

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

AB-9796

File: 20-314531; Reg: 18087289

7-ELEVEN, INC. and DOMENO & ASSOCIATES,
dba 7-Eleven Store #2173-18837
1516 Lincoln Boulevard
Venice, CA 90291,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 3, 2019
Los Angeles, CA

ISSUED OCTOBER 15, 2019

Appearances: *Appellants:* Adam N. Koslin, of Saltsman & Jamieson, as counsel
for 7-Eleven Inc. and Domeno & Associates,

Respondent: Alanna K. Ormiston, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Domeno & Associates, doing business as 7-Eleven Store #2173-18837, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 5 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated February 7, 2019, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 16, 1996.

There is no history of prior departmental discipline against the license.

On August 6, 2018, the Department filed a single-count accusation against appellants charging that, on June 2, 2018, appellants' clerk, Ankush Kumar (the clerk), sold an alcoholic beverage to 19-year-old Reynaldo Ramirez (the decoy). Although not noted in the accusation, the decoy was working for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on November 20, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy and LAPD officers Cameron Orszewski and Herbert Jimenez. Appellants presented no witnesses.

Testimony established that on June 2, 2018, Ofcr. Jimenez entered the licensed premises. Shortly thereafter, the decoy entered, followed by Ofcr. Orszewski. The decoy selected a can of Modelo beer and took it to the counter where he stood in line. When it was his turn, the clerk rang up the beer and completed the sale without asking for identification.

Ofcr. Orszewski identified himself to the clerk and explained the violation. He escorted the clerk outside where the decoy was waiting with another officer. Ofcr. Orszewski asked the decoy who sold him the beer. The decoy pointed at the clerk and said that he had. The two of them were standing approximately two feet apart at the time. A photo of the decoy and clerk was taken (exh. 7) and the clerk was cited.

The administrative law judge (ALJ) submitted his proposed decision on

December 20, 2018, sustaining the accusation and recommending a 5-day suspension. The Department adopted the proposed decision in its entirety on February 4, 2019, and a Certificate of Decision was issued on February 7, 2019.

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

DISCUSSION

ISSUE CONCERNING DECOY'S APPEARANCE

Appellants contend the decoy's facial hair, large stature, jewelry, watch, and police training gave him an appearance of a person over the age of 21. (AOB at p. 8.) As such, they maintain the ALJ erred by finding compliance with rule 141(b)(2). (*Ibid.*)

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 the standards set forth in rule 141(b)(2). They argue that the decoy's physical appearance as well as his demeanor violated this rule. Appellants argue that the decoy's large and imposing frame, and the fact that he wore a mustache, gave him the stature and appearance of a grown man. (AOB at p. 7.) They further argue that the

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.

decoy's wearing of stud earrings and an Apple watch displayed “a level of disposable income not available to most minors. . . .” (*Ibid.*) They assert these factors gave the decoy an appearance of someone over the age of 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, 112 [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. Ramirez appeared and testified at the hearing. On June 2, 2018, he was 5' 9" tall and weighed 210 pounds. He wore a black shirt, black pants, black and white shoes, earrings, and a watch. He had a thin moustache. (Exhibits 2-3 & 7.) At the hearing his appearance was the same except that his hair was a little shorter on top.

[¶ . . .]

8. Ramirez learned of the decoy program through his role as a cadet with LAPD. He has participated in two or three different decoy operations. As a cadet, he was trained to deal with the public. He has participated in various community events, drills, and competitions. He did not believe that being a cadet affected how he carried himself; in fact, he testified that he was nervous while inside the Licensed Premises and while testifying.

9. Ramirez appeared his age—19—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 2, 2018, Ramirez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Kumar.

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

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 Ramirez's physical appearance (e.g., earrings, moustache, Apple watch), coupled with his experience as a cadet and a decoy, gave him the appearance of a person over the age of 21. This argument is rejected. First, Ramirez testified that his training and experience did not affect his appearance or behavior. Second, Kumar did not testify, so there is no evidence that any of these factors affected his evaluation of Ramirez's appearance. Finally, as noted above, Ramirez's appearance was consistent with his actual age, 19. Even his thin moustache was consistent with that typically worn by teenagers, not having grown in yet. (Finding of Fact 9.)

(Conclusions of Law, ¶ 5.) We agree with the ALJ's reasoning and conclusions.

As this Board has said many times, minors come in all shapes and sizes and we are reluctant to suggest that a minor decoy automatically violates the rule based on height, weight, 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." (Rule 141(b)(2).) In Findings of Fact paragraphs 5-9, and Conclusions of Law paragraph 5, the ALJ found

that the decoy met this standard, notwithstanding the details highlighted by appellants such as his mustache, earrings, and watch. We agree.

Appellants also argue that the decoy displayed a demeanor which was not typical for a teenager because of his seven years of experience in law enforcement. They maintain this experience gave the decoy a confident demeanor which made him appear more mature. The Board has, however, rejected the “experienced decoy” argument many times. 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.) This case is no different.

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 determining whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

[O]ne 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. We do not believe the evidence supports a finding that the ALJ “could not reasonably have concluded otherwise.” (*Ibid.*) As stated 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 experience, physical appearance, or demeanor *actually resulted* in his displaying the 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 made the sale without asking for identification. There is simply no evidence to establish that the decoy’s physical appearance, experience, or demeanor were the *actual reason* the clerk made the sale.

