

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

AB-7336c

File: 47-243016 Reg: 98043001

GMRI, INC., dba The Olive Garden
5526 Philadelphia Street, Chino, CA 91710,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED JANUARY 21, 2004

This is the fourth appeal of GMRI, Inc., doing business as The Olive Garden (appellant), from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for its waitress having served an alcoholic beverage (beer) to a 19-year-old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant GMRI, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Following an administrative hearing, the Department, in a decision dated December 31, 1998,² ordered the suspension of appellant's license for the sale of an

¹The Department's Decision Following Appeals Board Decision, dated April 23, 2003, is set forth in the appendix.

²The Department's December 31, 1998, decision is included in the appendix.

alcoholic beverage to a police minor decoy. On March 30, 2000, the Appeals Board reversed the decision of the Department, concluding that, by his failure to consider age indicia other than physical appearance, the administrative law judge (ALJ) had misapplied rule 141(b)(2).³ (*GMRI, Inc.* (2000) AB-7336.)

Following the Board's order of reversal, the Department, on June 13, 2000, in a Decision Following Appeals Board Decision, remanded the matter to the ALJ for decision and clarification as he deemed appropriate, including receiving any further evidence in his exclusive discretion. Appellant's appeal from this order was dismissed by the Appeals Board for lack of jurisdiction. (*GMRI, Inc.* (2001) AB-7336a.)

Thereafter, the ALJ submitted a new proposed decision, stating in the second and fourth introductory paragraphs:

The Department . . . issued a Decision Following Appeals Board Decision remanding the matter to Administrative Law Judge Rodolfo Echeverria for decision and clarification as he deemed appropriate including the submission of any further evidence in the exclusive discretion of the Administrative Law Judge. After having carefully reviewed the entire record including the transcript of the hearing and my hearing notes, it has been determined that a further hearing is not necessary.

In the new proposed decision, the ALJ reiterated the findings of the original decision on those issues other than that involving the decoy's appearance and rule 141(b)(2). He added the following with respect to the decoy's appearance (Finding of Fact II. E.):

This Administrative Law Judge did consider the overall appearance of decoy #1 including his demeanor, his poise, his mannerisms, his maturity, his clothing, his size and his physical appearance in assessing whether the decoy displayed the appearance which could generally be expected of a person under the age of 21 years. The appearance of

³4 Cal. Code Regs., §141, subd. (b)(2).

decoy #1 at the time of the hearing was substantially the same as his appearance on the day of the decoy operation except that he weighed five pounds less on December 12, 1997. Although the waitress testified at the hearing that decoy #1 looked pretty much the same at the hearing as he did on the date of the sale, she was not asked at the hearing whether or not decoy #1 looked under or over the age of 21. Decoy #1 is six feet one inch in height, he weighed about one hundred seventy-five pounds, he had a military-type haircut with about one quarter of an inch growth on the top of his head and he was clean shaven on the date of the sale. On that date, decoy #1 wore the exact same clothes which he wore to the hearing which consisted of blue jeans, a plaid shirt and brown dress shoes which did not add very much height to him. At the hearing, the decoy answered questions in a straightforward manner. The decoy also testified that he had participated in two prior decoy operations, that he was a college student as of the date of the sale and that he had been working as a police cadet for about eleven months as part of an internship program as of the date of the sale. After considering the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

The Department adopted the proposed decision as its own on May 24, 2001.⁴

Appellant appealed the new decision of the Department, and the Board again reversed (*GMRI, Inc.* (2002) AB-7336b), stating its belief that the procedure used was unfair and that it had expected the ALJ would hold another hearing at which the parties would have the opportunity to address the evidence regarding the decoy's appearance.

On April 23, 2003, the Department issued its decision following the Board's decision in AB-7336b. In affirming its previous order, the Department relied on *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2002) 103 Cal.App.4th 1084 [127 Cal.Rptr.2d 652] (*Southland/Pannu*). Appellant has now appealed from the decision of the Department, contending that *Southland/Pannu* is distinguishable.

⁴The Department's May 24, 2001, decision is also included in the appendix.

DISCUSSION

Southland/Pannu traveled essentially the same administrative path that appellant's case has: The Appeals Board reversed the original Department decision in *The Southland Corporation/Pannu* (2000) AB-7316, because the ALJ addressed only the decoy's physical appearance in his proposed decision; the Department remanded the matter to the ALJ for further findings; the ALJ found, based on the existing record, his notes, and his recollection, that the decoy displayed an appearance that could generally be expected of a person under the age of 21 years; another appeal was taken to the Appeals Board, which again reversed the Department's decision (*The Southland Corporation/Pannu* (2002) AB-7316a), suggesting that it would have been more fair for the ALJ to hold a hearing "where the parties could have addressed the various indicia of age displayed by the decoy" and that the Department should dismiss the accusation.

