

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

AB-9045

File: 48-442384 Reg: 08069812

THE RAMPAW CORPORATION, dba Deanes of Cucamonga
8108 San Bernardino Road, Rancho Cucamonga, CA 91730,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 3, 2010
Los Angeles, CA

ISSUED AUGUST 9, 2010

The Rampaw Corporation, doing business as Deanes of Cucamonga (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its bartender selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant The Rampaw Corporation, appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on September 18,

¹The decision of the Department, dated June 3, 2009, is set forth in the appendix.

2006. On October 10, 2008, the Department filed an accusation charging that appellant's bartender, Cecelia Cuevas Casanova (the bartender), sold an alcoholic beverage to 18-year-old Julian Joseph Araujo on May 12, 2008. Although not noted in the accusation, Araujo was working as a minor decoy for the Department at the time.

At the administrative hearing held on April 15, 2009, documentary evidence was received, and testimony concerning the sale was presented by Araujo (the decoy) and by Joseph Perez, Jr., a Department investigator.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed an appeal contending: (1) The identification of the bartender did not comply with rule 141(b)(5)² and (2) the decoy's appearance did not comply with rule 141(b)(2).

DISCUSSION

Appellant contends that the Department did not prove compliance with rule 141(b)(5),³ which provides that, following a sale, the decoy should make a face-to-face identification of the person who sold the alcoholic beverages.

The premise upon which appellant's argument is based is that it was "unduly suggestive" for the investigator to have asked the decoy "Did she sell you the alcohol?" [RT 36] prior to the actual face-to-face identification which took place five minutes later. Appellant argues that the decoy must have felt compelled to answer in the affirmative to

² References 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.

³The rule states: "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."

please the investigator because of the decoy's aspirations to work in law enforcement. The appellant also contends that the decoy operation was not conducted in "a manner that promotes fairness" as required by rule 141(a) because the face-to-face identification required by rule 141(b)(5) was made subsequent to this initial exchange between the investigator and the decoy.

In *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826], the Court of Appeal addressed the standard of review that it, and this Board, must use when considering a decision of the Department:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends* [(2002)] 100 Cal.App.4th [1250] at p. 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) 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. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) 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.

Appellant attempts to draw a parallel to *People v. Slutts* (1968) 259 Cal.App.2d 886 [66 Cal.Rptr. 862], in which an identification was found unduly suggestive after the witness had been shown a photograph with a beard drawn on it, rather than an unmarked photograph. Nothing approaching that took place here, and *Slutts* is distinguishable both on its facts as well as in reflecting a legal principle that is not involved in this case. The instant case is not a criminal line-up or photo ID where the identity of the defendant is in question and the investigator is planting a suggestion in the decoy's mind. Rather, the investigator in this case

merely confirmed that a sale had taken place, prior to the actual face-to-face identification. The administrative law judge (ALJ) made a factual determination that the question was not unduly suggestive and that a face-to-face identification did take place as required by rule 141; we cannot second-guess that determination. Appellant is asking this Board to re-weigh the evidence and reach a conclusion different from that of the ALJ which this the Board is not entitled to do.

Appellant also argues that the decoy's appearance did not comply with Rule 141(b)(2),⁴ and argues that the ALJ failed to consider the fact that the bartender saw the decoy in a dimly lit bar, in which the decoy (at six feet tall, 165 pounds and muscular build) may have appeared to be over the age of 21 even though he did not appear so at the well-lit hearing or in photographs taken the day of the alleged violation.

As the Board has so often said, it will not second-guess the factual determination by the ALJ concerning the appearance of the decoy unless the appellant can demonstrate an abuse of discretion. Abuse of discretion exists whenever in the exercise of its discretion, the court exceeds the bounds of reason, all of the circumstances before it being considered. (*Marriage of Connolly* (1979) 23 Cal.3d 590, 598 [153 Cal.Rptr. 423, 591 P.2d 911]; *People v. Russell* (1968) 69 Cal.2d 187, 194 [70 Cal.Rptr. 210, 443 P.2d 794], cert. den., *Russel v. Craven* (1968) 393 U.S. 864 [21 L.Ed.2d 132, 89 S.Ct. 145].)

The ALJ in this case determined that the decoy's appearance complied with rule 141(b)(2). He made this determination after observing the decoy as he testified, as well as in

⁴ The rule 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 offense."

the photographs taken the day of the event,⁵ and having been made aware of the dim lighting in the bar [RT 39]. Appellant has not presented any convincing argument that the ALJ abused his discretion in making this determination.

The ALJ is the trier of fact and has the opportunity, which this Board does not, of observing the decoy as he testifies. All this Board has available is a "cold record," and a partisan appeal asserting that the decoy lacked the appearance required by the rule. Even if we were permitted to do so, we are not in a position to second-guess the ALJ's determination.

Furthermore, the phrase "under the actual circumstances presented to the seller ... at the time of the alleged offense" refers to the requirement that the decoy must appear to be under the age of 21 at the time of the sale - since some decoys may look considerably older by the time of the Board hearing. But in this case, the photographic evidence showed that the decoy appeared much the same on the date of the alleged offense as at the hearing. The additional fact that the bar was dimly lit does not establish a "defense as a matter of law," as appellant argues in its brief. If all it took to avoid liability was to say "it was too dark to tell how old he was" no licensee would ever be found to be in violation.

As this Board has previously said:

[T]he fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many, if not most, sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older.

(*7-Eleven/Williams* (2001) AB-7591).

⁵ The photograph of the decoy taken immediately after his purchase of the beer is "arguably the most important piece of evidence in considering whether [he] displayed the physical appearance of someone under 21 years of age." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2002) 103 Cal.App.4th 1084, 1094, 127 [Cal.Rptr.2d 652].)

ORDER

The decision of the Department is affirmed.⁶

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
SOPHIE WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁶This 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.