

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

AB-9660

File: 20-567121 Reg: 16085122

7-ELEVEN, INC. and HADY NAWABI,
dba 7-Eleven #36042B
3225 McHenry Avenue,
Modesto, CA 95350,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: July 12, 2018
South San Francisco, CA

ISSUED AUGUST 2, 2018

Appearances: *Appellants:* Donna Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Hady Nawabi, doing business as 7-Eleven #36042B.
Respondent: Sean Klein as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Hady Nawabi, doing business as 7-Eleven #36042B (appellants), 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 Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated July 14, 2017, is set forth in the appendix

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 13, 2016. On December 16, 2016, the Department filed an accusation charging that appellants' clerk, Fnu Babrak (the clerk), sold an alcoholic beverage to 17-year-old Angela Luong on July 29, 2016. Although not noted in the accusation, Luong was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on May 3, 2017, documentary evidence was received, and testimony concerning the sale was presented by Luong (the decoy) and by Agent Nate Lauer of the Department of Alcoholic Beverage Control. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises, then looked for the cases with beer since she was unfamiliar with the premises. After finding them, she observed that they needed to be opened with a key. The decoy made contact with the clerk on duty. The clerk asked for her identification, which she produced. The clerk took the identification. He did not appear to look at it at this time. He gave the decoy the key and retained her identification while she returned to the case. The decoy selected a can of Coors Light beer. She then took her selection back to the clerk and waited behind the one customer who was before her. After the clerk was done with the customer before her, the decoy presented for purchase the can of Coors Light beer she had selected.

The clerk continued to hold the decoy's identification as he completed the transaction for the beer. The decoy's identification was the portrait type, with a red bar under the date of birth that specifically said she would not be 21 until 2019.

Despite the information on the decoy's identification, no questions were asked of the decoy about her age at any point during the transaction. The clerk rang up the beer, told the decoy the cost, then returned her identification. He completed the transaction for the beer after the decoy gave him cash to pay for the can of Coors Light beer. The decoy was given change by the clerk along with the beer purchase. She then exited the licensed premises with the can of Coors Light beer.

The decoy immediately went to the vehicle where Department agents were waiting and confirmed what had just occurred. The decoy immediately reentered with the Department agents. After allowing the clerk to complete transactions with customers who were in line, one of the agents informed the clerk of why they were there, and that he had sold alcohol to a minor. After this was done, one of the Department agents asked the decoy who sold her the beer. The decoy pointed at the clerk and said "He did." This occurred from a distance of approximately three feet. The clerk was looking at the decoy when she identified him.

After the hearing, the Department issued a decision determining the violation charged was proved and no defense was established.

Appellants then filed this appeal contending the decoy's mature demeanor violated rule 141(b)(2).

DISCUSSION

Appellants argue the decoy's appearance violated rule 141(b)(2). In particular, they contend the decoy's "physical appearance did not off-set the mature demeanor developed by her extensive experience as a decoy." (App.Br., at p. 6.) Appellants direct this Board to the decoy's testimony, in which she acknowledged having "participated in

20 to 30 operations," with each operation encompassing 10 to 15 licensed premises. (App.Br., at p. 3.) Additionally, the decoy had served as a police Explorer for two to three years. (*Ibid.*)

Appellants claim "[i]t is axiomatic that the amount of experience a person has practicing a task the more comfortable they will become at it and the more confident and self-assured they will appear in performing that task." (App.Br., at p. 6.) Moreover, appellants argue that "[a]n ALJ should consider all aspects of the decoy, which can include the past experience of the decoy and the observable effect that experience has on the decoy's appearance." (*Ibid.*, citing *7-Eleven, Inc.* (2001) AB-7631.) Appellants contend that an ordinary minor would not have handed over her identification in exchange for the key to the coolers, but that this decoy's experience and confidence "allowed her to approach the situation with the ease and maturity of an adult who had years of experience purchasing alcohol unimpeded." (App.Br., at p. 7.) Finally, appellants complain that "the ALJ did not note anything about [the decoy's] physical appearance that would off-set the impression set by her experienced demeanor." (*Ibid.*)

Rule 141 provides, in relevant part: "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." (Code Regs., tit. 4, § 141(b)(2).) The rule provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445, at pp. 3-16; *7-Eleven, Inc./Lo* (2006) AB-8384, at pp. 8-11.)

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

The ALJ made the following relevant findings of fact:

[The decoy] appeared her chronological age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of the clerk at the Licensed Premises on July 29, 2016, [the decoy] displayed the appearance which could generally be expected of a person less than 21 years of age during her interactions with the clerk. The clerk did not testify in this matter to explain his age related impressions of [the decoy] or why he sold [the decoy] alcohol after being given a California Identification card that showed her to be 17 years of age at the time of the transaction.

(Findings of Fact, ¶ 15.) Based on these findings, the ALJ reached the following conclusions of law:

5. The Respondent[s] argued that the decoy operation at the Licensed Premises failed to comply with rule 141^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the appearance of [the decoy] failed to comply with rule 141(b)(2) because her appearance and demeanor appeared older because of her experience with operations and explorer training.

6. There is no credible evidence supporting the assertion by the Respondent that there was a failure to comply with the requirements of rule 141(b)(2). Neither the clerk nor any other witnesses for the Respondent testified regarding the impact of [the decoy]'s physical appearance, demeanor, or her apparent age. Given the totality of the evidence presented by the Department credibly establishing compliance with rule 141(b)(2), the Respondent's unsupported assertions that compliance did not occur is found not credible.

7. [The decoy] testified in this matter and her appearance matched the appearance she presented to the clerk on the date of the operation. Her appearance was consistent with a person under the age of 21. She presented identification to the clerk that clearly showed she was 17 years old. As previously noted, the clerk did not testify to establish whether there was anything in [the decoy]'s manner or appearance that led him to reasonably conclude that she was over 21.

(Conclusions of Law, ¶¶ 5-7.) The ALJ's conclusions are supported by the evidence, or rather, by the lack thereof. Appellant would have this Board reverse based merely on the unsupported generalization that a decoy with explorer experience necessarily looks over the age of 21 by virtue of her relative confidence. They provide no evidence, however, to show how experience or confidence affected *this particular decoy's* appearance. Appellants do argue that the decoy's confidence manifested in her audacity, that a typical minor would not have handed over her identification in order to obtain the keys to the cooler. (App.Br., at pp. 7-8.) However, this too is an unsupported generalization; anyone who has interacted with teenagers knows that audacity is not a trait limited to adults.

Finally, appellants attempt to shift the burden of proof when they argue that "the ALJ did not note anything about [the decoy's] appearance that would off-set" her confidence and experience. (App.Br., at p. 7.) Appellants, however, bore the burden of proof; in order to prevail on their affirmative defense, they needed to establish, with

evidence, that this particular decoy appeared over 21. They failed to do so. The Department was not required to rebut appellants' unsupported assertions.

The ALJ's factual findings were reasonable and supported by the evidence. We therefore offer no relief.

ORDER

The decision of the Department is affirmed.²

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

2. 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.