In *Southland/Pannu* the Court of Appeal granted the Department's petition for a writ of review filed in response to the Board's decision in AB-7316a. The court held that the ALJ was entitled to rely on the existing record when he found that the decoy's appearance complied with rule 141(b)(2) because: the Board did not require the ALJ to conduct another hearing or take more evidence; the ALJ had already received evidence and argument in the original hearing; he had the exhibits, including a photograph of the decoy just after the sale, and the hearing transcript; and he indicated in his decision that he was able to recall his observations of the decoy at the hearing. The court concluded: "Absent any evidence to the contrary, we must accept ALJ Lo's statements at face value." (*Southland/Pannu, supra*, 103 Cal.App.4th at p. 1092.)

The court went on to address the issue of whether substantial evidence existed to support the ALJ's finding, an issue the Appeals Board had not addressed because of

its conclusion that the ALJ should not have relied solely on the existing record when making his finding. The court reviewed, among other things, the photograph of the decoy taken shortly after the sale, calling it "arguably the most important piece of evidence" of the decoy's physical appearance at the time of the sale (*Southland/Pannu, supra*, 103 Cal.App.4th at p. 1094). It deferred to the ALJ's judgment of the decoy's nonphysical appearance, because that was based on his observation of the decoy at the hearing. The court concluded that substantial evidence supported the ALJ's finding that the decoy displayed the appearance of a person under the age of 21, as required by rule 141(b)(2).

Appellant contends that the Department's reliance on *Southland/Pannu* is misplaced because the record in the present case does not include a photograph of the decoy at the time of the sale, as did the record in *Southland/Pannu*. It argues that the court considered the photograph to be "the necessary, crucial and vital element required for the ALJ to render a fair and just decision based solely on the record." (App. Br. at p. 8.) Without a photograph, appellant asserts, there is no substantial evidence to support the ALJ's finding, and basing the decision solely on the ALJ's memory and hearing notes is inherently unfair.

We do not believe that the Department's reliance on *Southland/Pannu* was misplaced. The court's primary conclusion in that case was that the ALJ was entitled to rely on the existing record for his finding that the decoy's appearance complied with rule 141(b)(2). The photograph was just one of the things that the court noted was available to the ALJ in the record.

A photograph will undoubtedly be helpful to an ALJ when considering whether a decoy's appearance complied with rule 141(b)(2), but the lack of a photograph does not

mean that substantial evidence for the finding is lacking. This Board has considered in prior decisions assertions that substantial evidence did not support the ALJ's finding regarding the decoy's apparent age. In *Circle K Stores, Inc.* (2001) AB-7498, the Board said:

Nor is the Board in a position to say that there was not substantial evidence to support this finding. The decoy himself provides the evidence of his appearance.

Similarly, in footnote 2 of *The Southland Corporation/Amir* (2001) AB-7464a, the Board responded to the argument by saying:

We simply do not agree that an administrative law judge who must determine the apparent age of a decoy, and actually sees the decoy in person, lacks substantial evidence to make such a determination.

Rule 141(b)(2) requires an ALJ to make a subjective judgment, on the evidence presented, whether the decoy displayed to the seller of alcoholic beverages the appearance generally expected of a person under the age of 21. Where there is no evidence that the decoy's appearance changed substantially between the time of the sale and the hearing, the ALJ's observation of the decoy at the hearing provides sufficient evidence on which to base a finding. This remains true even if, as here, a substantial period of time has passed since the hearing, as long as the ALJ is able to recall his observation of the decoy's appearance at the hearing.

In *Southland/Pannu, supra*, the court gave considerable deference to the ALJ's ability to recall and fairly judge the decoy's appearance, even though a considerable period of time had passed:

Presumably, if ALJ Lo believed he needed additional evidence or argument, he would have requested either or both. However, he had already received evidence and heard argument on the issue. Among other things, ALJ Lo had the photograph of the decoy that was taken immediately after the sale, as well as a transcript of the original hearing where he heard testimony and argument concerning the appearance requirement. In addition, as reflected in various statements by ALJ Lo in

his decision, ALJ Lo was able to recall the voice, mannerism and demeanor displayed by the decoy at the hearing. Absent any evidence to the contrary, we must accept ALJ Lo's statements at face value.

We give similar deference to ALJ Echeverria's ability in the present case to know and acknowledge if he needed additional evidence or argument on the issue of the decoy's appearance. In his original decision, ALJ Echeverria discussed only the physical appearance of the decoy, but in his second proposed decision, he affirmed that he had, in fact, observed and considered the full spectrum of the decoy's indicia of age, including "his demeanor, his poise, his mannerisms, his maturity, his clothing, his size and his physical appearance." Based on all those factors, ALJ concluded that the decoy displayed an overall appearance which could generally be expected of a person under 21 years of age. "Absent any evidence to the contrary, we must accept ALJ [Echeverria's] statements at face value." (*Southland/Pannu, supra*, 103 Cal.App.4th at p. 1092.)

ORDER

The decision of the Department is affirmed.⁵

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This 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.