

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

SHAMS ALI SAVAJA	)	AB-7326
dba Bargain 98 Cents and Up)	
495 North G Street, Suite A	)	File: 20-291856
San Bernardino, CA 92410,	)	Reg: 98044149
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	December 3, 1999
	)	Los Angeles, CA

Shams Ali Savaja, doing business as Bargain 98 cents and Up (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 25 days for his clerk having sold an alcoholic beverage to a minor, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Shams Ali Savaja, appearing through his counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the

¹The decision of the Department, dated December 17, 1998, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 2, 1994. Thereafter, the Department instituted an accusation against appellant charging that, on May 20, 1998, appellant's clerk, Aaron Michael Terry ("Terry"), sold an alcoholic beverage (a 24-ounce can of Budweiser beer) to Gary Michael Pahls ("Pahls"), who was then 16 years of age and a police decoy.

An administrative hearing was held on October 30, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the sale by Pahls, Terry, and Rodney Wayne John, one of the San Bernardino police officers participating in the decoy operation.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred, and ordered the 25-day suspension.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant contends that the decoy lacked the appearance which could generally be expected of a person under the age of 21 years, and the Department erred in its application of Rule 141(b)(2).

DISCUSSION

Appellant contends that by limiting his assessment to physical aspects of the decoy's appearance, the Administrative Law Judge overlooked all other age-indicative considerations contemplated by the rule.

The ALJ found as follows with respect to the appearance of the decoy:

“Although Gary Michael Pahls (hereinafter ‘the minor’) was six feet three inches in height and weighed about two hundred ten pounds as of May 20, 1998, his youthful looking face is such that it would be reasonable to consider him as being under twenty-one years of age”

This is a frequently recurring issue on appeal.

In Circle K Stores, Inc. (1999) AB-7080, the Board stated:

“Nonetheless, while an argument might be made that when the ALJ uses the term “physical appearance,” he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what he did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy’s appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.

“It is not the Appeals Board’s expectation that the Department, and the ALJ’s, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ’s are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.

“Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department’s concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).

As can be seen from his proposed decision, the ALJ discounted the decoy’s large physical stature because of his youthful-looking face. But, as the Board has observed on other occasions, even someone 40 years of age can have a youthful

looking face.²

This case is no different than the earlier Rule 141(b)(2) cases in which the Board reversed the Department because of its reliance upon an improper standard in its consideration of Rule 141(b)(2) - in this case, limiting its assessment to the decoy's facial appearance alone, and failing to consider any other indicia of age -and deserves no different treatment.

ORDER

The decision of the Department is reversed.³

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² That the decoy in this case was only 16 years of age is overshadowed by the fact that he was 6'3" tall and weighed 210 pounds. The Board has frequently expressed its concerns about the use of decoys large in stature, such as the decoy in this case, but the message does not seem to reach law enforcement.

³ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.