

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

AB-8861

File: 21-337876 Reg: 07067063

ADIB DIAB, dba Fountain Square Liquor
8320 Stewart and Gray Road, Downey, CA 90241,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: June 4, 2009
Los Angeles, CA

ISSUED AUGUST 27, 2009

Adib Diab, doing business as Fountain Square Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which revoked his license for his clerk, Oscar Garcia Ortiz, having sold a six-pack of Bud Light beer, an alcoholic beverage, to Diana Marmol, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a). The violation was appellant's third sale-to-minor violation within a 36-month period, and the second by the same clerk.

Appearances on appeal include appellant Adib Diab, appearing through his

¹The decision of the Department, dated March 27, 2008, is set forth in the appendix.

counsel, Ralph B. Saltsman, Stephen W. Solomon, and Alicia Ekland, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 4, 1998. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on May 24, 2007.

An administrative hearing was held on January 31, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Terence Goeckner, a Downey police officer, and Diana Marmol, a 19-year-old police minor decoy.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as alleged in the accusation, that it was appellant's third such violation within a 36-month period, and ordered appellant's license revoked.

Appellant filed a timely notice of appeal in which he raises the following issues: (1) the administrative law judge (ALJ) failed to provide an analytical basis for his finding that the decoy displayed the appearance that could generally be expected of a person less than 21 years of age; and (2) the police use of a decoy having the poise and demeanor of a person older than 21 years violates Rules 141(a) and 141(b)(2). These issues are related and will be discussed together.

DISCUSSION

I and II

Appellant contends that, as a result of the demeanor and poise exhibited by the decoy, coupled with her substantial experience as a police decoy (as many as 12 prior

decoy operations), she displayed an appearance of a person older than 21 years. This, appellant says, was unfair, and violated Department Rules 141(a) and 141(b)(2) (4 Cal. Code Regs., §141, subds. (a), (b)(2).)

Rule 141(a) requires a decoy operation to be conducted in a manner which promotes fairness. Rule 141(b)(2) requires that a minor decoy display the appearance which could generally be expected of a person less than 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

Appellant argues that the ALJ, by failing to discuss the decoy's year-long experience as a decoy, and the clerk's testimony that the decoy exhibited the demeanor and poise of a person older than 21, appearing to him to be 24 or 25 years of age, failed to conduct the analysis of the evidence required by the California Supreme Court in *Topanga Ass'n for a Scenic Community v. Los Angeles County* (1974) 11 Cal.3d 506, 516-517 [113 Cal. Rptr. 836.]

This is not the first time this Board has heard an argument in this vein. Indeed, many cases have challenged an ALJ's determination that a decoy displayed the appearance required by Rule 141(b)(2), and this Board has held, with rare exception, that the ALJ is the trier of fact, that he, unlike this Board, has the opportunity to observe the decoy as he or she testifies, that the ALJ's determination is a factual determination, and the Board will not substitute its judgment for that of the ALJ in the absence of extraordinary circumstances, none of which are present here.

It is less than accurate to say that the ALJ failed to consider clerk Ortiz' testimony that the decoy appeared "mature enough" to him, that he looked in her eyes, and the two made eye contact. The ALJ, of course, heard this testimony, yet still

concluded that her appearance and conduct before the clerk were consistent with the requirements of Rule 141. Similarly, his failure to mention that the decoy had participated in 12 prior decoy operations may well have been his reaction to the fact, which he noted, that the decoy was able to purchase an alcoholic beverage in only four of the twenty premises she visited on the night in question.

In the last analysis, this is just another in a long line of cases in which the licensee has sought to have the Board substitute the partisan judgment of licensee's counsel for that of the person who heard the evidence, saw and heard the decoy testify, and made a reasoned determination of her apparent age. We decline to accept appellant's invitation to do so in this case.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.