

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

AB-9776

File: 47-567036; Reg: 18086983

SADDLE RANCH VALENCIA, LLC,
dba Saddle Ranch Chop House
24201 Valencia Boulevard, Suite 102
Santa Clarita, CA 91355-1862,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 3, 2019
Los Angeles, CA

ISSUED OCTOBER 15, 2019

Appearances: *Appellant:* Ralph Barat Saltsman, of Solomon, Saltsman & Jamieson, as counsel for Saddle Ranch Valencia, LLC,

 Respondent: Joseph J. Scoleri III, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Saddle Ranch Valencia, LLC, doing business as Saddle Ranch Chop House, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 15 days because its bartender sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated December 4, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on June 29, 2016. There is no record of departmental discipline against the license.

On May 29, 2018, the Department filed a single-count accusation charging that appellant's bartender, Ashley Mertes (the bartender), sold an alcoholic beverage to 17-year-old Arlene E. (the decoy) on February 8, 2018. Although not noted in the accusation, the decoy was working for the Los Angeles County Sheriff's Department at the time.

At the administrative hearing held on October 2, 2018, documentary evidence was received, and testimony concerning the sale was presented by the decoy and Department Agent Danny Vergara.² Appellant presented no witnesses.

Testimony established that on February 8, 2018, Agent Vergara and Deputy Ogle entered the licensed premises and sat at a cocktail table. Shortly thereafter, the decoy entered and sat at the bar counter. The bartender asked her what she wanted and she ordered a Bud Light beer.

The bartender asked for her identification and the decoy handed her California identification card to the bartender. The ID card had a portrait orientation, contained her correct date of birth indicating that she was 17 years old, and contained a red stripe indicating "AGE 21 IN 2022." (Exh. 2.) The bartender looked at the ID for a few seconds, then handed it back to the decoy.

²We use the spelling used by the ALJ in the decision. The agent is referred to as Danny Bergara in the reporter's transcript, but past experience tells us that Vergara is the correct spelling.

The bartender asked if the decoy wanted to open a tab and the decoy said she did. The bartender asked for a credit card, but the decoy told her she only had cash. The bartender said that was okay, and served the decoy a Bud Light beer from one of the taps.

Agent Vergara contacted a manager and asked that someone cover for the bartender. He then contacted the bartender and escorted her to the patio. He called the decoy over and asked her how old she was. She said she was 17. He then asked her who sold her the beer and she identified the bartender from a distance of about three feet. A photo of the decoy and bartender was taken (exh. 3) and the bartender was cited.

The administrative law judge (ALJ) submitted his proposed decision on October 11, 2018, sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision in its entirety and issued a Certificate of Decision on December 4, 2018.

Appellant then filed a timely appeal contending the ALJ's finding that the decoy's appearance complied with rule 141(b)(2)³ is not supported by substantial evidence.

DISCUSSION

Appellant contends that the ALJ's decision is not supported by substantial evidence because the decoy's appearance was not one which could generally be expected of an individual under 21 years of age. (AOB at pp. 5-7.)

³References 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(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 appellant.

(Chevron Stations, Inc. (2015) AB-9445; 7-Eleven, Inc./Lo (2006) AB-8384.)

Appellant maintains the sheriff's department used a decoy in this case that failed to comply with the standards set forth in rule 141(b)(2). It argues that the decoy's physical appearance — which it states included dark circles and wrinkles around her eyes, gel extensions on her nails, and a ring on her left hand which made her look like a married woman — violated this rule, as did the decoy's experience as a police Explorer and as a police decoy, giving her a confident and practiced demeanor which was not the appearance which could generally be expected of an individual under 21 years of age.

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, 112 [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 regarding the decoy's appearance and experience:

4. Arlene E. was born on January 3, 2001. She served as a minor decoy during an operation conducted by the Los Angeles County Sheriff's Department on February 8, 2018. On that date she was 17 years old.

5. Arlene E. appeared and testified at the hearing. On February 8, 2018, she was 5' 5" tall and weighed 135 pounds. She wore a black t-shirt, jeans, and tennis shoes. Her hair was in a bun. She was not wearing any make-up other than eyebrow powder. She wore a ring on the ring finger of her left hand and her fingernails had gel extensions. (Exhibits 3-5.) Her appearance at the hearing was the same, except that her hair was down and she wore some mascara.

¶¶ ...¶¶

10. Arlene learned of the decoy program through her participation in the Explorers with the San Fernando Police Department. She had been an Explorer for approximately three years as of February 8, 2018 and had participated in at least 10 decoy and shoulder tap operations. Arlene visited four or five locations during the February 8, 2018 decoy operation. The Licensed Premises was the only one which sold an alcoholic beverage to her. She was not nervous while inside the Licensed Premises.

11. Arlene 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 8, 2018, Arlene displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Mertes.

