

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

AB-9053

File: 47-224669 Reg: 09070723

F V BOWLING L-PSHIP, dba Fountain Bowl
17110 Brookhurst Street, Fountain Valley, CA 92708,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 6, 2010
Los Angeles, CA

ISSUED JULY 22, 2010

F V Bowling L-PSHIP, doing business as Fountain Bowl (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all of which were stayed, conditioned upon the completion of a one-year probationary period, for its clerk selling an alcoholic beverage to a law enforcement minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant F V Bowling L-PSHIP, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated July 13, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on December 1, 1988. The Department filed an accusation charging that appellant's bartender sold an alcoholic beverage to 19-year-old Bryan Nguyen on January 8, 2009. Although not noted in the accusation, Nguyen was working as a minor decoy for the Department and the Fountain Valley Police Department at the time.

At the administrative hearing held on May 29, 2009, documentary evidence was received, and testimony concerning the sale was presented by Nguyen, by Martin Vu, an 18-year-old who accompanied the decoy, and by Department investigator Danielle Shaver. Appellant presented no witnesses.

On January 8, 2009, Nguyen entered the premises with Vu and the two sat at the fixed bar. Nguyen told the female bartender that he wanted a Bud Light beer and she asked for his identification. Nguyen gave her his California driver's license, which showed he was under the age of 21. The bartender looked at the license and then served him the beer.

The bartender then asked Vu what he wanted and he asked for water. She got him water and asked how old he was. When he told her he was not 21, the bartender said he would have to sit at a table instead of at the bar since he was under 21. Nguyen and Vu then moved to a table.

Law enforcement officers then approached the bartender, identified themselves, and told her she had sold to a minor. Nguyen was called over to the bar and asked who had sold the beer to him. Nguyen identified the bartender and a citation was issued to her.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant then filed this appeal contending that the administrative law judge (ALJ) failed to make a proper analysis of the decoy's appearance when he determined there was compliance with rule 141(b)(2).²

DISCUSSION

Appellant contends the ALJ erred when he found that the decoy's appearance complied with rule 141(b)(2). It was erroneous, appellant argues, because the ALJ failed to take into consideration the effect of having a second person with the decoy and the significance of the decoy being able to purchase alcoholic beverages at two of the three licensed premises that he visited during the decoy operation.

Appellant supports its contention that the ALJ was required to account for the effect of a second person with the decoy by citing certain Appeals Board decisions in which the particular facts involved dictated the results. These cases are inapposite. In *Hurtado* (2000) AB-7246, the 27-year-old undercover police officer shared a table with the decoy and both the officer and the decoy ordered beers. In *7-Eleven, Inc./Smith* (2001) AB-7740, there was a serious question whether the person accompanying the decoy appeared to be under the age of 21, as well as evidence that she had some involvement in the transaction. *Star & Crescent Boat Company* (2001) AB-7637, involved the same decoy as in *7-Eleven, Inc./Smith*, and is equally irrelevant to this appeal.

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. 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."

The Appeals Board has previously considered, and consistently rejected, contentions essentially the same as those made here by appellant. (See, e.g., *Circle K Stores, Inc.* (2002) AB-7817 ["The ALJ had no obligation to discuss a hypothetical 'impact' Edison may have had on the appearance presented by Lowe to the clerk."].) Appellant does not explain what impact it believes Vu had on Nguyen's appearance. It merely asserts that the ALJ did not make a finding regarding what impact, if any, Vu had on Nguyen's appearance, and concludes that the decision must, therefore, be reversed. Appellant is wrong.

The Board has said that "the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law." (*7-Eleven, Inc. and Janizeh Corporation* (2002) AB-7790.) Where, as here, the seller of alcoholic beverages does not testify, there is no evidence that the clerk was distracted. In this appeal, there is not even a claim or allegation that the clerk was distracted.

Appellant also contends that the ALJ erred by not considering the significance of the decoy being able to purchase alcoholic beverages at two of the three licensed premises that he visited during the decoy operation. It cites the appeal of *7-Eleven/Dianne Corporation* (2002) AB-7835 (*Dianne*), in which the Board said that the decoy's 80-percent purchase rate was a "strong indication" that the decoy's appearance did not comply with rule 141(b)(2).

Appellant neglects to consider the Board's more recent decision in *7-Eleven/Jain* (2004) AB-8082, in which the Board made clear that *Dianne, supra*, did not signify that an 80-percent purchase rate would inevitably result in finding noncompliance with rule

141(b)(2). "Such a per se rule would be inappropriate, since the sales could be attributable to a number of reasons other than a belief that the decoy appeared to be over the age of 21." (*Ibid.*)

Appellant also ignores the facts in *Dianne, supra*, which are clearly unlike the facts in the present case. For example, in *Dianne*, the decoy was not even asked for identification, while here the decoy presented, and the clerk examined, the decoy's valid California driver's license before selling to him.

As the Board has so often said, it will not second-guess the factual determination by the ALJ concerning the appearance of the decoy unless the appellant can demonstrate an abuse of discretion. The ALJ determined that the decoy's appearance complied with rule 141(b)(2) (Det. of Issues II). He made this determination after observing the decoy as he testified and having been made aware of the matters relied upon by appellants. Appellant has not presented any convincing argument that the ALJ abused his discretion in making this determination.

ORDER

The decision of the Department is affirmed.³

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