determinations as to witness 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].) The Appeals Board will not interfere with those credibility determinations in the absence of a clear showing of an abuse of discretion. The ALJ here found the agents' testimony to be credible, as reflected in the

findings and conclusions in the decision and he addressed the somewhat less certain testimony of the decoy. The Board may not re-weigh the evidence to reach a different conclusion, nor may it make its own credibility determinations.

The Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (*Masani, supra.*) Looking at the entire identification procedure — including the agents informing the clerk he had sold beer to the minor, the decoy pointing out the clerk to the agents, and the clerk and decoy being photographed together — the clerk knew, or reasonably should have known, that he was being identified as the person who sold alcohol to a minor. As in *CVS*, the clerk here “had ample opportunity to observe the minor and to object to any perceived misidentification.” (*CVS, supra*, at p. 547.) The face-to-face identification in this matter fully complies with rule 141(b)(5).

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.