

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

AB-9229

File: 20-441075 Reg: 10074034

APRO, LLC, dba Apro #35
3860 Governor Drive, San Diego, CA 92122,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 1, 2012
Los Angeles, CA

ISSUED DECEMBER 4, 2012

Apro, LLC, doing business as Apro #35 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 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 Apro, LLC, appearing through its counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 17, 2006. On December 27, 2010, the Department filed an accusation charging that appellant's clerk, Margarita Herrera (the clerk), sold an alcoholic beverage to 17-year-old Shannon P. on May 5, 2010. Although not noted in the accusation, Shannon P. was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 5, 2011, documentary evidence was received, and testimony concerning the sale was presented by the decoy and by Tristina Craft, a Department investigator.

Testimony established that the decoy entered the licensed premises on May 5, 2010, and walked straight to the beer cooler where she selected a six-pack of Budweiser beer in bottles. The decoy took the beer to the counter, the clerk asked her for identification, and she produced her California driver's license which contained a red stripe indicating "AGE 21 in 2013." The clerk looked at the license, returned it to the decoy without asking any age-related questions, and completed the sale. The clerk was subsequently issued a citation.

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

Appellant filed a timely appeal contending that the ALJ's findings that the decoy's appearance complied with rule 141(b)(2)² are not supported by substantial evidence.

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.

DISCUSSION

When findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

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];) 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.App2d 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.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*

(*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Appellant contends that the decoy's appearance did not comply with rule 141(b)(2)³ because of her mature appearance and her experience as a decoy. Appellant maintains that since the decoy stood 5 feet 7 inches tall on the day of the

³Rule 141(b)(2) dictates: "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."

decoy operation, weighed 130 pounds, and had visited at least 100 stores as a minor decoy [RT 12-14], these factors resulted in an individual who would have looked "mature" to the clerk.

Appellant also contends that the ALJ erred in relying, in part, on the decoy's soft-spoken voice in his determination that she presented the appearance required by the rule. It argues that since the decoy said nothing to the clerk, her soft-spoken voice was not something properly to be considered in assessing the appearance presented to the clerk.

"[T]he burden is on appellant to show there is no substantial evidence whatsoever to support the findings [Citation.]" (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335-336 [25 Cal.Rptr.2d 842].)

The ALJ made the following findings about the decoy's appearance in Findings of Fact (FF) II-D-1 through 4:

FF II-D. The overall appearance of the decoy including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty-one. The decoy's appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that she was an inch taller and approximately ten pounds heavier on the day of the hearing.

FF II-D-1. The decoy is a very youthful looking young lady who was five feet seven inches in height and who weighed one hundred thirty pounds on the day of the sale. On that day, the decoy was wearing blue jeans and a black T-shirt. The photographs depicted in Exhibits 2, 3 and 4 were all taken on the day of the sale and these photographs show how the decoy looked and what she was wearing on the day of the sale.

FF II-D-2. The decoy had been a decoy for approximately twelve months prior to the date of the sale and she had taken part in about five prior decoy operations. The evidence established that the decoy visited between twelve and twenty locations on the day of the sale. The decoy testified that only one other location sold her an alcoholic beverage that evening.

FF II-D-3. There was nothing remarkable about the decoy's nonphysical appearance. She was soft-spoken but she provided straight forward answers while testifying. Although the decoy recently turned nineteen, she still looks very youthful and very similar to the photographs that were taken on the day of the sale.

FF II-D-4. After considering the photographs depicted in Exhibits 2, 3 and 4, the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance that 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.

Appellant maintains that the ALJ "improperly discounted the decoy's experience and physical appearance by noting that the decoy was soft spoken during the hearing." (App.Br. at p. 4.) But we do not believe the ALJ's inclusion of her manner of speech in a comprehensive assessment of her appearance faults in any way his determination that there was compliance with rule 141(b)(2).

The decoy in this case was only 17 years of age. The ALJ had the benefit of three photographs (Exhibits 2, 3, and 4) of the decoy taken at the time of the decoy operation showing how she appeared at that time, and was able to observe her as she testified. Appellant's suggestion that this 17-year-old female appears older than 21 years of age solely by reason of her height, weight, and experience is unsupported and unsupportable.

The clerk did not testify. We cannot know what went through her mind in the course of the transaction, but we do know that she requested and was furnished the decoy's identification, a driver's license showing her date of birth and bearing a prominent red stripe with the legend "AGE 21 in 2013," and that she made the sale anyway.

The evidence presented at the hearing, including the presence of the decoy

herself, clearly did provide substantial evidence for finding that the decoy's appearance complied with the requirements of rule 141(b)(2). We can only conclude that the Department's decision should be affirmed.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.