

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

AB-9635

File: 21-411967; Reg: 16084421

SF SACRAMENTO, INC.,
dba SF Supermarket
4562 Mack Road, Sacramento, CA 95823,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: April 6, 2018
Sacramento, CA

Continued Closed Session Deliberation: May 3, 2018
Los Angeles, CA

ISSUED MAY 30, 2018

Appearances: *Appellant:* Ralph Barat Saltsman and Donna J. Hooper, of
Solomon, Saltsman & Jamieson, as counsel for appellant SF
Sacramento, Inc.

Respondent: Sean Klein, as counsel for Department of Alcoholic
Beverage Control.

OPINION

SF Sacramento, Inc., doing business as SF Supermarket, appeals from a
decision of the Department of Alcoholic Beverage Control¹ suspending its license for 15

¹The decision of the Department, dated January 11, 2017, is set forth in the
appendix.

days (with 10 days conditionally stayed for one year, provided no further cause for discipline arises during that time period) because its clerk sold an alcoholic beverage to a minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 20, 2004. There is no record of any prior disciplinary action against the license.

On June 29, 2016, the Department filed an accusation charging that appellant's clerk, Yuying Huang, sold an alcoholic beverage to 19-year-old Michael Reese on April 28, 2016. Although not noted in the accusation, Reese was working as a minor decoy in a joint operation conducted by the Sacramento Police Department (SPD) and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 19, 2016, documentary evidence was received, and testimony concerning the sale was presented by Reese (the decoy); by Yuying Huang (the clerk); by the store manager, Fi Ah Ro; and by SPD Officer Yul Alameda.

Testimony established that on April 28, 2016, the decoy entered the licensed premises and went to the coolers where he selected a 6-pack of Coronitas beer. He took the beer to the sales counter and set it down. The clerk scanned the beer and asked to see the decoy's identification. The decoy handed the clerk his California driver's license. The license had a portrait orientation, showed his correct date of birth—showing him to be 19 years of age—and contained a blue stripe indicating "AGE 18 IN 2015," as well as a red stripe indicating "AGE 21 IN 2018." (Exh. D-3.) The

clerk looked at the license, then completed the sale without asking any age-related questions. The decoy exited the premises.

After conferring with Officer Alameda and a Department agent, the decoy re-entered the premises with them. They approached the register and waited nearby until the clerk finished waiting on a customer—an elderly African-American woman. One of the officers communicated to another employee and to the store manager that they were conducting an investigation, and the clerk was told that the officers wished to speak to her. When she finished with her customer, the clerk came out from behind her register and came over to the officers. Officer Alameda identified himself and told the clerk that she had sold alcohol to a minor, gesturing towards the decoy as he did so. The decoy was asked to identify the person who sold him the beer. He gestured towards the clerk and said “she is the one who sold me the beer.” The group moved away from the cash register area, and a photograph was taken of the decoy and clerk together. (Exh. D-4.)

The clerk was issued a citation and read her Miranda rights. For the first time, she indicated to Officer Alameda that she did not speak English. All of the conversation up to this point—as well as instructions given to and followed by the clerk in the 5 to 8 minutes prior to this request—had been conducted in English without this concern being raised. During the administrative hearing, the clerk testified through a certified Cantonese interpreter as well as answering some questions all or in part in English. The clerk has lived in the United States for nearly 10 years, and has worked as a cashier at the premises for more than 2 years.

Following the hearing, on October 31, 2016, the administrative law judge (ALJ)

submitted a proposed decision, sustaining the accusation and suspending the license for a period of 15 days—with 10 days stayed for one year, provided no further cause for discipline arises during that time. Thereafter, on November 8, 2016, 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 January 3, 2017, the Department adopted the proposed decision in its entirety, and on January 11, 2017, the Department issued its Certificate of Decision.

Appellant then filed a timely appeal contending the ALJ disregarded credible evidence and assumed facts not in evidence when he found that the face-to-face identification of the clerk complied with rule 141(b)(5).²

DISCUSSION

Appellant contends the ALJ disregarded credible evidence and assumed facts not in evidence when he found that the face-to-face identification of the clerk complied

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.

with rule 141(b)(5). Appellant argues that the ALJ abused his discretion by disregarding video evidence presented by appellant which it claims contradicts the testimony of Department witnesses. (App.Op.Br. at pp. 3-7.) Appellant also contends the clerk was not made aware that she was being identified as the seller by the decoy because of a language barrier. (*Id.* at pp. 8-10.)

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 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:

11. Alameda identified himself and he was displaying his badge as Huang walked up. He explained that Huang had sold beer to a minor. As he did this, Alameda gestured towards Reese while Huang was looking at him. At this point, Huang and Reese were directly facing each other and were no more than three feet apart. Huang made a gesture as if checking an identification she was holding during this interaction. (Exhibit L-2)

12. During the investigation and while Huang was present, Reese was asked to identify the person who sold him the beer. Reese gestured at Huang and said that “she is the one who sold me the beer.” The latter part of the investigation was moved to an area away from the register where the sale was made. Before moving from the register area, Alameda had Huang retrieve what appeared to be her purse.

13. Reese accompanied Huang and the officers to the area away from the registers. While at this location, Reese posed for a picture standing directly next to Huang while holding up his license and the 6-pack he had purchased from Huang. Alameda directed questions and instructions to Huang during the investigation in English and Huang either responded to the questions or followed the instructions given. Huang was issued a citation and read her Miranda rights. For the first time, she indicated to Alameda that she did not speak English and asked for a translator. Prior to this, Alameda had interacted with Huang for 5-8 minutes without this concern being raised by Huang.

