

ISSUED MAY 7, 1998

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

| | | |
|-------------------------|---|--------------------------|
| ROXY A. RABAN |) | AB-6855 |
| dba Pappy's Market |) | |
| 601 North Cleveland |) | File: 21-282623 |
| Oceanside, CA 92054, |) | Reg: 96037995 |
| Appellant/Licensee, |) | |
| |) | Administrative Law Judge |
| v. |) | at the Dept. Hearing: |
| |) | Sonny Lo |
| |) | |
| DEPARTMENT OF ALCOHOLIC |) | Date and Place of the |
| BEVERAGE CONTROL, |) | Appeals Board Hearing: |
| Respondent. |) | February 4, 1998 |
| |) | Los Angeles, CA |
| |) | |

Roxy A. Raban, doing business as Pappy's Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 20 days, with 10 days stayed for a two-year probationary period, for appellant and appellant's clerk selling an alcoholic beverage to a minor decoy on two occasions, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §25658, subdivision (a).

¹The decision of the Department, dated April 3, 1997, is set forth in the appendix.

Appearances on appeal include appellant Roxy A. Raban, appearing through his counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 23, 1993.

Thereafter, the Department instituted an accusation against appellant charging that appellant's clerk, on January 18, 1996, and appellant, on June 6, 1996, sold beer to a minor decoy working for the Oceanside Police Department, neither one asking for the minor's age or identification before selling the beer to her.

An administrative hearing was held on March 5, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the minor decoy, Linda Isakson; one of the Oceanside police officers involved, Michael Wood; appellant's clerk, Rajhed Raban; and by the appellant, Roxy Raban, concerning the decoy operation and the circumstances of the two sales and the events following the sales.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged were proven; that Rule 141 (Cal.Code Regs., title 4, §141) had not been violated on June 6, 1996, and was not applicable on January 18, 1996; that the minor had, on both occasions, returned to the store with a police officer and identified the selling clerk; and that neither appellant nor his clerk had asked the minor for her age or her identification before selling the beer

to her. The Department ordered the license suspended for 20 days, with 10 days stayed for a probationary period of 2 years.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: The police violated (1) the requirement of a face-to-face identification by the minor of the seller (Rule 141(b)(5)) and (2) the requirement that the minor decoy have the appearance of a person under the age of 21 (Rule 141(b)(2) and Bus. & Prof. Code §25658, subd. (e)).

DISCUSSION

I

Appellant contends that Rule 141(b)(5) was violated in that the minor decoy did not make a face-to-face identification of the seller after the sale. Appellant bases this argument on conflicts between the testimony of the police officer and the minor and on the testimony of appellant and his clerk that no identification was made.²

The Administrative Law Judge (ALJ) made specific findings (Findings of Fact IV. B.) that the conflicts in the testimony of the officer and the minor were insignificant in light of the decoy's positive recollection of the identification and her lack of motive to be untruthful. The ALJ did not mention the testimony of the appellant and his clerk. Presumably he did not find it as credible as that of the minor decoy.

² Appellant concedes that Rule 141 was not in effect at the time of the January 18, 1996, decoy operation.

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

II

Appellant contends that the decoy wore make-up "sufficient . . . to affect her apparent age." (App. Br. at 6.) The decoy testified that she wore mascara, lip gloss, and foundation during the decoy operation. Appellant contends that the ALJ did not make reference to the decoy's appearance, but if he had, the "reference most certainly would have indicated that either the rule or the statute or both (respectively) were violated by the apparent age of the minor." (App. Br. at 6.)

There was no reference by the ALJ of the apparent age of the decoy.

Presumably this is because the decoy did not appear to be over 21, nor would have appeared so when wearing the small amount of make-up she described. There was no blush or rouge, no eye shadow or eyeliner, and no colored lipstick. It is highly unlikely that the make-up worn by the decoy could have altered her appearance to make her appear to be older than 21.

The ALJ had the opportunity to observe the decoy in person, and we must defer to his apparent, but unexpressed, conclusion that the decoy would not have appeared to be over the age of 21 when wearing the make-up she described.

CONCLUSION

The decision of the Department is affirmed.³

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.