

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

**AB-9655**

File: 20-413825; Reg: 16084755

AMOUNA, INC.,  
dba American Gas Company  
24062 Lyons Avenue, Santa Clarita, CA 91321-2446,  
Appellant/Licensee

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:** *Appellant:* Ralph Barat Saltsman, of Solomon, Saltsman & Jamieson, as counsel for Amouna, Inc.,

*Respondent:* Jennifer M. Casey, as counsel for Department of Alcoholic Beverage Control.

**OPINION**

Amouna, Inc., doing business as American Gas Company, appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> suspending its license for 10 days (with all 10 days conditionally stayed for a period of one year, provided no further cause for discipline arises during that time) because its clerk sold an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

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<sup>1</sup>The decision of the Department, dated May 22, 2017, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 16, 2004. On September 23, 2016, the Department filed an accusation charging that appellant's clerk, Jacob Madrid (the clerk), sold an alcoholic beverage to 17-year-old Ariana G. (the decoy) on July 30, 2016. Although not noted in the accusation, Ariana was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on February 8, 2017, documentary evidence was received and testimony concerning the sale was presented by the decoy, as well as by Department Agents David Duran and Charlotte Clark. Appellant presented no witnesses.

Testimony established that on July 30, 2016, Agent Duran entered the licensed premises, followed a short time later by the decoy. The decoy went to the coolers where she selected a can of Bud Light beer, then went to the register and set it down. The clerk was on the phone but he asked for her identification. The decoy handed him her California identification card which contained her correct date of birth — showing her to be 17 years of age — as well as a blue stripe indicating "AGE 18 IN 2017" and a red stripe indicating "AGE 21 IN 2020." (Exh. 5.) The clerk looked at the ID and completed the sale without asking any age-related questions. The decoy exited the store.

The decoy joined Department agents at their vehicle and they were joined by Agent Duran. Agents Duran and Clark re-entered the premises with the decoy. The agents contacted the clerk and explained the violation. The clerk was asked to step out from behind the register and the decoy was asked who sold her the beer. She pointed at the clerk. The two of them were facing each other at the time. A photo of the clerk

and decoy together was taken (exh. 6) and the clerk was issued a citation.

Following the hearing, on March 10, 2017, the administrative law judge (ALJ) submitted a proposed decision, sustaining the accusation and suspending the license for a period of 10 days — with all 10 days stayed for one year, provided no further cause for discipline arises during that time. Thereafter, on March 22, 2017, the Department's Administrative Hearing Office sent a letter from its Chief ALJ to both appellant and Department counsel, inviting the submission of comments on the proposed decision and stating that the proposed decision and any comments submitted would be submitted to the Director of ABC in 14 days.

Appellant 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 May 1, 2017, the Department adopted the proposed decision in its entirety, and on May 22, 2017, the Department issued its Certificate of Decision.

Appellant then filed a timely appeal contending the ALJ failed to proceed in a manner required by law when he disregarded witness testimony that conflicted with his findings.

#### DISCUSSION

Appellant contends the ALJ failed to proceed in a manner required by law when he disregarded witness testimony that conflicted with his findings, and improperly found

that the face-to-face identification of the clerk complied with rule 141(b)(5).<sup>2</sup> Appellant maintains the decoy's testimony establishes that the clerk was not looking at her when he was being identified. (AOB at pp. 4-8.)

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

This rule provides an affirmative defense. The burden is, therefore, on appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) The rule requires "strict adherence." (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the clerk in that case].) The plain language of the rule in no way forbids the officers to first make contact with the suspected seller.

In *Chun* (1999) AB-7287, this Board made the following observation about the purpose of face-to-face identifications:

The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where, as here, an officer initiates contact with the clerk

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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.

following the sale:

As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven, Inc./Morales* (2014) AB-9312; *7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Keller)* (2003) 109 Cal.App.4th 1687, 1697 [3 Cal.Rptr.3d 339] [finding that the rule leaves the location of the identification to the discretion of the peace officer].)

More recently, the court found rule 41(b)(5) was not violated when:

the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (CVS)* (2017) 18 Cal.App.5th 541, 547 [226 Cal.Rptr.3d 527, 531].) The court explained that the exact moment of the identification could not be severed from the entire identification procedure, which included the decoy pointing out the clerk to the police, the decoy accompanying the police officer to the counter, the officer informing the clerk she had sold beer to the minor at his side, and the clerk and decoy being photographed together. (*Id.* at p. 532.) The court said. "The clerk in these circumstances certainly

knew or reasonably ought to have known that she was being identified" because of the totality of the circumstances. (*Ibid.*)

The ALJ made the following findings on the face-to-face identification in this case:

9. Agent Duran re-entered the Licensed Premises accompanied by Agent Clark. They contacted the clerk, identified themselves, and explained the violation. Agent Duran asked Madrid to step out from behind the counter, which he did. Agent Duran asked Ariana to identify the person who sold her the beer. She pointed to Madrid. Ariana and Madrid were facing each other at the time and Madrid was not otherwise engaged. A photo of the two of them was taken (exhibit 6), after which Madrid was cited.

