

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

AB-9968

File: 20-580953; Reg: 22092121

7-ELEVEN, INC. and BHANGALL BROS & SONS INC.
dba 7-Eleven Store #22849E
4500 Holt Boulevard
Montclair, CA 91763-4709,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 15, 2023
Sacramento, CA/Telephonic

ISSUED SEPTEMBER 19, 2023

Appearances: *Appellants:* Jess Stroman, of Solomon, Saltsman & Jamieson, as counsel for 7-Eleven Inc. and Bhangall Bros & Sons, Inc. dba 7-Eleven Store #22849E;

Respondent: Erica M. Navarro, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Bhangall Bros & Sons Inc., doing business as 7-Eleven Store #22849E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk sold an alcoholic

¹ The decision of the Department, dated May 2, 2023, is set forth in the appendix.

beverage to a police minor decoy, in violation of Business and Professions Code² section 25658(a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine licensed was issued on July 3, 2017. There is no record of prior discipline against the license.

On April 26, 2022, the Department filed a single-count accusation against appellants charging that, on August 26, 2021, appellants' clerk, Navneet Bhangal (the clerk), sold an alcoholic beverage to 19-year-old Arian Ordaz (the decoy). The decoy was working for the Department as part of a minor decoy operation at the time of the sale.

At the administrative hearing held on January 17, 2023, documentary evidence was received, and testimony concerning the sale was presented by the decoy, Department Agent Mehul Patel, and the clerk. Evidence established that Agent Patel entered the licensed premises followed shortly thereafter by the decoy. The decoy went to the alcohol section and selected a 6-pack of Coors Light beer. The clerk rang up the sale without asking to see any identification or inquiring as to the decoy's age. The decoy paid for the beer, received change, and then exited. After the decoy exited the licensed premises, Agent Patel followed him outside.

The decoy, Agent Patel, and other agents met up outside, then re-entered the licensed premises. Agent Patel contacted the clerk, identified himself, and explained the violation. Agent Patel asked the decoy to identify the person who sold him beer

² All statutory references are to the Business and Professions Code unless otherwise stated.

and the decoy identified the clerk. The decoy and the clerk were photographed together (exh. 5).

On March 21, 2023, the administrative law judge (ALJ) issued a proposed decision recommending that the accusation be sustained and that appellants' license be suspended for 15 days. The Department adopted the ALJ's decision in its entirety on May 2, 2023. Appellants filed a timely appeal contending that the decoy did not display the appearance which could generally be expected of a person under 21 years of age.

DISCUSSION

Appellants contend that the Department's finding that the decoy's appearance complied with rule 141(b)(2)³ is not supported by substantial evidence. (AOB, at pp. 5-8.) Specifically, appellants argue that the decoy's body size and shape (five feet, ten inches tall and 280 pounds) gave the clerk the reasonable impression that "he was someone old enough to purchase alcohol." (*Id.* at p. 6.) Further, appellants argue that the Department's finding that the decoy's face was "youthful" is not supported by the evidence since during the entirety of the transaction, the decoy wore a black facemask consistent with COVID-19 protocols. (*Id.* at p. 5.) Finally, given the totality of the evidence, appellants contend that the rebuttable presumption stated in *7-Eleven, Inc. and Gytari, Inc. dba 7-Eleven #2365-27912D*, 19-02-E (April 12, 2019) was rebutted by substantial evidence. (*Id.* at pp. 7-8).

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.

³ All references to Rule 141 and its subdivisions are to title 4 of the California Code of Regulations unless otherwise noted.

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.)

Here, the Department found that the decoy's appearance complied with rule 141(b)(2). (Conclusions of Law ¶ 6.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]"; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) "Substantial evidence" is "evidence of ponderable legal significance, which is 'reasonable in nature, credible and of solid value.'" (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

In its decision, the Department rejected appellants' arguments that the decoy's physical appearance did not comply with rule 141(b)(2). (Conclusions of Law, ¶ 6.)

The Department found that:

[...] Ordaz's appearance was consistent with that of a 19 year old and, therefore, he had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.) More particularly, he had a very youthful face and, although heavy, did not have an adult-like physique.