(Findings of Fact, ¶¶ 4-11.) Based on these findings, the ALJ addressed appellant's

rule 141(b)(2) argument:

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that Arlene was an experienced decoy who was able to discuss opening a tab and was not nervous. She wore a ring on the ring finger of her left hand—suggesting that she was married—and had gel extensions. This argument is rejected. First, the ring did not resemble a wedding ring. Second, the legal age to get married without a parent's consent is 18 years old, not 21. Third, Mertes did not testify, so

there is no evidence that the ring had any effect on her evaluation of Arlene's appearance. Fourth, it is common for teenage girls to have their nails done—nothing about Arlene's nails suggested she was over the age of 21. In short, Arlene's appearance was that of a teenager and, therefore, was consistent with that generally expected of a person under the age of 21. (Finding of Fact ¶ 11.)

(Conclusions of Law, ¶ 5.) We concur with the ALJ's assessment.

As this Board has said many times, we are reluctant to suggest, without more, that a minor decoy automatically violates the rule based on various physical characteristics. (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." (Rule 141(b)(2).) In Findings of Fact paragraphs 4-11, and Conclusions of Law paragraph 5, the ALJ found that the decoy met this standard.

Appellant argues that the decoy displayed a demeanor which was not typical for a teenager because of her experience as a police Explorer and as a minor decoy — experience which gave her a confident and mature demeanor. The Board has, however, rejected the "experienced decoy" argument many times. As the Board previously observed:

A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the observable effect of that experience

that can be considered by the trier of fact. . . . There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

(*Azzam* (2001) AB-7631, at p. 5, emphasis in original.) This case is no different.

In a case where the Court of Appeal was tasked with determining whether an ALJ's assessment of the decoy's appearance was correct, the Court said that under the facts before them, while:

one could reasonably look at the photograph [of the decoy] and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2002) 103

Cal.App.4th 1084, 1087 [127 Cal.Rptr.2d 652].) The instant case is no different. We

do not believe the evidence supports a finding that the ALJ “could not reasonably have concluded otherwise.” (*Ibid.*) As stated above, case law instructs us that when, as

here, “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, supra.*)

Finally, appellant contends that the “simple act of handing over identification for a bartender to check is in and of itself a signal that the person offering the identification is old enough to purchase alcohol.” (AOB at p. 7.) We must reject appellant's contention that the decoy's confidence in handing her license to the bartender created the appearance that she was over 21. The bartender did not testify — we have no way

of knowing if her confidence caused the bartender to make the sale. Furthermore, there is nothing in the record indicating that the decoy's presentation of the driver's license was done "confidently," as appellant contends. Appellant seems to suggest that the mere presentation of any driver's license, when asked, would give a decoy the appearance of someone older than 21. However, by that logic, everything a decoy does could be seen as "confident" — from ordering an alcoholic beverage from a bartender to volunteering to be a decoy in the first place. Under those circumstances, all decoys would appear over 21 years of age and the criteria of 141(b)(2) would lose all meaning. Accordingly, we reject appellant's argument.

In sum, appellant presented no evidence that any of these factors — the decoy's physical appearance, her wearing of a ring on her left hand, her fingernail extensions, her experience in law enforcement, or the presentation of her ID in a so-called confident manner — actually resulted in her displaying an appearance of a person 21 years old or older on the date of the operation in this case. Absent some evidence to establish that these factors were the actual reason the bartender made this sale, these arguments must fail. Ultimately, appellant is asking this Board to second guess the ALJ and reach a different conclusion, despite substantial evidence to support the findings in the decision. This the Board cannot do.

ORDER

The decision of the Department is affirmed.⁴

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

SUSAC A. BONILLA CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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:**

SADDLE RANCH VALENCIA LLC
SADDLE RANCH CHOP HOUSE
24201 VALENCIA BLVD, SUITE 102
SANTA CLARITA, CA 91355-1862

ON-SALE GENERAL EATING PLACE - LICENSE

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

VAN NUYS DISTRICT OFFICE

File: 47-567036

Reg: 18086983

CERTIFICATE OF DECISION

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 this case. 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, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after January 14, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: December 4, 2018



Matthew D. Botting
General Counsel

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**Alcoholic Beverage Control
Office of Legal Services**

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

IN THE MATTER OF THE ACCUSATION AGAINST:

| | | |
|---|---|---------------------------------|
| Saddle Ranch Valencia LLC | } | File: 47-567036 |
| dba Saddle Ranch Chop House | } | |
| 24201 Valencia Blvd., Suite 102 | } | Reg.: 18086983 |
| Santa Clarita, California 91355-1862 | } | |
| | } | License Type: 47 |
| Respondent | } | |
| | } | Word Count: 5,500 |
| | } | |
| | } | Reporter: |
| | } | Savauna Winn |
| | } | Kennedy Court Reporters |
| | } | |
| <u>On-Sale General Eating Place License</u> | } | <u>PROPOSED DECISION</u> |

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on October 2, 2018.

