

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

AB-9189

File: 21-420417 Reg: 10073666

SFC MARKETPLACE, INC., dba Seafood City
31840 Alvarado Boulevard, Union City, CA 94587,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 12, 2012
Sacramento, CA

ISSUED AUGUST 14, 2012

SFC Marketplace, Inc., doing business as Seafood City (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant SFC Marketplace, Inc., appearing through its counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

¹The decision of the Department, dated August 17, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 1, 2005. On October 26, 2010, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 18-year-old Marcos Hernandez-Ramos on June 7, 2010. Although not noted in the accusation, Hernandez-Ramos was working as a minor decoy for the Department at the time.

At the administrative hearing held on June 15, 2011, documentary evidence was received, and testimony concerning the sale was presented by Hernandez-Ramos (the decoy) and by Department investigator Michelle Ott.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed an appeal contending: (1) The decoy's appearance did not comply with Department rule 141(b)(2)²; (2) there is no rational connection between the decision and the evidence presented; and (3) the Department's action was barred by laches.

DISCUSSION

I

Appellant contends the decoy did not display "the appearance that could generally be expected of a person under 21 years of age" as required by rule 141(b)(2) because of the decoy's prior experience as a police Explorer. In addition, appellant argues, a decoy who "towers" over the clerk is not "representative of a person that is under the age of 21." (App. Br. at p. 6.)

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.

Appellant's arguments about rule 141(b)(2) were addressed, and rejected, in the decision, in Determination of Issues II:

Respondent argued that the decoy's experience as a police explorer sergeant made the decoy appear at least twenty-one years old to Respondent's clerk, in violation of the Department's Rule 141(b)(2). The argument is rejected. There is no evidence that the decoy's experience made him appear more than two years older than his age. Also, the photograph taken of the decoy and Respondent's clerk on June 7, 2010 shows the decoy displayed the appearance which could generally [be] expected of a person under twenty-one years old. Finally, because Respondent's clerk did not testify, there is no evidence of how the decoy appeared to her.

There is little we could add to the ALJ's analysis. The ALJ, who saw and listened to the decoy at the hearing, determined that the decoy's appearance complied with rule 141(b)(2). Appellant has presented no evidence that would cause us to question the ALJ's determination. Indeed, since appellant presented no evidence whatsoever on this issue, it cannot hope to meet its burden of proving this affirmative defense.

As for "towering over" the clerk, the decoy was only 5'7" tall, clearly not an extraordinary height for an 18-year-old male. The clerk was only 5'2", so many of the customers probably "towered over" her. The decoy's height, absolute or relative to the clerk's, is not an indicia of age.

II

Appellant contends that the decision shows that the ALJ did not consider "all relevant factors" nor did he "articulate a rational connection" between the facts and the determinations. Appellant relies on a standard of review stated in *Golden Drugs Co., Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1471 [102 Cal.Rptr.3d 446] (*Golden Drugs*):

[W]e will uphold the agency's decision unless it is devoid of evidentiary support. This test calls upon us to ensure that the administrative agency

has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choices made, and the purposes of the enabling statute.

Appellant concludes that the Department's decision did not satisfy this standard of review.

The standard of review appellant relies on comes from a case that is distinguishable, both factually and legally, from any case involving the Board's review of a Department decision. In *Golden Drugs*, the California Department of Health Care Services (CDHC) terminated a pharmacy's Medi-Cal provisional provider license. The pharmacy's administrative appeal was denied and its subsequent petition to the superior court for a writ of mandamus was also denied. The pharmacy then appealed from the denial of the petition for writ. The Court of Appeal affirmed the order of the superior court.

The standard of review described by the court in *Golden Drugs* is that applicable in ordinary mandamus actions pursuant to Code of Civil Procedure section 1085. The standard of review the Appeals Board must use in reviewing Department decisions, however, is the substantial evidence test. (Bus. & Prof. Code, § 23090.2.) As the court noted in *Golden Drugs*, "the question whether agency action is 'entirely lacking in evidentiary support' is not the same as a substantial evidence test." (179 Cal.App.4th 1455, 1466.)

The requisites of the substantial evidence test are described in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826] (*Masani*):

Certain principles guide our review. . . . We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, Inc. v.*

Alcoholic Bev. Control Appeals Bd. (2002) 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*)).) The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

Applying the proper standard, it is clear that, despite a few inconsequential inconsistencies in the testimony, substantial evidence supports the findings and the findings support the determination that appellant's clerk sold an alcoholic beverage to a person under the age of 21. Appellant presented no evidence that cast doubt on the findings and determination of the Department's decision.

III

Appellant contends that the Department is prohibited from bringing an action against Tuxedo Liquor due to laches. Laches is an equitable remedy that may apply when there has been undue delay in bringing an action resulting in undue prejudice to the other party. Prejudice from the delay is not presumed, but must be affirmatively shown. (*Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624 [166 Cal.Rptr. 826, 614 P.2d 258].)

Whatever may be the situation involving Tuxedo Liquor, this case concerns only SFC Marketplace, Inc., doing business as Seafood City.

Even if appellant meant to refer to Seafood City rather than Tuxedo Liquor, it did not raise the issue of laches at the administrative hearing, so it has waived the right to

have the Appeals Board consider the issue. (*Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy* (1992) 4 Cal.App.4th 963, 976 [6 Cal. Rptr. 2d 193].)

In any case, appellant has presented nothing to support its assertion that it "lost its right to any meaningful cross-examination" due to unreasonable delay. For that matter, it has not shown that there was any unreasonable delay.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, 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.