

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

AB-9767

File: 20-265424; Reg: 18086967

7-ELEVEN, INC. and SHOUKAT HUSSAIN ALI,
dba 7-Eleven Store #2136-27083
500 West Colorado Street, Glendale, CA 91204,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 6, 2019
Ontario, CA

ISSUED JUNE 21, 2019

Appearances: *Appellants:* Ralph Barat Saltsman, of Solomon, Saltsman &
Jamieson, as counsel for 7-Eleven, Inc. and Shoukat Hussain Ali,

Respondent: Joseph J. Scoleri III, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Shoukat Hussain Ali, doing business as 7-Eleven Store #2136-27083, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 10 days, with all 10 days conditionally stayed for a period of one year provided no further cause for discipline arises during that time, because their clerk sold an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated November 14, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 15, 1991.

There is no record of departmental discipline against the license.

On May 25, 2018 the Department filed a single-count accusation against appellants charging that, on February 17, 2018, appellants' clerk, David Ramirez (the clerk), sold an alcoholic beverage to 19-year-old Ariana Garnica (the decoy). Although not noted in the accusation, Garnica was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on August 9, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy and by Department Agent Steven Geertman.

Testimony established that on February 17, 2018, the decoy entered the licensed premises, followed shortly thereafter by Agent Geertman. The decoy went to the coolers where she selected a can of Bud Light beer which she took to the sales counter. The clerk scanned the beer and completed the sale without asking for identification and without asking any age-related questions. Agent Geertman observed the transaction from inside the premises. He then texted his partners outside that he had observed a violation.

The decoy exited the store and joined Department agents waiting for her outside. Agent Geertman approached the clerk, explained the violation to him, then asked him and another (female) clerk to step out from behind the counter. During questioning, the clerk told Agent Geertman that he thought "the decoy appeared under the age of 30 but over the age of 21." (RT at p. 36.)

The decoy and other agents re-entered the premises, and went over to Agent Geertman. He asked the decoy to identify the person who sold her the beer. She pointed at the clerk who sold her the beer, and said “He did.” The decoy and clerk were standing approximately five feet apart and facing each other at the time. A photo of the two of them was taken (exh. 2) and the clerk was subsequently cited.

The administrative law judge (ALJ) submitted his proposed decision on September 11, 2018, sustaining the accusation and recommending suspension of the license for 10 days, with the entire penalty stayed for one year on the condition that no further cause for discipline arises during that time. The Department adopted the proposed decision in its entirety on October 31, 2018 and a Certificate of Decision was issued on November 14, 2018.

Appellants then filed a timely appeal contending that the decoy’s appearance did not comport with the appearance required by rule 141(b)(2)² and that the ALJ’s finding — that the decoy displayed the appearance which would generally be expected of a person under the age of 21 — is not supported by substantial evidence.

DISCUSSION

Appellants contend that the decoy’s appearance did not comport with the appearance required by rule 141(b)(2) because of her dyed hair and body shape — an assertion they maintain was corroborated by the clerk’s statements to Agent Geertman during the investigation. (AOB at p. 2.) As a result, appellants contend that the ALJ’s finding — that the decoy displayed the appearance which would generally be expected of a person under the age of 21 — is not supported by substantial evidence. (*Id* at

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.

pp- 4-6.)

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 police used a decoy in this case that failed to comply with standards set forth in rule 141(b)(2). They argue that the decoy's appearance violated this rule because of her physical appearance — specifically, her dyed hair and stocky build. Appellants argue that the decoy presented an appearance which was not one which could reasonably be expected of someone under age 21.

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 regarding the decoy's appearance:

5. Garnica appeared and testified at the hearing. On February 17, 2017 [*sic*], she was 5' 6" tall and weighed 150 pounds. She wore a gray t-shirt, black pants, and black and white tennis shoes. Her hair was long, straight, and parted off to one side. Her hair had some blond highlights at the tips. She was not wearing any jewelry or make-up. (Exhibits 2-4.)

Her appearance at the hearing was the same, except that she was approximately 20 pounds heavier and her hair was approximately one inch longer.

[¶ . . . ¶]

10. Garnica appeared her age—19—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 the Licensed Premises on February 17, 2018, Garnica displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Ramirez.

(Findings of Fact, ¶¶ 5-10.) Based on these findings, the ALJ addressed appellants' rule 141(b)(2) argument:

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 Garnica had a matronly figure. This argument is rejected. There was nothing about Garnica's appearance which would make her appear old enough to legally purchase alcoholic beverages. Phrased another way, Garnica's appearance was consistent with that generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

(Conclusions of Law, ¶ 5.) We concur.

As this Board has said many times, minors come in all shapes and sizes and we are reluctant to suggest, without more, that a minor decoy automatically violates the rule based on height, weight, hair color, or other physical characteristics. (See, e.g., *7-Eleven/NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that:

[a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.)

Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." In Findings of Fact paragraphs 5 and 10, and Conclusions of Law paragraph 5, the ALJ found that the decoy met this standard.

Appellants argue that the Board's past decisions dictate reversal in this case because the Board previously found that:

The phrase "could generally be expected" clearly implies, as this board has said, that *not everyone* will necessarily believe that a particular decoy appears to be under 21, but it also means that *most* people will believe that the decoy appears to be under 21.

