

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

AB-9636

File: 20-564656; Reg: 16084408

7-ELEVEN, INC. and KAMALL, INC.,
dba 7-Eleven Store #2368-32376B
9600 Brimhall Road, Bakersfield, CA 93312,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 7, 2018
Los Angeles, CA

ISSUED JULY 13, 2018

Appearances: *Appellants:* Ralph Barat Saltsman, of Solomon, Saltsman &
Jamieson, as counsel for 7-Eleven, Inc. and Kamall, Inc.,

Respondent: Jonathan V. Nguyen, as counsel for Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Kamall, Inc., doing business as 7-Eleven Store #2368-32376B, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 5 days (with all 5 days conditionally stayed for one year, provided no further cause for discipline arises during that time), because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated January 12, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 28, 1998, originally to Veena Kamboj and Shashi Kant Kamboj. On January 20, 2016, they incorporated their interest into Kamall, Inc. There is no record of prior disciplinary action against the license.

On June 28, 2016, the Department filed an accusation against appellants charging that, on April 6, 2016, appellants' clerk, Sukhbir Singh (the clerk), sold an alcoholic beverage to 18-year-old Alyssa Owen. Although not noted in the accusation, Owen was working as a minor decoy for the Bakersfield Police Department at the time.

At the administrative hearing held on October 5, 2016, documentary evidence was received and testimony concerning the sale was presented by Owen (the decoy) and by Alex Paiz, a Bakersfield Police officer.

Testimony established that on April 6, 2016, the decoy entered the licensed premises followed shortly thereafter by Officer Alex Paiz. The decoy went to the coolers where she selected a tall can of Bud Light beer. She took the beer to the counter and set it down. The clerk scanned the beer and asked for her identification. The decoy handed the clerk her California drivers license which had a vertical format. It contained her correct date of birth, showing her to be 18 years of age, and a red stripe indicating "AGE 21 IN 2018." (Exh. 2.) The clerk looked at the license for a few seconds, handed it back to the decoy, then completed the sale. The decoy then exited the premises. Officer Paiz made a small purchase and exited as well.

Outside, the decoy met with several officers. The officers entered the licensed premises and contacted the clerk. The decoy joined them a short time later. One officer asked the decoy if this was the clerk who sold her the beer. She pointed at the

clerk and said "yes." They were approximately 3 feet apart at the time. A photo of the two of them was taken (exh. 3), and the decoy exited the premises.

On November 3, 2016, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and suspending the license for a period of 5 days—with all 5 days stayed for a period of one year, provided no further cause for discipline arises during that time. Thereafter, on November 14, 2016, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellants and Department counsel, inviting the submission of comments on the proposed decision, stating that the proposed decision and any comments submitted will be submitted to the Director of ABC in 14 days.

Appellants submitted comments to the Director, arguing that neither the Administrative Procedure Act (APA) nor the ABC Act authorize the Department to permit the parties in a disciplinary procedure to comment on a proposed decision, and that by requesting submission of these comments, the Department exceeded the authority granted to it by the APA. The Department did not submit comments.

On January 3, 2017, the Department adopted the proposed decision in its entirety, and on January 12, 2017, the Department issued its Certificate of Decision.

Appellants then filed a timely appeal contending that the ALJ's finding that the decoy displayed the appearance generally expected of a person under the age of 21 is not supported by substantial evidence.

DISCUSSION

Appellants contend that the ALJ's finding that the decoy displayed the appearance generally expected of a person under the age of 21 is not supported by

substantial evidence—in violation of rules 141(b)(2)² and 141(a). (AOB at pp. 5-6.)

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.

This rule provides an affirmative defense, and the burden of proof lies with appellants.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellants maintain that the decoy's mature physical appearance undermines a finding that her appearance complied with rule 141(b)(2). They argue:

Exhibit 3 is a picture of how Owen looked during the decoy sting operation. It accurately depicts Owen's appearance under the circumstances presented to the clerk at the time of the sale. The picture of Owen actually in the premises and in the company of the clerk depicts a grown and mature woman who carries more weight than the typical 18-year-old. She appears to be wearing heavy eye make-up with carefully groomed and arched eyebrows. Her hair is pulled make [sic] in a severe and neat manner. Her clothes are not at all trendy or what would normally be expected of a young woman. A flannel shirt over a black tee-shirt does not reflect youthful taste but is more in line with something a person who had been in the work force a significant number of years would wear. Her figure reflects a woman approaching thirty who has borne one of [sic] two healthy children. . . .

