

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

AB-8979

File: 47-360820 Reg: 08068857

TAHOE JOE'S, INC., dba Tahoe Joe's 823
9000 Ming Avenue, Suite P, Bakersfield, CA 93311,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: December 2, 2010
Los Angeles, CA

ISSUED FEBRUARY 3, 2011

Tahoe Joe's, Inc., doing business as Tahoe Joe's 823 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its bartender selling alcoholic beverages to two police minor decoys, violations of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Tahoe Joe's, Inc., appearing through its counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated December 3, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on December 27, 1999. On May 29, 2008, the Department filed an accusation charging that appellant's bartender sold alcoholic beverages to 17-year-old James Tyler Moore and 19-year-old Karena De La Garza on April 12, 2008. Although not noted in the accusation, Moore and De La Garza were working as minor decoys for the Bakersfield Police Department at the time.

At the administrative hearing held on September 16, 2008, documentary evidence was received and testimony concerning the sale was presented by Moore and De La Garza (collectively, the decoys) and by Dennis Murphy, a Bakersfield Police officer. Wendi Dodson, appellant's manager, testified about procedures and employee training with regard to alcoholic beverage sales at the licensed premises.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant filed an appeal contending: (1) the decoy operation did not comply with the fairness standard of rule 141(a)², and (2) the penalty is excessive.

DISCUSSION

I

Rule 141(a) provides that decoy operations shall be conducted "in a fashion that promotes fairness." Appellant contends that the decoy operation was not fair because the decoys looked old enough to legally purchase alcoholic beverages.³ De La Garza

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.

³Inherent in this contention is the allegation that the decoys violated rule 141(b)(2), which requires a decoy to display the appearance that could generally be expected of a person under the age of 21.

must have appeared older because she wore heels (1½"-2" high), earrings, a wristwatch, and makeup; her eyebrows were shaped; and she was comfortable during the decoy operation. Moore "would lead a reasonable person to believe that he is of age" (App. Br. at p. 5) because he was 5'11" tall, weighed about 190 pounds, and had training as a Police Explorer. Most important, according to appellant, is that the two decoys were able to purchase alcoholic beverages in 60 percent (3 out of 5) of the premises they visited during the decoy operation. Appellant asserts that a "success rate" of over 50 percent means that the decoy operation "most likely" was not conducted in a manner that promoted fairness.

In Findings of Fact 14 and 16, the ALJ specifically found that both Moore and De La Garza displayed the appearance that could generally be expected of persons under the age of 21. The ALJ responded to appellant's argument about the decoys' appearance in Conclusion of Law 4:

Respondent argued there was a failure to comply with sections 141(a), 141(b)(2) and/or (b)(5) of Chapter 1, title 4, California Code of Regulations. [Rule 141.] Therefore, Rule 141(c) applies and the Accusation must be dismissed. Respondent argued that neither decoy Karena De La Garza nor decoy Tyler Moore complied with the apparent age requirement contained in Rule 141(b)(2). De La Garza did not fit within the Rule because she wore makeup that was not in compliance with instructions given her and she was comfortable serving as a decoy. Moore violated the standard because he had been a decoy for a long time, was tall and heavy and was confident in his role. Finally, the two decoys together were sold alcoholic beverages at 60% of the 5 stores visited that night. That is a strong indication that Moore and De La Garza violated the apparent age requirement. The appearance of the decoys was addressed above in Findings of Fact, paragraphs 6, 7 and 13-16. Nothing about their appearance in front of bartender Norman that night violated the Rule. While a 60% purchase rate is high, it is not dispositive by itself. The sample size is awfully small to say definitively the Rule was violated when their appearance in person at the hearing and in the Exhibit 2, A 1 and A 2 photographs say they had the appropriate appearance. There was no violation of Rule 141(b)(2).

The ALJ considered the same attributes appellant relies on and concluded that the decoys' appearance did not violate rule 141(b)(2). Appellant has provided no reason that we should reject the ALJ's finding in favor of appellant's. 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 decoys as they testify. Under these circumstances, the Board will not second-guess the factual determination by the ALJ concerning the appearance of the decoys.

II

Appellant contends the Department's imposition of a 10-day suspension failed to give proper consideration to all the mitigation evidence presented. The "proper" penalty, according to appellant, would have stayed all the days of the suspension.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Appellant's disagreement with the penalty imposed does not mean the Department abused its discretion. Whether or not all the mitigating factors were given proper weight is not the concern of the Appeals Board; the Board's only concern is that the penalty imposed is not clearly unreasonable. It is not.

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, 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.