(Conclusions of Law, ¶ 6.) The Department further found:

Ordaz's appearance was consistent with his actual age, 19 years old. 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 August 26, 2021, Ordaz displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Bhargal.

(Findings of Fact, ¶ 10.) As noted above, "we are bound to construe the evidence in the light most favorable to the ALJ's decision" and will uphold the findings so long as they are supported by substantial evidence. (*Southland, supra*, 103 Cal.App.4th at 1087.)

To support its findings, the Department relied on photographs of the decoy from the day of the operation. (Exhs. 2 and 5; Findings of Fact, ¶¶ 5 and 7.) Photographs of a decoy from the day of the operation are "arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age." (*Southland, supra*, 103 Cal.App.4th at 1094.) Further, the Department relied on the ALJ's personal observations of the decoy's appearance at the hearing. Even though the decoy had grown an inch taller and weighed approximately 45 pounds less at the hearing, the ALJ still observed the decoy's physical appearance, dress, poise, demeanor, maturity, and mannerisms at the hearing to be consistent with that of a 19-year-old. (Findings of Fact, ¶ 10.)

The Board sees no error with the Department's findings regarding the decoy's appearance, which are supported by the photographs of the decoy from the date of the operation, as well as the ALJ's personal observations of the decoy at the hearing. Both sources are "reasonable in nature, credible and of solid value." (*County of Los*

Angeles, supra, 32 Cal.App.4th at 814.) Even though the decoy wore a facemask during the transaction, there is no evidence that the facemask completely obscured the decoy's face so that the clerk could not observe the same youthful features that the ALJ noted at the hearing.

Based on the above, the Department's findings regarding the decoy's appearance must stand. Ultimately, appellants are asking this Board second-guess the Department and reach a different result. Extensive legal authority prohibits this Board from doing so. (*Southland, supra*, 103 Cal.App.4th at 1094.)

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.

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. Service on the Board pursuant to California Rules of Court (Rule 8.25) should be directed to: 400 R Street, Ste. 320, Sacramento, CA 95811 and/or electronically to: abcboard@abcappeals.ca.gov.

APPENDIX

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

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

7-ELEVEN INC. & BHANGALL BROS. & SONS
INC.
7-ELEVEN STORE #22849E
4500 HOLT BLVD.
MONTCLAIR, CA 91763-4709

OFF-SALE BEER AND WINE - LICENSE

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

RIVERSIDE DISTRICT OFFICE

File: 20-580953

Reg: 22092121

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 April 28, 2023. 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. The appeal must be filed within 40 calendar days from the date of the decision, unless the decision states it is to be "effective immediately" in which case an appeal must be filed within 10 calendar days after the date of the decision. Mail your written appeal to the Alcoholic Beverage Control Appeals Board, 400 R St, Suite 320, Sacramento, CA 95811. For further information, and detailed instructions on filing an appeal with the Alcoholic Beverage Control Appeals Board, see: <https://abcab.ca.gov> or call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.

On or after June 12, 2023, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: May 2, 2023



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. & Bhangall Bros. & Sons Inc.	}	File: 20-580953
dba 7-Eleven Store #22849E	}	
4500 Holt Blvd.	}	Reg.: 22092121
Montclair, California 91763-4709	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 8,000
	}	
	}	Reporter:
	}	Hanna Jenkin
	}	Kennedy Court Reporters
	}	
<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 by videoconference on January 17, 2023.

Erin Lovelace, Attorney, represented the Department of Alcoholic Beverage Control.

Adam N. Koslin, attorney-at-law, represented respondents 7-Eleven Inc. and Bhangall Bros. & Sons Inc.

The Department seeks to discipline the Respondents' license on the grounds that, on or about August 26, 2021, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Arian Ordaz, 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 January 17, 2023.

