

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

AB-9191

File: 21-469078 Reg: 11074657

FORTUNE COMMERCIAL CORPORATION, dba Seafood City
16130 Nordhoff Street, Sepulveda, CA 91343-3044,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 31, 2012
Los Angeles, CA

ISSUED JUNE 15, 2012

Fortune Commercial Corporation, doing business as Seafood City (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Fortune Commercial Corporation, appearing through its counsel, Ralph B. Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated August 31, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 16, 2008. On March 24, 2011, the Department filed an accusation charging that appellant's clerk, Marivic Cendana (the clerk), sold an alcoholic beverage to 18-year-old Laura Sanchez on August 28, 2010. Although not noted in the accusation, Sanchez was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on July 7, 2011, documentary evidence was received, and testimony concerning the sale was presented by Sanchez (the decoy) and by Christopher Glassford, a Los Angeles Police officer. The testimony established that the decoy entered the premises on August 28, 2010, located a bottle of merlot wine, checked to make sure the label indicated alcohol content, and then took the bottle to the checkout counter. The clerk scanned the bottle and received an age-related prompt which she cleared by entering her own, rather than the decoy's, date of birth. The bottle was then scanned a second time and the transaction was completed. No identification was requested from the decoy. At the hearing, the Department's motion for official notice, that merlot is an alcoholic beverage, was granted.

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

Appellant filed an appeal contending: (1) The decoy's appearance did not comply with rule 141(b)(2);² and (2) the administrative law judge (ALJ) abused his discretion in granting the Department's motion for official notice that merlot is an alcoholic beverage.

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.

DISCUSSION

I

Appellant contends that the decoy did not display the appearance required by rule 141(b)(2), which dictates: “[t]he 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.” Appellant maintains that the decoy’s wearing of makeup and bracelets, her “above-average female stature” (App. Br., p. 4), and her prior experience, disqualify her from compliance with rule 141(b)(2).

The ALJ made the following finding about the decoy’s appearance in Findings of Fact (FF) paragraph 12:

12. Sanchez appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Cendana at the Licensed Premises on August 28, 2010, Sanchez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Cendana.

The ALJ notes, and then rejects, the specific concerns outlined by appellant in Conclusions of Law (CL) paragraph 7:

7. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2) [fn. omitted] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that Sanchez did not have the appearance generally expected of a person under the age of 21 because she wore bracelets and make-up, particularly in light of her alleged “womanly” appearance. This argument is rejected. As set forth above, [Sanchez] had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 12.)

We note that the decoy wore the same makeup, *i.e.* mascara and eyeliner, at the hearing that she wore on the day of the decoy operation [RT 29] and the bracelets to

which the appellants refer appear to be made of rubber or plastic (Exh. 4), hardly a mature type of jewelry. The ALJ described the decoy in FF paragraph 5 as follows:

5. Sanchez appeared and testified at the hearing. While inside the Licensed Premises she wore a white v-neck shirt, blue jeans, and Vans. At the time she was 5'7" tall, weighted 150 pounds, and her hair was well past her shoulders. She wore two bracelets on one wrist and a hair tie on the other. She was wearing mascara and eyeliner, but no other make-up. (Exhibits 2 & 4.) At the hearing she was the same height and weight and was dressed the same way.

Appellants assert that the ALJ's findings constitute an abuse of discretion because they are not supported by substantial evidence. When findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647]; *Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456].)

The Board is bound by the factual findings in the Department's decision as long as they 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. (*CMPB Friends, [Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779];) 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.App2d 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.

(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.

(Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as she testifies, and making the determination whether the decoy's appearance met the requirement of rule 141 that she possessed 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. We are not in a position to second-guess the trier of fact, or to reweigh the evidence, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that she did not.

II

Appellant contends secondly that the ALJ abused his discretion in granting the Department's motion for official notice that "merlot" is an alcoholic beverage.

" 'Abuse of discretion' in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations..]" (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].)

The ALJ addresses the motion for official notice in CL paragraph 5:

5. The Department requested that the undersigned take official notice of the fact that merlot is a well-known type of wine. The Respondent opposed this request. [Fn. omitted.] The Department's request is hereby granted. This ruling is consistent with the evidence submitted during the

hearing (e.g., Sanchez examined the bottle and located a label relating to alcohol content, Cendana entered a date of birth in connection with the transaction).

Appellant maintains that the motion in question is not encompassed by Government Code section 11515, which provides in pertinent part: “[i]n reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency’s special field. . . .” Appellant asserts that classifying merlot as referring only to an alcoholic beverage is not a “generally accepted technical or scientific matter within the agency’s special field,” but rather, a fallacy or assumption. (App. Br., p. 5.)

We believe that appellant has somewhat misstated the Department’s Request for Official Notice. In paragraph one of that motion, it states: “Pursuant to Government Code section 11515, the Department of Alcoholic Beverage Control hereby requests that official notice be taken of the fact that ‘Merlot’ is an alcoholic beverage.” (Exh. 7.) Similarly, at the administrative hearing, the Department’s attorney said: “At this time I’m going to make a request that you take official notice of the fact that Merlot is a wine.” [RT 49.] Appellant, however, charges: “[a]t hearing, the Department’s [sic] requested that official notice be taken that the term ‘merlot’ is solely related to an alcoholic beverage.” (App. Br., p. 5.) Appellant then goes on to note that merlot also refers to a type of grape, and can be utilized in items which do not contain alcohol such as a type of dip mix. However, the decoy in this matter was not buying a bunch of grapes, and it is unlikely that a dip mix would be sold in a wine-type bottle.

We do not believe the Department’s motion, nor the ALJ’s proposed decision, intended to do anything more than establish that the beverage in *this* matter, *i.e.* Tisdale Merlot, is an alcoholic beverage. The ALJ’s reference to evidence presented at

the hearing makes this abundantly clear: “[t]his ruling is consistent with the evidence submitted during the hearing (e.g., Sanchez examined the bottle and located a label relating to alcohol content, Cendana entered a date of birth in connection with the transaction).” (CL-5.) The bottle purchased by the decoy was returned to the seller after the decoy operation, and a sample of the bottle’s contents was not available as evidence [RT 39], therefore the Department’s motion was required in order for it to establish that the bottle sold to this minor contained alcohol.

The fact that merlot is a type of wine, and that wine is an alcoholic beverage, is within the Department’s field of expertise, and precisely the sort of “generally accepted technical or scientific matter within the agency’s special field” covered by Government Code section 11515. It was not an abuse of discretion for the ALJ to grant such a motion for official notice.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, 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.