(AOB at pp. 5-6.) At the administrative hearing appellants also argued that the decoy's experience contributed to her mature appearance.

Rule 141(a) provides:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

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.

Appellants maintain that the facts in this case indicate unfairness in that the decoy appeared older than her true age of 18 because of her stature, manner of dress, and experience. (AOB at p. 5.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] 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. [Citations.] 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 Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

When findings are attacked as being unsupported by the evidence, the power of this Board begins and ends with an inquiry as to whether there is substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more competing inferences of equal persuasion can be reasonably deduced from the facts, the Board is without power to substitute its deductions for those of the Department—all conflicts in the evidence must be resolved in favor of the Department's decision. (*Kirby v. Alcoholic Bev. Control Appeals Bd. (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]; Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106 [28 Cal.Rptr.74].*) Therefore the issue of substantial evidence, when raised by an appellant, leads to an examination by the Appeals Board to determine, in light of the

whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. The Appeals Board cannot disregard or overturn a finding of fact by the Department merely because a contrary finding would be equally or more reasonable. (Cal. Const. Art. XX, § 22; Bus. & Prof. Code § 23084; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113]; *Harris, supra*, at 114.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the ALJ's findings on the issue of whether there was compliance with rule 141(b)(2). The ALJ made the following findings of fact regarding the decoy's appearance and demeanor:

5. Owen appeared and testified at the hearing. On April 6, 2016, she was 5'9" tall and weighted 180 pounds. She wore ripped blue jeans, a black shirt with a flannel shirt over it, and black sandals. She wore a ring on the ring finger of her right hand. Her hair was straight, parted in the middle, and came approximately halfway down her back. While inside the Licensed Premises, her hair was partially pulled back into a pony tail. She had on mascara and nail polish. (Exhibits 3-5.) Her appearance at the hearing was the same except that her hair was a little shorter.

¶ . . . ¶

10. Owen appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in the Licensed Premises on February [sic] 6, 2016, Owen displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk.

(Findings of Fact, ¶¶ 5-10.) Based on these findings, the ALJ addressed appellants' rule 141(a) and 141(b)(2) arguments:

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(a)^[m.1] and 141(b)(2) and, therefore, the accusation should be dismissed pursuant to rule 141(c).

With respect to rule 141(b)(2), the Respondents argued that Owen's experience—she had visited four locations before this one—and her physical appearance gave her the appearance of a person over the age of 21. This argument is rejected. Owen's experience was minimal and there was no evidence that it had any impact upon her behavior or appearance. Since the clerk did not testify, there is no evidence what, if any, impact it may have had upon him. Additionally, there was nothing unusual or particularly mature about Owen's appearance; rather, her appearance was consistent with that of a typical 18 year old. Taking into account **all** of the evidence presented at the hearing,^[m.] Owen's appearance was that generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

With respect to rule 141(a), the Respondents argued that it was unfair to use Owen as a decoy because she did not have the appropriate appearance. This appears to be a restatement of the Respondents' rule 141(b)(2) argument. As noted in the last paragraph, Owen had the appearance generally expected of a person under the age of 21. There is nothing unfair about using a decoy who appears her actual age.

(Conclusions of Law, ¶ 5.)

The Board has repeatedly declined to substitute its judgment for that of the ALJ on this particular question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule. (See, e.g., *7-Eleven/NRG Convenience Stores* (2015) AB-9477; *7-Eleven Inc./Lobana* (2012) AB-9164.) This Board has noted that:

[a]n ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJs are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751, at pp. 6-7.) Notably, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." In Finding of Fact paragraph 10, and Conclusions of Law paragraph 5, the ALJ found that the decoy met this standard.

