

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

AB-9686

File: 20-484724; Reg: 17085580

7-ELEVEN, INC. and SABI INDUSTRIES, INC.,
dba 7-Eleven Store #39217
12902 Foothill Boulevard, Unit A, Sylmar, CA 91342-4900,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 4, 2018
Ontario, CA

ISSUED OCTOBER 19, 2018

Appearances: Appellants: Donna J. Hooper, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and Sabi Industries, Inc.,

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

OPINION

7-Eleven, Inc. and Sabi Industries, Inc., doing business as 7-Eleven Store #39217, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 8, 2010. There is no record of prior departmental discipline against the license.

¹The decision of the Department, dated January 19, 2018, is set forth in the appendix.

On May 22, 2017, the Department filed an accusation against appellants charging that, on October 26, 2016, appellants' clerk, Jaspreet Singh (the clerk), sold an alcoholic beverage to 18-year-old Michael Lopez. Although not noted in the accusation, Lopez was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on October 17, 2017, documentary evidence was received and testimony concerning the sale was presented by Lopez (the decoy) and by LAPD Officer Lizette² Meneses.

Testimony established that on October 26, 2016, the decoy entered the licensed premises, followed shortly thereafter by LAPD Officer Freire. The decoy went to the coolers and selected a 25-ounce can of Bud Light beer. The decoy took the beer to the counter, where the clerk rang it up and completed the sale without asking for any identification. The decoy exited the store with the beer and met up with the officers conducting the decoy operation.

The decoy re-entered the premises with several LAPD officers. Officer Meneses contacted the clerk, identified herself, and explained the violation to him. Meneses asked the decoy to identify the person who sold him the beer. The decoy pointed at the clerk and said "he did." The clerk and decoy were approximately three feet apart at the time. A photo of the clerk and decoy together was taken (exh. 6) and the clerk was subsequently issued a citation.

The administrative law judge (ALJ) submitted his proposed decision on November 9, 2017, sustaining the accusation and recommending a 10-day suspension of the license. On December 14, 2017, the Department adopted the decision in its entirety, and a certificate of decision was issued on January 19, 2018.

Appellants then filed a timely appeal, contending (1) the ALJ's finding that the decoy's appearance complied with rule 141(b)(2)³ is not supported by substantial evidence, and (2) the

²We have utilized the name used by the ALJ. In the reporter's transcript, this officer is referred to as Lizeeth rather than Lizette.

³References 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.

decoy operation was not conducted in a fashion that promotes fairness. These issues will be discussed together.

DISCUSSION

Appellants contend that the ALJ's finding of compliance with rule 141(b)(2) is not supported by substantial evidence. They maintain the decoy's extensive experience — working as a decoy and as a police cadet — and the fact that he was only one month away from being 20 years old, caused him to appear too mature to be used as a decoy in a fashion that promotes fairness. (AOB at pp. 5-8.)

Rule 141(b)(2) provides:

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 appellants.

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

Appellants maintain the Department used a decoy in this case that failed to comply with standards set forth in rule 141(b)(2). Appellants argue that the decoy's experience as a decoy, and four years of experience as a police cadet, caused him to display a mature and confident demeanor, devoid of the normal insecurities and apprehension that would be expected of a person under the age of 21. (AOB at pp. 6-7.)

Appellants further maintain that the facts in this case indicate unfairness in that the decoy was only one month away from his 20th birthday on the day of the operation — too close to his 21st birthday, they assert, to be used in a fair fashion, as required by rule 141(a). (*Ibid.*)

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.

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 decoy's appearance, demeanor, and experience:

5. Lopez appeared and testified at the hearing. On October 26, 2016, he was 5' 8" tall and weighed 145 pounds. He wore a gray t-shirt with a pocket, light colored jeans, and black-and-white Vans. (Exhibits 4-6.) His appearance at the hearing was the same, except that he was five pounds heavier.

