

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

AB-9671

File: 47-467576; Reg: 17085335

BARNEY'S BURBANK, L.P.,
dba Barney's Beanery
250 North 1st Street, Suite 120,
Burbank, CA 91502-1858,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 6, 2018
Ontario, CA

ISSUED SEPTEMBER 18, 2018

Appearances: *Appellant:* Donna J. Hooper, of Solomon, Saltsman & Jamieson, as
counsel for Barney's Burbank, L.P.,

Respondent: John P. Newton, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

Barney's Burbank, L.P., doing business as Barney's Beanery, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 20 days because its bartender sold alcoholic beverages to two minor decoys, in violation of

¹The decision of the Department, dated October 3, 2017, is set forth in the appendix.

Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general license was issued on August 5, 2008. There is one instance of prior discipline on the license, in 2015, for a sale of alcohol to a minor, in violation of Business and Professions Code section 25658(a).

On February 9, 2017, the Department filed a two-count accusation charging that on June 30, 2016, appellant's bartender, Madison Wiesler (the bartender), sold alcoholic beverages to two under-age individuals: 18-year-old Brendan David Panosian and 18-year-old Samvel Ekimyan. Although not noted in the accusation, both Panosian and Ekimyan were working as a minor decoys for the Burbank Police Department at the time.

At the administrative hearing held on July 13, 2017, documentary evidence was received, and testimony concerning the sale was presented by Burbank Police Detective Brittany Hensley; by Panosian (decoy #1); by Ekimyan (decoy #2); and by Alexander Sacher, Regional Manager for Barney's Beanery.

Testimony established that on June 30, 2016, Det. Hensley and her partner entered the licensed premises in plain clothes and sat at the bar. The two decoys entered a few moments later and stood at the bar to the right of Det. Hensley. The bartender asked the decoys what they wanted and they ordered two beers.

The bartender asked to see their identification and they each handed her their California driver's license. Both licenses had a portrait format. Decoy #1's ID showed his correct date of birth, showing him to be 18 years of age, and contained a red stripe indicating "AGE 21 IN 2019." (Exh. 6.) Decoy #2's ID showed his correct date of birth, showing him to be 18 years of age, and contained a red stripe indicating "AGE 21

IN 2018.” (Exh. 4.) The bartender looked at both IDs then handed them back to the decoys. She then poured two beers from a tap labeled Bud Light and served them to the decoys. Decoy #2 paid for the beers and both decoys subsequently exited the premises.

Det. Hensley contacted the bartender and identified herself as a police officer. She explained the violation, then escorted the bartender outside where she asked the two decoys to identify the person who sold them the beers. Both pointed at the bartender from a distance of approximately three to five feet.

The administrative law judge (ALJ) submitted his proposed decision on August 14, 2017, sustaining the accusation and recommending a 20-day suspension of the license. On September 20, 2017, the Department adopted the decision in its entirety, and a certificate of decision was issued on October 3, 2017.

Appellant then filed a timely appeal contending the ALJ erred by concluding there was no evidence that the decoys’ law enforcement training and experience impacted their appearance or behavior.

DISCUSSION

Appellant contends the ALJ failed to proceed in a manner required by law when he concluded that there was no evidence that the two decoys’ experience and training in law enforcement had an impact on their appearance or behavior. (AOB at pp. 5-8.)

Rule 141(b)(2)² provides:

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.

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.

This rule provides an affirmative defense, and the burden of proof lies with appellant.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellant maintains the Department failed to proceed in the manner required by law when it certified the ALJ's proposed decision, in which the ALJ asserted that there was no evidence presented to support a rule 141(b)(2) defense, and specifically found that there was no evidence that the decoys' experience and training in law enforcement had an impact on their appearance and behavior. Appellant argued that the decoys' training and experience in law enforcement caused them to behave and present themselves in a mature manner, inconsistent with that of typical minors. (AOB at p. 6.)

Rule 141(a) provides:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Appellant maintains that the facts in this case indicate unfairness in that the decoys appeared older than their true age of 18 because of their law enforcement experience. (AOB at p. 5.)