Appellants have presented no *evidence* that the decoy's experience *actually resulted* in her displaying an appearance of a person 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot know what went through his mind in the course of the transaction, but we do know that he requested and was furnished the decoy's identification (a driver's license showing her date of birth and bearing a prominent red stripe stating "AGE 21 in 2018") yet he made the sale anyway. Rather, appellants rely on a difference of opinion — theirs versus that of the ALJ — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, this argument must fail.

We have reviewed the entire record and agree with the ALJ's determination that there was compliance with rule 141(b)(2). As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to observe the decoy as she testifies and to make the determination whether the decoy's appearance met the requirement of rule 141 that she possess 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.

The evidence presented at the hearing, including the presence of the decoy herself, clearly provided substantial evidence for finding that the decoy's appearance complied with the requirements of rule 141(b)(2). We see no flaw in the ALJ's findings or determinations. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This we cannot do.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
JUAN PEDRO GAFFNEY RIVERA, 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.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

7-ELEVEN, INC & KAMALL, INC
7-ELEVEN #2368-32376B
9600 BRIMHALL ROAD
BAKERSFIELD, CA 93312

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

BAKERSFIELD DISTRICT OFFICE

File: 20-564656

Reg: 16084408

CERTIFICATE OF DECISION

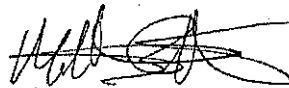
It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on January 3, 2017. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

Sacramento, California

Dated: January 12, 2017



Matthew D. Botting
General Counsel

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Alcoholic Beverage Control
Office of Legal Services

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven Inc. & Kamall, Inc.
dba 7-Eleven #2368-32376B
9600 Brimhall Rd.
Bakersfield, California 93312

Respondents

Off-Sale Beer and Wine License

} File: 20-564656
}
} Reg.: 16084408
}
} License Type: 20
}
} Word Count: 8,500
}
} Reporter:
} Cameron Hop
} Kennedy Court Reporters
}
} **PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Bakersfield, California, on October 5, 2016.

Jonathan V. Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Saranya Kalai, attorney-at-law, represented respondents 7-Eleven Inc. and Kamall, Inc.

The Department seeks to discipline the Respondents' license on the grounds that, on or about April 6, 2016, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Alyssa Owen, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on October 5, 2016.

FINDINGS OF FACT

1. The Department filed the accusation on June 28, 2016.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 20, off-sale beer and wine license to 7-Eleven Inc., Veena Kamboj, and Shashi Kant Kamboj for the above-described location on July 28, 1998 (the Licensed Premises). On January 20, 2016, the Kambojs incorporated their interest into Kamall, Inc.
3. There is no record of prior departmental discipline against the Respondents' license.
4. Alyssa Owen was born on August 6, 1997. She served as a minor decoy during an operation conducted by the Bakersfield Police Department on April 6, 2016. On that date she was 18 years old.
5. Owen appeared and testified at the hearing. On April 6, 2016, she was 5'9" tall and weighed 180 pounds. She wore ripped blue jeans, a black shirt with a flannel shirt over it, and black sandals. She wore a ring on the ring finger of her right hand. Her hair was straight, parted in the middle, and came approximately halfway down her back. While inside the Licensed Premises, her hair was partially pulled back into a pony tail. She had on mascara and nail polish. (Exhibits 3-5.) Her appearance at the hearing was the same except that her hair was a little shorter.
6. On April 6, 2016, Owen entered the Licensed Premises. Ofcr. Alex Paiz entered shortly after her. Owen walked to the coolers and selected a tall can of Bud Light beer. She took the beer to the counter and set it down. The clerk scanned the beer and asked to see her ID. She handed her California driver license (exhibit 2) to him. He looked at it for a few seconds, then handed it back. The clerk told her the price of the beer, which she paid. He gave her some change and bagged the beer, after which Owen exited. Ofcr. Paiz made a small purchase, then exited as well.
7. Sometime between April 6, 2016 and the hearing, Owen lost her California driver license. Exhibit 2 is a copy of that license. Owen identified it on the stand as a true and correct copy of the original license (with the driver license number and her home address redacted).
8. Outside, Owen met up with various officers and gave them the beer and the change. Some of the officers entered the Licensed Premises and contacted the clerk. Owen re-entered a short time later. One of the officers asked Owen if this clerk was the person who sold her the beer. She pointed to him and said, "Yes." They were approximately three feet apart at the time. A photo of the two of them was taken (exhibit 3), after which Owen exited.
9. Owen learned of the decoy program through one of her friends, whose father was a police officer. April 6, 2016 was her first time acting as a decoy. She visited five locations that day, of which the Licensed Premises was one of the last.