(Finding of Fact, ¶ 9.) Based on these findings, the ALJ reached the following conclusions:

5. All three witnesses testified credibly. Ariana, however, was less certain of some details than Agent David Duran and Agent Charlotte Clark were. Accordingly, to the extent Ariana's testimony differs from that of the two agents, the agents' testimony is relied upon.

6. ¶ . ¶ .

Finally, the Respondent argued that the face-to-face identificaiton failed to comply with rule 141(b)(5) because the agents were talking to Madrid during the identification. This argument is rejected. Although the agents talked to Madrid during the entire identification and citation process, the testimony of the agents clearly established that they were not talking to him at the time Ariana identified him. (Finding of Fact ¶ .)

(Conclusions of Law, ¶¶ 5-6.)

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].)

Furthermore, the agents' testimony supports a finding that a proper face-to-face identification occurred, and it is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimor v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those credibility determinations in the absence of a clear showing of an abuse of discretion. The ALJ here found the agents' testimony to be credible, as reflected in the findings and conclusions in the decision and he addressed the somewhat less certain testimony of the decoy. The Board may not re-weigh the evidence to reach a different conclusion, nor may it make its own credibility determinations.

The Board is prohibited from reweighing the evidence or exercising its independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (*Masani, supra.*) Looking at the entire identification procedure — including the agents informing the clerk he had sold beer to the minor, the decoy pointing out the clerk to the agents, and the clerk and decoy being photographed together — the clerk knew, or reasonably should have known, that he was being identified as the person who sold alcohol to a minor. As in CVS, the clerk here "had ample opportunity to observe the minor and to object to any perceived

misidentification." (*CVS, supra*, at p. 547.) The face-to-face identification in this matter fully complies with rule 141(b)(5).

ORDER

The decision of the Department is affirmed.<sup>3</sup>

BAXTER RICE, CHAIRMAN  
PETER J. RODDY, MEMBER  
JUAN PEDRO GAFFNEY RIVERA, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>3</sup>This 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:**

AMOUNA INC  
AMERICAN GAS COMPANY  
24062 LYONS AVE  
SANTA CLARITA, CA 91321-2446

OFF-SALE BEER AND WINE - LICENSE

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

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 May 1, 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: May 22, 2017



Matthew D. Botting  
General Counsel

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Alcoholic Beverage Control  
Office of Legal Services

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**ABC APPEALS BOARD**

VAN NUYS DISTRICT OFFICE  
*AB-9655*  
File: 20-413825

Reg: 16084755

**CERTIFICATE OF DECISION**

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

IN THE MATTER OF THE ACCUSATION AGAINST:

|  |  |  |
|--|--|--|
| Amouna, Inc.<br>dba American Gas Company<br>24062 Lyons Ave.<br>Santa Clarita, California 91321-2446 | {<br>}<br>{<br>}<br>{<br>}<br>{<br>}<br>{<br>} | File: 20-413825                                    |
| Respondent   |  | Reg.: 16084755                                     |
|  |  | License Type: 20                                   |
|  |  | Word Count: 16,000                                 |
| Off-Sale Beer and Wine License   |  | Reporter:<br>Barbara Small<br>California Reporting |

**PROPOSED DECISION**

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on February 8, 2017.

John P. Newton, Attorney, represented the Department of Alcoholic Beverage Control.

Saranya Kalai, attorney-at-law, represented respondent Amouna, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about July 30, 2016, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to Ariana G.,<sup>1</sup> an individual under the age of 21, in violation of Business and Professions Code section 25658(a).<sup>2</sup> (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 February 8, 2017.

**FINDINGS OF FACT**

1. The Department filed the accusation on September 23, 2016.

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<sup>1</sup> Because the minor in this case was also a juvenile (i.e., under the age of 18), only her first name and last initial were used during the hearing.

<sup>2</sup> 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 the Respondent for the above-described location on August 16, 2004 (the Licensed Premises).

3. The Respondent's license has been the subject of the following discipline:

| <u>Date Filed</u> | <u>Reg. No.</u> | <u>Violation</u>          | <u>Penalty</u> |
|-------------------|-----------------|---------------------------|----------------|
| 5/24/2007         | 07065801        | BP §§ 23804 &<br>25658(a) | 10-day susp.   |
| 9/19/2007         | 07066840        | BP §§ 23804 &<br>25658(a) | 25-day susp.   |

The foregoing disciplinary matters are final. (Exhibits 2-3.)

4. Ariana G. was born on June 9, 1999. She served as a minor decoy during an operation conducted by the Department on July 30, 2016. On that date she was 17 years old.

5. Ariana G. appeared and testified at the hearing. On July 30, 2016, she wore a black alien shirt and black pants. Her brown hair was parted near the top of her head and came down past her shoulders. She was between 5'5" and 5'6" tall and weighed 140 pounds. (Exhibits 4 & 6.) At the hearing her appearance was the same except that she had dyed her hair red.

