

**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

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

Professions Code section 25658, subdivision (a).

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.

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.

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.

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)^[fn.] 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,^[fn.] 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

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The following pages have not been remediated to be accessible for the disabled:

- Certificate of Decision (File # 20-564656 on January 12, 2017)
- Proposed Decision (File # 20-564656 on November 3, 2016)
- Signature to Adopt (File # 20-564656 on January 3, 2017)

You have two options.

- 1) You can display the unremediated document right now by clicking the request [link](#).
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