(Finding of Fact, ¶¶ 11-13.) Based on these findings, the ALJ reached the following conclusions:

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that the circumstances of the face to face identification did not comply with rule 141(b)(5). The Respondent relied on a short, soundless video of the register area to assert that the Decoy did not make a compliant face to face identification. The Respondent also asserted, though testimony by Huang and a co-worker, that a language barrier prevented the clerk from understanding what was occurring.

[¶ . . . ¶]

9. Here, Reese testified that he initially pointed out Huang as they were walking up to her register and that he later pointed out Huang as the seller in her presence. This alone would have been insufficient since Huang was interacting with customers at this time. However, Reese continued to interact with Huang during the investigation including standing both in front and next to her after she was put on notice of the investigation. Alameda had Huang stand directly facing Reese (who was still holding the 6-pack) when he explained why the officers were talking with her. It is unclear if Reese is saying anything as they are standing facing each other since there was no audio to the video introduced by the Respondent. Huang, at this point, gestures as if reading an identification which strongly inferred that she understood what was happening and the implications of her interaction with Reese. There was an extensive interaction with the decoy and officers that took place, off camera, subsequent to the video captured at the register and prior to the issuance of the citation. This interaction included having Huang photographed next to Reese while Reese was holding up his identification and the 6-pack. Given this, there was a sufficient evidence of compliance with the requirements of rule 141(b)(5). (Findings of Fact ¶ 12-12.)

10. There is no credible evidence supporting the assertion by the Respondent that a language barrier was a factor regarding compliance with the requirements of rule 141(b)(5). Reese interacted with Huang in English, as did the officers, until she was read Miranda warnings. Huang is observed extensively interacting with an African-American appearing customer prior to the purchase by Reese. It can be reasonably inferred that these interactions did not occur in Cantonese. Huang appears to

understand English initially upon contacting the officers when she gestures as if reading an identification moments into her interaction with Alameda. Alameda testified credibly that Huang appeared to understand questions and instructions. Huang is seen appearing to respond to an English language instruction to retrieve her identification before leaving the register. Huang repeatedly used English phrases even when speaking through the Cantonese interpreter. She has lived in the United States [sic.] for almost 10 years and has worked regularly as a cashier for the last two years. (Findings of Fact ¶¶ 12-13.) Given the totality of this evidence, Huang's assertion that she did not understand the officers and was unable to comprehend what was going on is found not credible. Given this, it is unnecessary to weigh the issue as to whether the officers had a duty, pursuant to rule 141(b)(5), to ensure that the alleged seller understood the face to face identification.

(Conclusions of Law, ¶¶ 5-10.)

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].)

Appellant maintains the Department cobbled together portions of testimony and pieces of the video evidence to establish that a proper face-to-face identification of the clerk took place. It contends that the video actually contradicts portions of the decoy's

testimony. (App.Op.Br. at p. 5.)

Prior to the initial Appeals Board hearing, only an unreadable copy of Exhibit L-2 was available, so the Board had not seen the video evidence at the time of the April hearing. The matter was put over for continued deliberation during closed session after the May hearing, and the Department supplied a readable copy of Exhibit L-2.

We have viewed the video evidence several times, and see no contradiction between the ALJ's findings and the limited video evidence—which shows only a small portion of the face-to-face identification procedure, with the majority of the procedure taking place off-camera. Furthermore, the decoy's 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. (*Lorimore 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 decoy's testimony to be credible, as reflected in the findings and conclusions in the decision, and the Board may not reweigh the evidence to reach a contrary conclusion.

Appellant also contends the ALJ erroneously failed to consider evidence that supported the existence of a language barrier, and that the clerk did not understand what was happening. (App.Op.Br. at pp. 8-9.) It maintains that the fact that the clerk and officer were using hand gestures as well as language to communicate, indicates that a language barrier existed.

The ALJ admittedly erred, in Conclusions of Law, ¶ 10, when he said, "Huang is

observed extensively interacting with an African-American appearing customer prior to the purchase by Reese.” He appears to have gotten the sequence of events out of order, but we do not believe this rises to the level of reversible error. The conversation which demonstrated the clerk’s ability to speak English actually occurred while the decoy and officers were waiting for the clerk to finish up with a customer before they confronted her with the fact of the sale, as properly described in Findings of Fact, ¶ 10:

10. Reese and the officers positioned themselves directly next to the bagging area where Huang was working. (Exhibit L-2) Huang was in the process of ringing up another customer when Reese and the officers positioned themselves next to her register area. One of the officers communicated to another employee and the manager that they were conducting an investigation regarding the incident. This led the employee to pass the information to Huang that the officers wanted to speak with her. Huang glanced at Reese and the officers after she was told this. The other employee also turned off the light to Huang’s register so that the customers knew the lane was closed. After she finished interacting with the last customer, an elderly woman who appeared to be African-American, Huang stepped out from her register area and walked up to the officers and Reese. (Exhibit L-2)

In other words, the clerk held a conversation at the cash register with an African-American women. And, as the ALJ observes, “It can be reasonably inferred that these interactions did not occur in Cantonese.” (Concl. of Law, ¶ 10.) Just because the ALJ refers to a mistaken point in time at which the conversation occurred does not erase the fact that a conversation took place between this clerk and another individual which was obviously in English. The language barrier defense must fail.

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 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—the clerk knew, or reasonably should have known, that she 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.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.