10. Owen appeared her age at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in the Licensed Premises on February 6, 2016, Owen displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk.

11. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on April 6, 2016, the Respondents' clerk, inside the Licensed Premises, sold an alcoholic beverage to Alyssa Owen, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(a)² and 141(b)(2) and, therefore, the accusation should be dismissed pursuant to rule 141(c). With respect to rule 141(b)(2), the Respondents argued that Owen's experience—she had visited four locations before this one—and her physical appearance gave her the appearance of a person over the age of 21. This argument is rejected. Owen's experience was minimal and there was no evidence that it had any impact upon her behavior or appearance. Since the clerk did not testify, there is no evidence what, if any, impact it may have had upon him. Additionally, there was

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

nothing unusual or particularly mature about Owen's appearance; rather, her appearance was consistent with that of a typical 18 year old. Taking into account *all* of the evidence presented at the hearing,³ Owen's appearance was that generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

With respect to rule 141(a), the Respondents argued that it was unfair to use Owen as a decoy because she did not have the appropriate appearance. This appears to be a restatement of the Respondents' rule 141(b)(2) argument. As noted in the last paragraph, Owen had the appearance generally expected of a person under the age of 21. There is nothing unfair about using a decoy who appears her actual age.

6. During closing arguments, the Respondents argued that Owen did not recall some details and was testifying from the report. They also noted that, since the actual driver license shown to the clerk was not available at the hearing, the only information available about the driver license was Owen's testimony that exhibit 2 was accurate. In short, the Respondents argued that Owen was not a credible witness. This argument is rejected. Owen testified credibly throughout the hearing and had a clear memory of the incident. She testified that she had reviewed the report before testifying and that it had refreshed her memory, but denied testifying from the report. Owen's testimony identifying a copy of her own driver license is sufficient to establish the accuracy thereof. In short, the Respondents' argument is without merit.

PENALTY

The Department requested that the Respondents' license be suspended for a period of 15 days. The Respondents argued that a 5 day, all stayed suspension was appropriate given their lengthy discipline-free operating history. The Respondents are correct—18 years of discipline-free operation warrants significant mitigation. The penalty recommended herein complies with rule 144.

ORDER

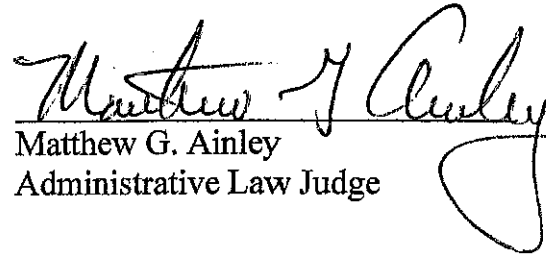
The Respondents' off-sale beer and wine license is hereby suspended for a period of 5 days, with execution of all 5 days of the suspension stayed, upon the condition that no subsequent final determination be made, after hearing or upon stipulation and waiver, that cause for disciplinary action occurred within one year from the effective date of this decision; that should such determination be made, the Director of the Department of Alcoholic Beverage Control may, in his or her discretion and without further hearing,

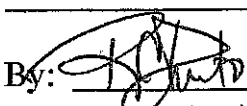
³ Owen's apparent age was determined based on all aspects of her appearance, training, and experience presented by both sides at the hearing. The important factors are specifically enumerated; some of the minor ones are not. A laundry list of minutia would not be helpful to the parties, the Department, or the Appeals Board since it would obscure the factors which actually affected her appearance.

7-Eleven Inc. & Kamall, Inc.
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vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: November 3, 2016


Matthew G. Ainley
Administrative Law Judge

| |
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| <input checked="" type="checkbox"/> Adopt |
| <input type="checkbox"/> Non-Adopt: _____ |
| By:  _____ |
| Date: <u>1/3/17</u> _____ |