Ultimately, appellants are simply 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.³

SUSAN A. BONILLA, CHAIR
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 part, before this final order becomes effective, may apply to the appropriate Court of appeal, or the California Supreme Court, for 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 AND DOMENO & ASSOCIATES
7-ELEVEN STORE #2173-18837
1516 LINCOLN BLVD
VENICE, CA 90291

OFF-SALE BEER AND WINE - LICENSE

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

CERRITOS DISTRICT OFFICE

File: 20-314531

Reg: 18087289

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 February 4, 2019. 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 20, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: February 7, 2019



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. and Domeno & Associates
dba 7-Eleven Store #2173-18837
1516 Lincoln Blvd.
Venice, California 90291

Respondents

Off-Sale Beer and Wine License

} File: 20-314531
}
} Reg.: 18087289
}
} License Type: 20
}
} Word Count: 8,500
}
} Reporter:
} Kennedy Court Reporters
}
} **PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on November 20, 2018.

Alanna Ormiston, Attorney, represented the Department of Alcoholic Beverage Control.

Alexa L. Halloran, attorney-at-law, represented respondents 7-Eleven Inc. and Domeno & Associates.

The Department seeks to discipline the Respondents' license on the grounds that, on or about June 2, 2108, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Reynaldo Ramirez, 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 November 20, 2018

FINDINGS OF FACT

1. The Department filed the accusation on August 6, 2018.
2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on February 16, 1996 (the Licensed Premises).

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

3. There is no record of prior departmental discipline against the Respondents' license.
4. Reynaldo Ramirez was born on January 5, 1999. He served as a minor decoy during an operation conducted by the Los Angeles Police Department on June 2, 2018. On that date he was 19 years old.
5. Ramirez appeared and testified at the hearing. On June 2, 2018, he was 5'9" tall and weighed 210 pounds. He wore a black shirt, black pants, black and white shoes, earrings, and a watch. He had a thin moustache. (Exhibits 2-3 & 7.) At the hearing his appearance was the same except that his hair was a little shorter on top.
6. On June 2, 2018, Ofcr. Jimenez entered the Licensed Premises. Ramirez entered shortly thereafter, followed by Ofcr. Cameron Orszewski. Ramirez walked to the alcoholic beverage section and grabbed a can of Modelo beer. He took the beer to the counter and stood in line. When it was his turn, the clerk, whose last name was Kumar, rang up the beer. Ramirez paid with a \$20 bill and received some change, after which he exited.
7. Ofcr. Orszewski, who had been standing in line behind Ramirez, contacted Kumar. He identified himself and explained the violation. Ofcr. Orszewski escorted Kumar outside, where Ramirez was waiting with an officer. Ofcr. Orszewski asked Ramirez to identify the person who sold him the beer. Ramirez pointed at Kumar and said that he had. They were one or two feet apart at the time. A photo of the two of them was taken (exhibit 7), after which Kumar was cited.
8. Ramirez learned of the decoy program through his role as a cadet with LAPD. He has participated in two or three different decoy operations. As a cadet, he was trained to deal with the public. He has participated in various community events, drills, and competitions. He did not believe that being a cadet affected how he carried himself; in fact, he testified that he was nervous while inside the Licensed Premises and while testifying.
9. Ramirez appeared his age—19—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 2, 2018, Ramirez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Kumar.
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 June 2, 2018, the Respondents' clerk, Mr. Kumar, inside the Licensed Premises, sold an alcoholic beverage to Reynaldo Ramirez, 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 Ramirez's physical appearance (e.g., earrings, moustache, Apple watch), coupled with his experience as a cadet and a decoy, gave him the appearance of a person over the age of 21. This argument is rejected. First, Ramirez testified that his training and experience did not affect his appearance or behavior. Second, Kumar did not testify, so there is no evidence that any of these factors affected his evaluation of Ramirez's appearance. Finally, as noted above, Ramirez's appearance was consistent with his actual age, 19. Even his thin moustache was consistent with that typically worn by teenagers, not having grown in yet. (Finding of Fact ¶ 9.)

PENALTY

The Department argued that the clerk's failure to ask for ID or to ask any age-related questions when faced with a person who appeared to be under the age of 21 should be considered as aggravation. The Department further argued that there were no mitigating factors. The Respondents argued that their 22 years of discipline-free operation

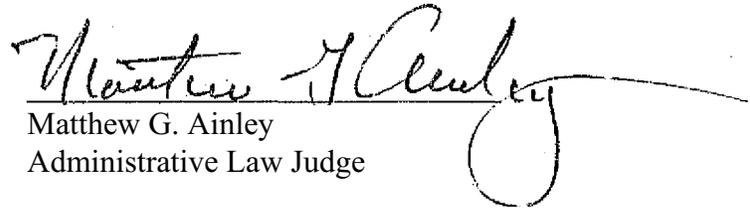
² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

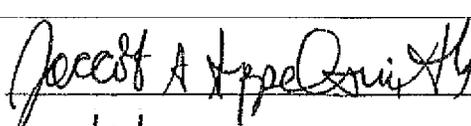
warranted mitigation. Accordingly, they recommended that, if the accusation were sustained, a five-day suspension would be appropriate. The Respondents are correct—22 years without discipline warrants substantial mitigation. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 5 days.

Dated: December 20, 2018


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>2/4/19</u>