Jonathan V. Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Alexa L. Halloran, attorney-at-law, represented respondent Saddle Ranch Valencia LLC.

The Department seeks to discipline the Respondent's license on the grounds that, on or about February 8, 2018, the Respondent, through its agent or employee, sold, furnished, or gave alcoholic beverages to Arlene E., an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (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 October 2, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on May 29, 2018.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on June 29, 2016 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. Arlene E. was born on January 3, 2001. She served as a minor decoy during an operation conducted by the Los Angeles County Sheriff's Department on February 8, 2018. On that date she was 17 years old.
5. Arlene E. appeared and testified at the hearing. On February 8, 2018, she was 5'5" tall and weighed 135 pounds. She wore a black t-shirt, jeans, and tennis shoes. Her hair was in a bun. She was not wearing any make-up other than eyebrow powder. She wore a ring on the ring finger of her left hand and her fingernails had gel extensions. (Exhibits 3-5.) Her appearance at the hearing was the same, except that her hair was down and she wore some mascara.
6. On February 8, 2018, Agent Danny Vergara and Dep. Ogle entered the Licensed Premises. They took a seat at a cocktail table. Arlene entered and sat down at the bar counter. The bartender, Ashley Mertes, asked her what she wanted. Arlene ordered a Bud Light. Mertes asked to see Arlene's ID. Arlene handed her California identification card (exhibit 2) to Mertes. Mertes looked at it for a few seconds, then handed it back to Arlene.
7. Mertes asked Arlene if she wanted to open a tab; Arlene said that she did. Mertes asked for a credit card, to which Arlene replied that she only had cash. Mertes said that that was OK and poured a Bud Light beer from one of the taps, which she served to Arlene.
8. Agent Danny Vergara approached Arlene and pulled her aside. He contacted a manager and asked that someone cover for Mertes so that they could contact her. The manager did so and Agent Vergara contacted Mertes. He obtained her information, then escorted her to the patio.
9. Agent Vergara called Arlene over and asked her how old she was. She said that she was 17. He then asked Arlene to identify the person who sold her the beer. She identified Mertes. Arlene and Mertes were approximately three feet apart at the time, facing each other. A photo of the two of them was taken (exhibit 3), after which Mertes was cited.
10. Arlene learned of the decoy program through her participation in the Explorers with the San Fernando Police Department. She had been an Explorer for approximately three years as of February 8, 2018 and had participated in at least 10 decoy and shoulder tap

operations. Arlene visited four or five locations during the February 8, 2018 decoy operation. The Licensed Premises was the only one which sold an alcoholic beverage to her. She was not nervous while inside the Licensed Premises.

11. Arlene 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 8, 2018, Arlene displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Mertes.

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 February 8, 2018, the Respondent's bartender, Ashley Mertes, inside the Licensed Premises, sold an alcoholic beverage to Arlene E., a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11.)

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that Arlene was an experienced decoy who was able to discuss opening a tab and was not nervous. She wore a ring on the ring finger of her left hand—suggesting that she was married—and had gel

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

extensions. This argument is rejected. First, the ring did not resemble a wedding ring. Second, the legal age to get married without a parent's consent is 18 years old, not 21. Third, Mertes did not testify, so there is no evidence that the ring had any effect on her evaluation of Arlene's appearance. Fourth, it is common for teenage girls to have their nails done—nothing about Arlene's nails suggested she was over the age of 21. In short, Arlene's appearance was that of a teenager and, therefore, was consistent with that generally expected of a person under the age of 21. (Finding of Fact ¶ 11.)

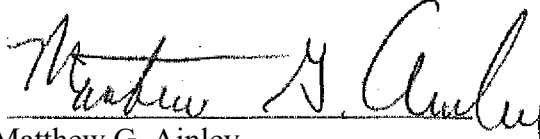
PENALTY

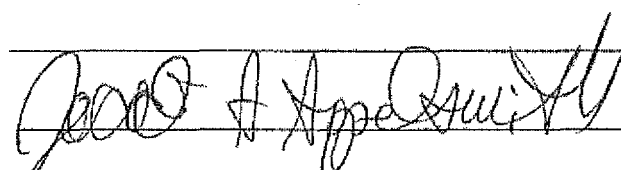
The Department requested that the Respondent's license be suspended for a period of 15 days since it had been licensed for less than two years. The Respondent argued that a mitigated penalty was appropriate since this was its first violation. Given the short amount of time that the Respondent has held its license, the standard penalty under rule 144 for a first-time sale-to-minor violation is warranted.

ORDER

The Respondent's on-sale general eating place license is hereby suspended for a period of 15 days.

Dated: October 11, 2018


Matthew G. Ainley
Administrative Law Judge

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|--|
| <input checked="" type="checkbox"/> Adopt |
| <input type="checkbox"/> Non-Adopt: _____ |
| By:  |
| Date: _____ |