¶ . . . ¶

8. Lopez had been a decoy approximately five times before October 25, 2017. [sic] Each time, he visited approximately ten locations. On October 26, 2017, [sic] he visited eight locations, of which two sold alcoholic beverages to him. He learned of the decoy program through his role as a cadet for LAPD. He joined the cadets in 2012 and, at the time of the operation, had risen to the rank of cadet sergeant. His duties as a cadet sergeant included making sure that cadets "looked sharp" and ensuring their competence. Lopez was nervous while inside the Licensed Premises and was very nervous while testifying (he even miscalculated his own age).

9. Lopez 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 October 26, 2016, Lopez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Singh.

(Findings of Fact, ¶¶ 5-9 .) Based on these findings, the ALJ addressed appellants' rule 141(b)(2) defense:

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Lopez, based on his physical appearance and experience in the cadet program, did not have the appearance generally expected of a person under the age of 21. This argument is rejected. Lopez's appearance was consistent with that of a person who was 18 or 19 years old. There is no evidence that this training and experience had any impact upon his appearance or his behavior—in fact, his nervousness on the stand and inside the Licensed Premises indicates the opposite. (Findings of Fact ¶¶ 8-9.) Moreover, since Singh did not testify, the impact of any such training and experience upon his evaluation of Lopez's age is speculative.

(Conclusions of Law, ¶ 5.)

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 decoy’s experience actually resulted in his displaying an appearance of a person 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 his mind in the course of the transaction or why he failed to ask for identification. Appellants simply rely on a difference of opinion — theirs 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 5-9, and Conclusions of Law paragraph 5, *supra*, the ALJ found that the decoy met the standard required by rule 141(b)(2).

On the issue of fairness, the Court of Appeals recently opined on whether the Board was empowered to impose additional fairness criteria beyond those enumerated in rule 141. The Court found:

Contrary to the Appeals Board’s contention, 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, subd. (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. [Citation.] Consequently, Rule 141’s use of the word “fairness” does not render the rule ambiguous or confusing. (Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd./ Garfield Beach (2017) 7

Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130.].) In other words, the Court made it very clear that the word “fairness” in rule 141(a) is not subject to enlargement, allowing the Appeals Board to add fairness requirements to decoy operations. Rather, the five factors enumerated in rule 141(b) lay out specifically what is required to make a decoy operation “fair,” and those five factors were all complied with in this case.

We have reviewed the entire record and agree with the ALJ’s determination that there was compliance with rule 141(b)(2). As we have said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies and to make a determination whether the decoy has an appearance which meets the requirement of rule 141 that he 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 decoy himself, clearly provided substantial evidence for finding that the decoy’s appearance complied with the requirements of rule 141(b)(2). Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This the Board cannot do.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

**7-ELEVEN INC. & SABI INDUSTRIES
INCORPORATED
7-ELEVEN
12902 FOOTHILL BLVD, UNIT A
SYLMAR, CA 91342-4900**

OFF-SALE BEER AND WINE - LICENSE

VAN NUYS DISTRICT OFFICE

File: 20-484724

Reg: 17085580

CERTIFICATE OF DECISION

**Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act**

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on December 14, 2017. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after March 1, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: January 19, 2018



**Matthew D. Botting
General Counsel**

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven Inc. & Sabi Industries Incorporated	}	File: 20-484724
dba 7-Eleven	}	
12902 Foothill Blvd., Unit A	}	Reg.: 17085580
Sylmar, California 91342-4900	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 8,100
	}	
	}	Reporter:
	}	Barbara Small
	}	California Reporting
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on October 17, 2017.

Kerry K. Winters, Deputy Chief Counsel, represented the Department of Alcoholic Beverage Control.

Melissa H. Gelbart, attorney-at-law, represented respondents 7-Eleven Inc. and Sabi Industries Incorporated.

