

ISSUED JANUARY 3, 2001

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

BEVERAGES & MORE, INC.	)	AB-7465
dba Beverages & More	)	
201 Bayshore Blvd.	)	File: 21-294713
San Francisco, CA 94124,	)	Reg: 99045817
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Michael B. Dorais
DEPARTMENT OF ALCOHOLIC	)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	September 22, 2000
	)	San Francisco, CA

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Beverages & More, Inc. doing business as Beverages & More (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its off-sale general license for 15 days for permitting its clerk to sell an alcoholic beverage to a person under the age of 21 years, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200,

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<sup>1</sup>The decision of the Department, dated July 29, 2000, is set forth in the appendix.

subdivision (a) and (b), arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Beverages & More, Inc. appearing through its counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

#### FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on June 7, 1998. Thereafter, the Department instituted an accusation against appellant charging that a clerk had sold an alcoholic beverage to a person under the age of 21 years (minor), who at the time was under the observation and control of officers of the San Francisco Police Department.

An administrative hearing was held on May 18, 1999, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had been proven.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raised the following issues: (1) the decision is defective in that it does not set forth sufficient reasons that the minor's appearance was such as would be expected of a person under the age of 21 years, and (2) the decision does not adhere to Rule 141(b)(2), concerning appearance. The contentions will be reviewed together.

#### DISCUSSION

Appellant argues that the findings as to the conduct of the clerk are irrelevant, the extreme experience of the minor acting as a decoy violates fairness,

and the Administrative Law Judge (ALJ) used an incorrect legal standard.

We think appellant reads more into Finding III and Determination of Issues V than is present, that is, on commenting on the appearance of the minor, was “such that a reasonably prudent licensee [appellant’s clerk] would request his age and proof of his identification and age before selling him an alcoholic beverage,” and “In this case, the decoy’s [minor’s] youthful appearance required preventive action by Respondent’s [appellant’s] clerk to avoid an illegal sale of an alcoholic beverage to a minor,” respectively.

The statements quoted add nothing to the case, but being only advice on how to avoid the illegal sale. Other than this, the statements are of little value and are irrelevant to the case, and do no harm.

The only issue is whether an illegal sale was made and whether there are any defenses that can be properly raised. The decision must contain the necessary reasons for the decision and meaningless statements by the ALJ do not, in this case, add or detract from the case.

Appellant argues that the experience of the minor was a factor in showing the operation was unfair. The minor testified that he had been involved in decoy operations some 20 nights with 15 to 20 visits per night, or a conservative estimate of 300 attempts at “buys.”<sup>2</sup> (RT 10.) Police officer Zmak testified that it

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<sup>2</sup>While the ALJ stated that the decoy operation for this minor was from 300 to 400 operations (Finding IV), this appears to be a maximum estimate, with a better estimate between 200 to 300, as if it makes any difference. The conclusion of the ALJ, based on the estimated “buys” or attempted “buys,” is that the minor

was a close estimate, "... Some nights about 15 or 20, sometimes it's less. Just depends. Never really a set number." (RT 25.)

Appellant further argues that the statement by the ALJ that: "No active measures to deceive were taken in this transaction ..." somehow shows at least there was some sort of unfairness. Implicit in appellant's argument is that there are no sophisticated non-decoy minors or non-decoy minors who are not nervous. A few "buys" by a minor makes that minor proficient and nervous-less, in many cases.

It appears to us that it does not take many "buys" for a decoy to become nervous-less thus starting to make a minor, or a decoy, confident, or on the other hand, sloppy. The cases cited by appellant are of no value.

Finally, appellant argues that the correct legal standard was not used in assessing whether the minor appeared as a person who would be generally expected to look under the age of 21 years, and complain that the ALJ failed to state reasons for his conclusion concerning the appearance of the minor.

The rule, 4 California Code of Regulations, § 141(b)(2), states:

"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 sale ...."

The ALJ stated in Finding 9:

"... [the minor] appeared at the hearing and his appearance, that is, his physical appearance and his demeanor, both at the hearing and under the

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was not nervous at the time of this operation.

circumstances at the time of the above noted transaction, was that which could be expected of a person substantially under the age of 21 years ...”

Then follows a statement which is considered in this appeal, supra, and which is of no legal significance, but tends to explain the thinking of the ALJ that since the minor looked under age, a reasonable person would be concerned in selling to such a youthful individual without some type of responsible inquiry; a logical question, but not a requirement under the law.

ORDER

The decision of the Department is affirmed.<sup>3</sup>

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

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<sup>3</sup>This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.