

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

**AB-9227**

File: 21-438008 Reg: 11074891

HUONG LEE LEE and JERRY LEE, dba Stewart's Liquor  
5505 Van Buren Boulevard, Riverside, CA 92503,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 6, 2012  
Los Angeles, CA

**ISSUED OCTOBER 23, 2012**

Huong Lee Lee and Jerry Lee, doing business as Stewart's Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 25 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Huong Lee Lee and Jerry Lee, appearing through their counsel, Ralph Barat Saltsman, D. Andrew Quigley and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

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<sup>1</sup>The decision of the Department, dated December 28, 2011, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 1, 2006.

Thereafter, the Department instituted an accusation against appellants charging that, on February 16, 2011, appellants' clerk, Linda Lee (the clerk), sold an alcoholic beverage (beer) to 18-year-old Eric Jiminez. Although not noted in the accusation, Jiminez was working as a minor decoy for the Riverside Police Department at the time.

An administrative hearing was held on October 13, 2011, at which time documentary evidence was received, and testimony concerning the sale was presented by Jiminez (the decoy), Michael Cobb and Robert Tipre, Riverside police detectives, and Eric Burlingame, a Department investigator.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal making the following contentions: (1) Rule 141(b)(2)<sup>2</sup> was violated, and (2) the Department failed to consider appellants' mitigation evidence.

## DISCUSSION

### I

Appellants argue that the decoy's non-physical demeanor was that of a confident peace officer; they say that his lack of nervousness derived from his five-year experience as a police Explorer. They also claim that he wore two t-shirts and a hooded sweatshirt which concealed his slight frame, and styled his hair in spikes. Appellants argue that these "undisputed facts" about the decoy's appearance

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<sup>2</sup> References 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.

demonstrate that the ALJ's conclusion that the decoy's appearance was consistent with someone under the age of 21 is without support in the record. (App. Br., p.5.)

Appellants' argument is not really new. They ask us to reweigh the evidence relating to the decoy's appearance and reach a conclusion contrary to that reached by the ALJ. That is not our function as a reviewing body.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.<sup>3</sup>

We are more impressed with the ALJ's discussion of the decoy's appearance as an assessment of his rule 141(b)(2) status than we are with appellants' brief summary of "undisputed facts." The ALJ had this to say (Findings of Fact D 1-4):

FF D: The decoy is a youthful looking male whose overall appearance including his demeanor, his poise, his mannerisms, his maturity, his size and his physical appearance were consistent with that of a person under the age of twenty-one. Furthermore, his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was approximately eight pounds heavier on the day of the hearing.

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<sup>3</sup> California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

D-1. On the day of the sale, the decoy was five feet eight inches in height and he weighed one hundred forty pounds. On that day, the decoy was clean-shaven, his hair was spiked as it was on the day of the hearing and his clothing consisted of jeans, a white T-shirt underneath a brown T-shirt, and a brown hooded sweater. He was not wearing a watch or any jewelry. The photograph depicted in Exhibit 3 was taken on the day of the sale before going out on the decoy operation and the photograph in Exhibit 2 was taken at the premises. Both of these photographs depict what the decoy looked like when he was at the premises. The decoy actually looks younger in person than he does in his photographs.

D-2. There was nothing remarkable about the decoy's non-physical appearance.

D-3. The decoy testified that he had participated in four prior decoy operations and that he had been an Explorer with the Riverside Police Department since he was thirteen. As an Explorer, he received various training and he went on multiple ride-alongs.

D-4. After considering the photographs depicted in Exhibits 2 and 3, 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.

We, of course, have no idea what the clerk thought about the decoy's age or appearance. She did not testify at the hearing. We do know, however, that she looked at the decoy's California ID (Exhibit 5) which contained the decoy's correct date of birth, a blue stripe indicating "AGE 18 IN 2010" and a red stripe indicating "AGE 21 IN 2013," and made the sale anyway. This would tend to refute or certainly question any suggestion that she may have thought the decoy to be of legal age to purchase alcohol.

## II

Appellants argue that the ALJ abused his discretion by imposing an aggravated penalty -- a 25-day suspension for appellants' second sale-to-minor violation within a 36-month period -- and failing to consider relevant evidence in mitigation.

Department rule 144 lists four examples of what may be considered mitigating

factors: length of operation without prior discipline or problems, positive corrective action, documented training, and cooperation by licensee in investigation.

Appellants claim that, although not required to do so, they have a “black light” scanner that is used to check identification cards and prevent unlawful sales. However, appellants offered no evidence that the black light was even functional, and it is undisputed that the clerk made no attempt to use it. Whether it might be a factor in mitigation in a proper case, it is of little assistance to appellants in this case.

Appellants also argue in their brief (App. Br., p. 6) that the clerk’s emotional reaction ought to be considered as a reason for a lesser penalty; she was “apologetic and cooperative.” But it does not seem to us, and it undoubtedly was not seen by the ALJ, that being “crestfallen” upon discovering that she had sold to a minor, or “crying and continuously apologizing” is cooperation as that term is generally understood. We have no doubt that a clerk who is cited for selling alcohol to a minor will be upset. Some clerks may show that upset more than others, but “cooperation in the investigation” as used in rule 144 must have contemplated more than simply an unhappy or remorseful clerk.

#### ORDER

The decision of the Department is affirmed.<sup>4</sup>

FRED ARMENDARIZ, CHAIRMAN  
BAXTER RICE, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>4</sup> 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.