The Department seeks to discipline the Respondents' license on the grounds that, on or about October 26, 2016, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Michael Lopez, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on October 17, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on May 22, 2017.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on April 8, 2010 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Michael Lopez was born on November 27, 1997. He served as a minor decoy during an operation conducted by LAPD on October 26, 2016. On that date he was 18 years old.
5. Lopez appeared and testified at the hearing. On October 26, 2016, he was 5'8" tall and weighed 145 pounds. He wore a gray t-shirt with a pocket, light colored jeans, and black-and-white Vans. (Exhibits 4-6.) His appearance at the hearing was the same, except that he was five pounds heavier.
6. On October 26, 2016, Lopez entered the Licensed Premises and walked to the rear. Ofcr. Freire entered separately. Lopez selected a 25-oz. can of Bud Light beer from the coolers and took it to the front counter. The clerk, Jaspreet Singh, rang up the beer and told Lopez the price. Lopez paid and Singh gave him some change. Lopez picked up the beer and exited.
7. Outside, Lopez met up with various officers, then re-entered the Licensed Premises with them. Ofcr. Lizette Meneses contacted Singh, identified herself, and explained the violation to him. Ofcr. Meneses asked Lopez to identify the person who sold him the beer. Lopez pointed to Singh and said, "He did." Lopez and Singh were approximately three feet apart at the time. A photo of the two of them was taken (exhibit 6), after which Singh was cited.
8. Lopez had been a decoy approximately five times before October 26, 2017. Each time, he visited approximately ten locations. On October 26, 2017, he visited eight locations, of which two sold alcoholic beverages to him. He learned of the decoy program through his role as a cadet for LAPD. He joined the cadets in 2012 and, at the time of the operation, had risen to the rank of cadet sergeant. His duties as a cadet sergeant included making sure that cadets "looked sharp" and ensuring their competence. Lopez was nervous while inside the Licensed Premises and was very nervous while testifying (he even miscalculated his own age).
9. Lopez 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 October 26, 2016, Lopez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Singh.

10. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on October 26, 2016, the Respondents' clerk, Jaspreet Singh, inside the Licensed Premises, sold an alcoholic beverage to Michael Lopez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-9.)
5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Lopez, based on his physical appearance and experience in the cadet program, did not have the appearance generally expected of a person under the age of 21. This argument is rejected. Lopez's appearance was consistent with that of a person who was 18 or 19 years old. There is no evidence that his training and experience had any impact upon his appearance or his behavior—in fact, his nervousness on the stand and inside the Licensed Premises indicates the opposite. (Findings of Fact ¶¶ 8-9.) Moreover, since Singh did not testify, the impact of any such training and experience upon his evaluation of Lopez's age is speculative.

PENALTY

The Department requested that the Respondent's license be suspended for a period of 15 days, arguing that the clerk's failure to check ID or inquire into Michael Lopez's age offset any mitigation which may be warranted based on the Respondents' discipline-free

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

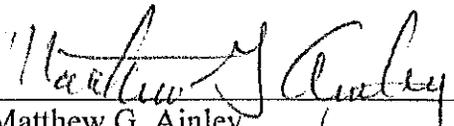
history. The Respondents argued that a mitigated penalty was warranted based on their 6½ years of discipline-free operation. They recommended a 10-day, all stayed suspension.

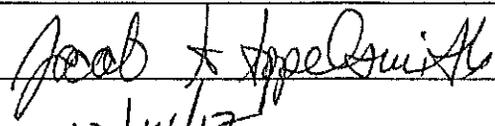
Jaspreet Singh clearly made a mistake in selling alcohol to Lopez. A mistake, in and of itself, is not a basis for aggravating a penalty. Since Singh did not testify, it is impossible to determine why he made such a mistake, e.g., whether it was a simple mistake, a failure of his training, or an intentional sale. In the absence of such evidence, no aggravation is warranted. The Respondents' 6½ years of discipline-free operation, on the other hand, warrants some mitigation. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 10 days.

Dated: November 9, 2017


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 12/14/17