

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

**AB-9419**

File: 21-433957 Reg: 13078425

ENAAM SEMAAN and SHAALAN SEMAAN,  
dba Paradise Market & Liquor  
259 North Sanderson Avenue, Suite A-4, Hemet, CA 92545,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: November 6, 2014  
San Diego, CA

**ISSUED DECEMBER 23, 2014**

Enaam Semaan and Shaalan Semaan, doing business as Paradise Market & Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> suspending their license for 25 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants Enaam Semaan and Shaalan Semaan, through their counsel, R. Bruce Evans and Jennifer L. Carr, of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Kimberly Belvedere.

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<sup>1</sup>The decision of the Department, dated March 4, 2014, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on January 4, 2007. On April 29, 2013, the Department filed an accusation against appellants charging that, on February 25, 2013, appellants' clerk, Steve Samoeum (the clerk), sold an alcoholic beverage to 17-year-old Nelson G. Although not noted in the accusation, Nelson was working as a minor decoy for the Hemet Police Department at the time.

At the administrative hearing held on January 29, 2014, documentary evidence was received and testimony concerning the sale was presented by Nelson (the decoy) and by Sergeant Glen Brock of the Hemet Police Department. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and proceeded to the cooler, where he selected a three-pack of Bud Light beer in 24-ounce cans. He then brought the beer to the counter for purchase.

The decoy placed the beer on the counter. The clerk asked the decoy for identification. The decoy handed the clerk his California driver's license, which showed he was under the age of 21. The clerk took possession of the driver's license, looked at it briefly, then handed it back to the decoy. The decoy paid for the beer and received some change, then exited the store with the beer.

The clerk did not ask any age-related questions, nor did he ask any questions about the decoy's identification. Sergeant Brock had entered the store before the decoy, and witnessed these events.

Sergeant Brock identified himself as a police officer and advised the clerk that he had sold alcohol to a minor. Brock moved the clerk to the end of the counter, then had the decoy return to the store. Brock asked the decoy if he could identify the person

who sold him the alcohol. The decoy pointed at the clerk and said "He did." The clerk and the decoy were standing three or four feet apart and facing each other at the time of the identification. Brock then asked the clerk if he understood he was being identified as the person who sold beer to the decoy. The clerk said that he understood. After the face-to-face identification, a photograph was taken of the decoy and the clerk together, and the clerk was cited.

The Department's decision determined that the violation charged was proved and no defense was established. As this was appellants' second sale-to-minor violation in three years and no mitigating evidence was presented, the ALJ assigned a penalty of 25 days' suspension.

Appellants then filed this appeal contending the face-to-face identification did not comply with rule 141(b)(5).<sup>2</sup>

## DISCUSSION

Appellants contend that the face-to-face identification was unduly suggestive because Sergeant Brock approached the clerk first, escorted him from the register area, and informed him that he had sold an alcoholic beverage to a minor. Moreover, appellants contend that the decoy completed the face-to-face identification after officers had begun the citation process, in violation of the plain language of rule 141(b)(5) requiring that the identification take place before a citation is issued.

The Department counters that although appellants did assert a rule 141(b)(5) defense, they did not raise these particular issues at the administrative hearing. It is settled law that, except for extenuating circumstances involving an issue of law, failure

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<sup>2</sup>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.

to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Araiza v. Younkin* (2010) 188 Cal.App.4th 1120, 1126-1127 [116 Cal.Rptr.3d 315]; *Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke v. Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

Rule 141(b)(5) provides:

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.

The rule provides an affirmative defense. The burden is therefore on the appellants to show non-compliance.

A review of the record reveals that the Department is correct. At the administrative hearing, appellants, represented by the same law firm that represents them on this appeal, neither argued nor attempted to show that the face-to-face identification was unduly suggestive or that the citation issued before the identification occurred. Appellants' closing argument was quite brief and turned on issues of credibility:

Your Honor, with respect to the face-to-face ID, I wouldn't say that the testimony was entirely inconsistent, but I think it's safe to say that it wasn't consistent between the decoy's testimony and the police officer's.

The police officer's version there are gestures that were made by the decoy. The decoy clearly testified he made no gestures. Police officer's version there was followup conversation and question of the

decoy and the clerk. In the decoy's testimony there was none of that.

But we will — we will stand on the affirmative defenses raised in the documents that are part of the record and under 141. We'll submit.

(RT at pp. 47-48.)

The Special Notice of Defense is even less helpful to appellants' case. The only reference to rule 141(b)(5) in the entire document is a few lines alleging:

the Department did not comply and has failed to show compliance with Rule 141. Specifically, the decoy operation was not conducted "in a fashion that promotes fairness" and in the following manner: The Department:

¶ . . . ¶

(5) failed to make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased the alcoholic beverages make a face-to-face identification of the alleged seller of the alcoholic beverages.

(Special Notice of Defense, Exhibit 1, at pp. 4-5.) Apart from a misstatement of the burden of proof, the Special Notice of Defense offers nothing but unsupported legal conclusions. It contains no reference to either suggestive circumstances or the issuance of the citation. Indeed, it contains no reference whatsoever to the particular facts of this case. As we noted in *7-Eleven, Inc./Samra* (2014) AB-9387, "[a]n ALJ is decisionmaker, not a clairvoyant. He cannot be expected to divine detailed, factually specific arguments from a few sentences of boilerplate." (*Id.* at p. 9.)

Appellants bore the burden of proof, yet failed to raise these issues at the administrative hearing. This Board will not address new factual arguments on appeal. The issues are therefore waived.

ORDER

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

BAXTER RICE, CHAIRMAN  
FRED HIESTAND, 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 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.