6. On July 30, 2016, Agent David Duran entered the Licensed Premises. Ariana followed a short time later. Ariana went to the coolers and selected a can of Bud Light beer. She took the beer to <sup>the</sup> counter and set it down.

7. Although the clerk, Jacob Madrid, was on the phone, he asked to see Ariana's ID. Ariana handed her California identification card (exhibit 5) to Madrid, who looked at it. Madrid did not ask any age-related questions, nor did he inquire as to Ariana's date of birth. Madrid finished ringing up the sale and Ariana paid for the beer. Madrid gave her some change and bagged the beer, after which Ariana exited.

8. Ariana walked over to the vehicle in which some of the agents, including Agent Charlotte Clark, were located. Agent Duran exited the Licensed Premises and joined them.

9. Agent Duran re-entered the Licensed Premises accompanied by Agent Clark. They contacted the clerk, identified themselves, and explained the violation. Agent Duran asked Madrid to step out from behind the counter, which he did. Agent Duran asked Ariana to identify the person who sold her the beer. She pointed to Madrid. Ariana and Madrid were facing each other at the time and Madrid was not otherwise engaged. A photo of the two of them was taken (exhibit 6), after which Madrid was cited.

10. Ariana learned of the decoy program through her step-mother, Agent Clark. She has been a decoy more than once, but could not recall if July 30, 2106 was her first time acting as a decoy or not. Agent Clark explained the rules relating to decoy operations to her before the start of this operation. Ariana was nervous when she first started working as a decoy, but became more confident over time. She was "a little bit" confident while inside the Licensed Premises. On July 30, 2016, she visited 13 locations, three of which sold alcoholic beverages to her.

11. Ariana G. 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 July 30, 2016, Ariana displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Madrid.

12. 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 Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on July 30, 2016, the Respondent's clerk, Jacob Madrid, inside the Licensed Premises, sold an alcoholic beverage to Ariana G., a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11.)
5. All three witnesses testified credibly. Ariana, however, was less certain of some details than Agent David Duran and Agent Charlotte Clark were. Accordingly, to the

extent Ariana's testimony differs from that of the two agents, the agents' testimony is relied upon.

6. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2),<sup>3</sup> 141(b)(4), and 141(b)(5) and, therefore, the accusation should be dismissed pursuant to rule 141(c). All of these arguments are without merit.

First, with respect to rule 141(b)(2), the Respondent argued that Ariana was confident and the photo on her ID appeared to be that of someone older. This argument is rejected—Ariana's appearance was consistent with her actual age, 17. Her appearance in the photo on her ID does not change this. Moreover, the evidence established that she was only a “little bit” confident while inside the Licensed Premises. There is no evidence that a little bit of confidence had any effect upon her appearance, much less such a large effect that she suddenly appeared four years older. (Findings of Fact ¶¶ 10-11.)

Second, the Respondent argued that Ariana had been mis-trained and, therefore, believed that she could lie about her age. Failure to properly train is not a defense to a sale-to-minor violation, nor is it a defense under rule 141 in a case arising from a decoy operation. Since Madrid did not ask any age-related questions, it is sheer speculation to assume—as the Respondent has—that Ariana would have lied about her age. In any event, Agent Charlotte Clark's testimony makes clear that Ariana was properly trained (Findings of Fact ¶¶ 7 & 10.)

Finally, the Respondent argued that the face-to-face identification failed to comply with rule 141(b)(5) because the agents were talking to Madrid during the identification. This argument is rejected. Although the agents talked to Madrid during the entire identification and citation process, the testimony of the agents clearly established that they were not talking to him at the time Ariana identified him. (Finding of Fact ¶ 9.)

## PENALTY

The Department requested that the Respondent's license be suspended for 10 days, with all 10 days stayed given that its last violation was over eight years ago. The Respondent argued that this length of discipline-free operation warranted even more mitigation and recommended a 5-day suspension, with all 5 days stayed. The penalty recommended herein complies with rule 144.

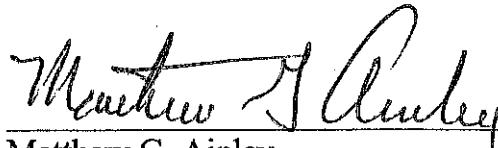
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<sup>3</sup> All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

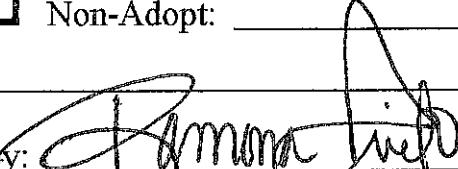
## ORDER

The Respondent's off-sale beer and wine license is hereby suspended for a period of 10 days, with execution of 10 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, vacate this stay order and reimpose the stayed penalty; and that should no such determination be made, the stay shall become permanent.

Dated: March 10, 2017

  
Matthew G. Ainley

Matthew G. Ainley  
Administrative Law Judge

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