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

**AB-9164**
File: 20-397260 Reg: 10072984

7-ELEVEN, INC. and MANINDER P.S. LOBANA, dba 7-Eleven #2133-16027
1840 Cochran Street, Simi Valley, CA 93065,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 2, 2012
Los Angeles, CA

**ISSUED FEBRUARY 29, 2012**

7-Eleven, Inc. and Maninder P.S. Lobana, doing business as 7-Eleven #2133-16027 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with all 10 days stayed, 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 7-Eleven, Inc. and Maninder P.S. Lobana, appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated April 6, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 10, 2003. On April 29, 2010, the Department filed an accusation against appellants charging that, on October 8, 2009, appellants' clerk, Sunia Hennadiage, sold an alcoholic beverage to 18-year-old Megan Harrison. Although not noted in the accusation, Harrison was working as a minor decoy for the Simi Valley Police Department at the time.

At the administrative hearing held on January 25, 2011, documentary evidence was received and testimony concerning the sale was presented by Harrison (the decoy), by Michael Foley, a Simi Valley police officer, and by the licensee, Maninder Lobana.

The Department's decision determined that the violation charged was proven and no defense to the charge was established.

Appellants then filed an appeal contending: (1) The decoy did not display the appearance required by rule 141(b)(2); (2) rule 141(a) was violated; and (3) the findings by the administrative law judge are not supported by substantial evidence. The first two issues will be discussed together.

DISCUSSION

I

Appellants contend that the decoy did not display the appearance required by rule 141(b)(2), which dictates: “[t]he 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.”

Rule 141(a) provides:

> (a) 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*. [Emphasis added.]

Appellants maintain that the facts in this case indicate unfairness in that the decoy appeared to be "mature," "matronly," and thus older than her true age of 18 because of her large stature and the fact that she wears a nose stud. (App. Br. at pp. 5-6.)

The administrative law judge (ALJ) made the following findings about the decoy's appearance in Findings of Fact, paragraphs 5 and 11:

> 5. Harrison appeared and testified at the hearing. While inside the Licensed Premises she wore dark pants, a tie-dyed shirt, and a gray sweatshirt. She had a small stud in the side of her nose. At the time she was 5'6" tall and weighed 155 pounds. At the hearing her height was the same, but she weighed 10 pounds less. She was not wearing any make-up at the hearing or while inside the Licensed Premises. (Exhibits 2-4 & B.)
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> 11. Harrison 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 front of Hennadiage at the Licensed Premises on October 8, 2009, Harrison displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Hennadiage.

The ALJ goes on to say in Conclusions of Law 5:

> 5. . . . With respect to rule 141(b)(2), the Respondents argued that Harrison was mature for her age based on her alleged "large stature." In this regard, the Respondents emphasized Exhibit 2 and the enlarged copy thereof, Exhibit B. This argument is rejected. The photo marked as Exhibits 2 and B is, unfortunately, not a good photo of Harrison. Exhibits 3 and 4 are more representative of her appearance, which is not unduly large. As set forth above, Harrison had the appearance generally expected of a person under the age of 21.

This Board has repeatedly declined to substitute its judgment for that of the ALJ on this 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 or that the wearing of a nose stud automatically equates to the appearance of maturity.

As we said in *O'Brien* (2001) AB-7751:

> An 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 ALJ's are reasonable and not arbitrary or capricious, we will uphold them.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as she testifies, and making the determination whether the decoy's appearance met the requirement of rule 141 that she possesses 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that she did not.

II

Appellants further contend that the ALJ's findings on the appearance of the decoy are not supported by substantial evidence.

When an appellant contends that the findings are not supported by the evidence, the standard of review is as follows:

> In examining the sufficiency of the evidence, all conflicts must be resolved in favor of the department, and all legitimate and reasonable inferences indulged in to uphold its findings if possible. When findings are attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more inferences can be reasonably deduced

> from the facts, the reviewing court is without power to substitute its deductions for those of the department. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 245, pp. 4236-4238.)

(*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815].)

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

Appellants argue that the administrative record is "devoid of evidence supporting . . . the Administrative Law Judge's conclusion." (App.Br. at p.6.) We believe, however, that a reasonable person would accept the evidence presented in this matter as substantial evidence, even though considered insufficient by appellants, for the conclusion that the decoy in this matter displayed the appearance which could generally

be expected of a person under the age of 21 under the circumstances presented to the clerk.

This Board has considered in prior decisions, assertions that substantial evidence did not support the ALJ's finding regarding the decoy's apparent age. In *Circle K Stores, Inc*. (2001) AB-7498, the Board said:

> Nor is the Board in a position to say that there was not substantial evidence to support this finding. The decoy himself provides the evidence of his appearance.

Similarly, in footnote 2 of *The Southland Corporation/Amir* (2001) AB-7464a, the Board responded to the argument by saying:

> We simply do not agree that an administrative law judge who must determine the apparent age of a decoy, and actually sees the decoy in person, lacks substantial evidence to make such a determination.

Rule 141(b)(2) requires an ALJ to make a subjective judgment, on the evidence presented, whether the decoy displayed to the seller of alcoholic beverages the appearance generally expected of a person under the age of 21. Where there is no evidence that the decoy's appearance changed substantially between the time of the sale and the hearing, the ALJ's observation of the decoy at the hearing provides sufficient evidence on which to base a finding. *(GMRI, INC*. (2004) AB-7336c.)

Appellant is asking this Board to reweigh the ALJ's factual determination. However, appellant's disagreement with that determination is not sufficient to show that there has been an abuse of discretion. Indulging, as we must, in all legitimate inferences in support of the Department's determination, it is clear that substantial evidence supports the Department's decision.

ORDER

The decision of the Department is affirmed.[2]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2]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.