

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

AB-8054

File: 21-291118 Reg: 02053355

LEWIS SALEM, INC. dba Ace Liquor
2892 Mission Boulevard, San Diego, CA 92109,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 14, 2003
Los Angeles, CA

ISSUED OCTOBER 8, 2003

Lewis Salem, Inc., doing business as Ace Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk having sold a 40-ounce bottle of Budweiser beer to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Lewis Salem, Inc., appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne Paige.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 7, 1994. On July 16,

¹The decision of the Department, dated November 7, 2002, is set forth in the appendix.

2002, the Department instituted an accusation against appellant charging an unlawful sale of beer to a 16-year-old minor. The minor was acting as a decoy for the San Diego Police Department.

An administrative hearing was held on September 26, 2002, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged, and appellant had failed to establish an affirmative defense to the charge.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was no compliance with Rule 141(b)(2); and (2) the administrative law judge (ALJ) failed to identify testimony found not to be credible and the evidence undermining such testimony.

DISCUSSION

I

Appellant contends that the decoy was overly large in stature and manifested a level of composure gained by extensive experience so as not to be qualified for use as a decoy. Appellant points to the decoy's height and weight - 5' 9" and 175-180 pounds - and her experience in 10 decoy operations, as well as her experience as a police cadet. Appellant also asserts that her manner of dress - she was wearing a blue denim jacket with the word "NAVY" on it - was unfairly calculated to mislead anyone attempting to determine whether she was of legal age.

The ALJ considered the same characteristics as does appellant to argue that the decoy appeared to be older than 21, and disagreed with appellant. He wrote (Finding of Fact D):

The overall appearance of the decoy including her demeanor, her poise, her

mannerisms, her maturity, her size and her physical appearance were consistent with that of a person under 21 years of age and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation. However, her hair was in a ponytail on the date of the sale and her hair was in braided pigtails on the day of the hearing. The decoy is five feet nine inches in height and she weighs between one hundred seventy-five and one hundred eighty pounds. She was not wearing any makeup or jewelry when she was at the premises on the date of the sale. The photograph depicted in Exhibit 2 was taken at the premises shortly after the sale and it depicts the decoy's appearance at the time of the sale. On that day she was wearing jeans, tennis shoes, a blue shirt depicting the Tasmanian Devil cartoon character and a blue denim jacket with "Navy" written on the front of it in blue letters as depicted in Exhibit 2.

The decoy testified that she had participated in approximately ten prior decoy operations and she is in the police cadet program.

The decoy has an extremely young looking face that can best be described as a "baby face." She was very soft-spoken and she appeared to be nervous while she was testifying. While she was testifying the decoy was observed to be fidgeting with her feet and her hands appeared to be trembling.

After considering the photograph (Exhibit 2), the overall appearance of the decoy when she testified, the way she conducted herself 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.

Whether her height and weight were enough to cause this 16-year-old decoy to appear older than 21 years of age was a question for the trier of fact, who saw and heard her testify. This Board has the opportunity neither to see nor hear her. The photograph (Exhibit 2) does not compel this Board to substitute its judgment for that of the ALJ.

This Board rarely sees an appeal without a contention that the decoy failed to comply with Rule 141(b)(2). It is often difficult to take these appeals seriously. Nonetheless, valuable Board time must be spent on every such appeal, simply because there may be merit in some few cases, despite our belief that the selection of decoys has become more consonant with the rule's expectations and those of the Legislature

expressed in Business and Professions Code section 25658, subdivision (f).

That having been said, we do not consider the appeal in this case frivolous. We do conclude that it lacks merit.

II

Appellant contends that the decision is flawed because the ALJ did not account for the testimony of an employee who was stocking shelves and, having observed the decoy, formed the opinion that she appeared to be older than 21 years of age.

Appellant cites *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195, and argues that it requires the ALJ to clearly explain the conflicts in testimony.

The Board has uniformly rejected contentions by appellants that the *Holohan* case compels the Department to justify its findings of credibility. The *Holohan* case dealt with administrative rejections of Social Security claimants, and is not binding on California courts.

The decision of the Department does not make any explicit credibility determinations. The closest it comes to doing so is found in one of the ALJ's legal bases for decision (Basis III), where he quotes from the Board's decision in *Prestige Stations, Inc.* (2000) AB-7248:

The decoy must only present an appearance which could generally be expected of a person under the age of 21 years. If a clerk, observing a decoy who presents such appearance generally perceives the decoy to be older than 21, he does so at his peril. A licensee cannot escape liability by employing clerks unable to make a reasonable judgment as to a buyer's age.

This could be interpreted as indicating the ALJ did not believe the employee's testimony that he had experience in judging people's ages, acquired through his participation in the Department's LEAD program. It could also be interpreted as

referring only to the clerk who actually made the sale, who, according to San Diego police officer Larry Darwent, said he wasn't paying attention. In either case, we do not believe the ALJ was obligated to state explicitly why he was unpersuaded by the witness's testimony, whether he believed it or not. It is enough that the ALJ made his own finding of the decoy's apparent age, and explained why he found as he did.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.