(Quoting *7-Eleven/Dianne Corp.* (2002) AB-7835 at p. 6, emphasis in original.) While the "most people" standard may have been the position of the Board in 2002, it simply does not state the controlling law on rule 141 (b)(2). In a similar minor decoy case, where the Court of Appeal was tasked with assessing whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

one could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2002) 103 Cal.App.4th 1084, 1087[127 Cal.Rptr.2d 652].) The instant case is no different. Even if we happened to disagree with the ALJ's assessment of the decoy's appearance, we do not believe the evidence supports a finding that the ALJ "could not reasonably have concluded otherwise." (*Ibid.*) As noted above, case law instructs us that when, as here, "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, supra.*)

Appellants presented no evidence that the decoy’s physical stature or hair color *actually resulted* in her displaying an appearance of a person 21 years old or older on the date of the operation in this case. Absent some evidence to establish that the decoy’s large stature or blonde highlights were the *actual reason* the clerk failed to ask for identification, this argument must fail. Ultimately, appellants are asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This we cannot do.

ORDER

The decision of the Department is affirmed.¹

MEGAN McGUINNESS, ACTING CHAIR
SUSAN A. BONILLA, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

¹This 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. & SHOUKAT HUSSAIN ALI
7-ELEVEN #2136-27083
500 W. COLORADO ST.
GLENDALE, CA 91204

OFF-SALE BEER AND WINE - LICENSE

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

VAN NUYS DISTRICT OFFICE

File: 20-265424

Reg: 18086967

CERTIFICATE OF DECISION

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 October 31, 2018. 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.

Sacramento, California

Dated: November 14, 2018

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**Alcoholic Beverage Control
Office of Legal Services**



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. & Shoukat Hussain Ali
dba 7-Eleven #2136-27083
500 W. Colorado St.
Glendale, California 91204

Respondents

Off-Sale Beer and Wine License

} File: 20-265424

} Reg.: 18086967

} License Type: 20

} Word Count: 7,000

} Reporter:

Dorothy Simpson

California Reporting

PROPOSED DECISION

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on August 9, 2018.

Jonathan V. Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Ralph Barat Saltsman, attorney-at-law, represented respondents 7-Eleven Inc. & Shoukat Hussain Ali.

The Department seeks to discipline the Respondents' license on the grounds that, on or about February 17, 2018, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Ariana Garnica, 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 August 9, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on May 25, 2018.

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 October 15, 1991 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Ariana Garnica was born on June 9, 1999. She served as a minor decoy during an operation conducted by the Department on February 17, 2018. On that date she was 19 years old.
5. Garnica appeared and testified at the hearing. On February 17, 2017, she was 5'6" tall and weighed 150 pounds. She wore a gray t-shirt, black pants, and black and white tennis shoes. Her hair was long, straight, and parted off to one side. Her hair had some blonde highlights at the tips. She was not wearing any jewelry or make-up. (Exhibits 2-4) Her appearance at the hearing was the same, except that she was approximately 20 pounds heavier and her hair was approximately one inch longer.
6. On February 17, 2018, Garnica entered the Licensed Premises. Agent Steven Geertman entered a few seconds later. Garnica went to the beer cooler and selected a can of Bud Light beer. She took the beer to the counter and set it down. The clerk, David Ramirez, scanned the beer and told her the price. She paid, he gave her some change, then she exited.
7. Agent Geertman remained inside the Licensed Premises and contacted Ramirez. He explained the violation to him, then asked him and the other cleric to come from behind the counter.
8. Outside, Garnica met up with some agents who were waiting for her. She re-entered the Licensed Premises with the agents and went over to Agent Geertman. Agent Geertman asked her to identify the person who had sold her the beer. Garnica pointed to Ramirez and said that he had, Garnica and Ramirez were five feet apart at the time, facing each other. A photo of the two of them was taken (exhibit 2), after which Ramirez was cited.
9. Garnica visited 10 locations on February 17, 2018. Three of these locations sold alcoholic beverages to her, including the Licensed Premises.
10. Garnica appeared her age—19—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 the Licensed Premises on February 17, 2018, Garnica displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Ramirez.

11. 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 February 17, 2018, the Respondents' clerk, David Ramirez, inside the Licensed Premises, sold an alcoholic beverage to Ariana Garnica, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)

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 Garnica had a matronly figure. This argument is rejected. There was nothing about Garnica's appearance which would make her appear old enough to legally purchase alcoholic beverages. Phrased another way, Garnica's appearance was consistent with that generally expected of a person under the age of 21. (Finding of Fact ¶10.)

PENALTY

The Department requested that the Respondents' license be suspended for a period of 10 days in light of their 2614 years of discipline-free operation. The Respondents argued that, if the accusation were sustained, substantial mitigation was warranted.

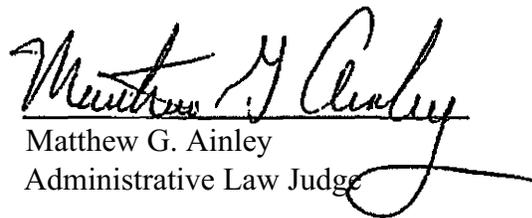
² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

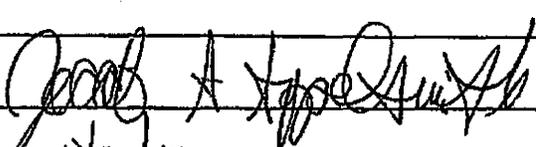
The Respondents are correct—two and one-half decades of discipline-free operation warrants substantial mitigation. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 10 days, with execution of all 10 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his or her discretion and without further hearing, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: September 11, 2018


Matthew G. Ainley
Administrative Law Judge

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<input type="checkbox"/> Non-Adopt: _____
By: 
Date: 10/31/18