This Board is bound by the factual findings in the Department's decision so long as those findings 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. [Citations.] 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. [Citations.] 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 Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. *(Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].)*

Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const.

Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; Harris, *supra*, at 114.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2). The ALJ made the following findings of fact regarding the decoys' appearance, demeanor, and experience:

11. Ekimyan had been a cadet with Burbank P.D. for approximately one year prior to this operation, and an Explorer for two years before that. June 30, 2016 was his first time working as a decoy. He felt a little weird during the decoy operation since he had never entered any bars before. As a cadet, Ekimyan wore a uniform and, at times, dealt with the public. He believes that being a cadet has helped him be organized, be more responsible, learn to work as a part of a team, and develop leadership skills.

12. June 30, 2016 was Panosian's first time working as a decoy. He had been a cadet for approximately one year prior to the operation and currently works in the dispatch center. He believes he has a better concept of the law and is more mature and responsible since becoming a cadet.

[¶ . . . ¶]

15. Ekimyan appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in the Licensed Premises on June 30, 2016, Ekimyan displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Wiesler.

16. Panosian appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in the Licensed Premises on June 30, 2016, Panosian displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Wiesler.

(Findings of Fact, ¶¶ 11-16.) Based on these findings, the ALJ addressed appellant's rule 141(a) and 141(b)(2) arguments:

7. The Respondent did not directly raise 141(b)(2) as a defense, at least at first. Rather, the Respondent argued that the operation violated rule 141(a) since it was not conducted in a manner which promoted fairness. The alleged unfairness, in the Respondent's view, was the decoys' appearance. The court of appeal in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Garfield Beach CVS, LLC)*^[fn.] clearly held that:

“Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141(b)(1)-(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation.”^[fn.]

Elsewhere, the court of appeal makes clear that the notion of fairness does not authorize the creation of new defenses under rule 141 beyond those specified in rule 141(b).^[fn.] Thus, an argument that one or both of the decoys lacked the requisite appearance required by the rule must be analyzed by reference to rule 141(b)(2).

In this case, the Respondent argued that neither Ekimyan nor Panosian had the appearance generally expected of a person under the age of 21. Rather, based on their training and experience as cadets (and, in Ekimyan's case, as an Explorer), their demeanor made them appear older than their actual age. This argument is rejected. Both Ekimyan and Panisian had the appearance of a typical 18 or 19 year old, consistent with their actual ages. There is no evidence that either one's training and experience had any impact upon their appearance or their behavior. Moreover, since Wiesler did not testify, the impact of such training and experience upon Wiesler's evaluation of their respective ages is speculative. (Findings of Fact ¶¶ 15-16.)

(Conclusions of Law, ¶ 7.)

The Board has repeatedly declined to substitute its judgment for that of the ALJ

on this issue, and has on innumerable occasions rejected the “experienced decoy” argument. As the Board previously observed:

A decoy’s experience is not, by itself, relevant to a determination of the decoy’s apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy’s experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(Azzam (2001) AB-7631, at p. 5, emphasis in original.)

Appellant presented no evidence that the decoys’ experience and training actually resulted in their displaying the appearance of persons 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot know what went through her mind in the course of the transaction, but we do know that she requested and was furnished both decoys’ identification, with clear indications they were under 21, yet she made the sales anyway. Rather, appellant relies on a difference of opinion — its versus that of the ALJ — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, this argument must fail. In Finding of Fact paragraphs 15-16, and Conclusions of Law paragraph 7, *supra*, the ALJ found that both decoys met the standard required by rule 141(b)(2).

We have reviewed the entire record and agree with the ALJ’s determination that there was compliance with the rule. As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoys as they testify and to make a determination whether those decoys have an appearance which meets the requirement of rule 141 that they possess 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.

The evidence presented at the hearing, including the presence of the decoys themselves, clearly provided substantial evidence for finding that the decoys' appearance complied with the requirements of rule 141(b)(2). Ultimately, appellant is asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This we cannot do.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, 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.