FINDINGS OF FACT

1. The Department filed the accusation on April 26, 2022.

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 July 3, 2017 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Arian Ordaz was born on October 17, 2001. On August 26, 2021, he participated in a minor decoy operation conducted by the Department. On that date he was 19 years old.
5. Ordaz appeared and testified at the hearing. On August 26, 2021, he was 5'10" tall and weighed 280 pounds. He wore blue jeans, a black t-shirt, and tennis shoes. His hair was short on the sides. On the top it was longer and slicked back. He wore a mask while inside the Licensed Premises. (Exhibits 2 & 5.) At the hearing he was 5'11" tall and weighed 235 pounds. He wore the same clothes that he wore inside the Licensed Premises.
6. On August 26, 2021, Agent M. Patel entered the Licensed Premises. Ordaz entered shortly behind him. He went to the alcohol section and selected a 6-pack of Coors Light beer. (Exhibit 3.) The clerk, Navneet Bhangal, rang up the sale without asking to see any ID or inquiring as to his age. Ordaz paid for the beer, received some change, then exited. Agent Patel also exited.
7. Ordaz, Agent Patel, and other agents met up outside, then re-entered. Agent Patel contacted Bhangal, identified himself, and explained the violation. Agent Patel asked Ordaz to identify the person who sold him the beer. At a distance of approximately six feet, Ordaz identified Bhangal as the person who sold him the beer. A photo of the two of them was taken. (Exhibit 5.) A copy of the receipt was obtained from the register. (Exhibit 6.)
8. Bhangal is employed at the Licensed Premises as a manager. At the time of the sale she was upset over some bad news she had just received. She was on the phone and failed to check ID as she usually does. She thought that Ordaz looked like one of her regular customers and old enough to purchase alcohol.
9. Of the nine locations Ordaz visited that day, five of them sold alcoholic beverages to him.
10. Ordaz's appearance was consistent with his actual age, 19 years old. 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 August 26, 2021, Ordaz displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Bhangal.

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 August 26, 2021, the Respondents' employee, Navneet Bhangal, inside the Licensed Premises, sold an alcoholic beverage to Arian Ordaz, 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 rules 141(b)(2)² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Ordaz was large (5'10" and 280 pounds), wore a mask, and a majority of the clerks who viewed him on August 26, 2021 sold alcoholic beverages to him. Furthermore, Bhangal testified that he looked to be over the age of 21.

6. This argument is rejected. As noted above, Ordaz's appearance was consistent with that of a 19 year old and, therefore, he had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.) More particularly, he had a very youthful face and, although heavy, did not have an adult-like physique.

7. The Respondent also argued that the doctrine of laches should apply since the hearing was held one year and five months after the sale and it appeared that the witnesses did not remember all of the facts. This argument is rejected.

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

8. First, all of the percipient witnesses were available for the hearing and actually testified. Second, the witnesses were able to recall the material facts related to the sale. It is true that the two witnesses called by the Department disagreed with each other, at least in part. Agent Patel and Ordaz had different memories concerning whether Ordaz wore a mask and Ordaz could not remember the exact number of location which sold alcohol to him (testifying that it was at least two). In all other respects, their memories were the same. Bhangal did not appear to have any trouble recalling the sale or the circumstances around it. These minor discrepancies are the sort regularly encountered in nearly every hearing. There is no evidence that the length of time between the sale and the hearing any impact upon the Respondents' ability to defend themselves.

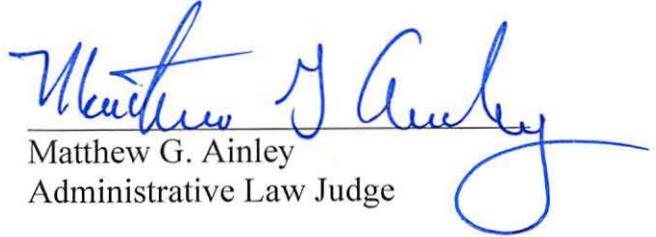
PENALTY

The Department requested that the Respondents' license be suspended for 15 days, the standard penalty under rule 144. The Respondents did not recommend a penalty in the event that the accusation were sustained. There was no evidence of aggravation presented by the Department nor was there any evidence of mitigation presented by the Respondents. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 15 days.

Dated: March 21, 2023


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By:  _____
Date: <u>04/28/23</u>