

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

AB-8291

File: 21-381993 Reg: 03055911

KI HO LEE and MICHAEL LEE, dba Snappy Food Mart
5205 West Imperial Highway, Los Angeles, CA 90045,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JULY 6, 2005

Ki Ho Lee and Michael Lee, doing business as Snappy Food Mart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Ki Ho Lee and Michael Lee, appearing through their counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated May 6, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on February 5, 2002. Thereafter, the Department instituted an accusation against appellants charging that, on July 19, 2003, appellants' clerk, Ricardo Valdez (the clerk), sold an alcoholic beverage to 19-year-old Guadalupe Tapia. Although not noted in the accusation, Tapia was working as a minor decoy for the Los Angeles Police Department at the time.

An administrative hearing was held on March 30, 2004, at which time documentary evidence was received and testimony concerning the sale was presented by Tapia (the decoy); by Steve Nassief, a Los Angeles police sergeant; and by Valdez, the clerk.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense had been established.

Appellants filed an appeal contending that rule 141(b)(2)² was violated.

DISCUSSION

Rule 141(b)(2) requires that the decoy's appearance be that "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."

Appellants contend that the decoy's appearance was not that which one could generally expect of a person under the age of 21, thereby violating rule 141(b)(2). They argue that the evidence does not support a finding that the decoy's appearance complied with the rule because the decoy's physical appearance and demeanor were

²Title 4, California Code of Regulations, section 141, subdivision (b)(2).

different at the hearing than on the night of the decoy operation; that she "approached the clerk with self-assurance and bravado that the normal underage non-decoy could not maintain"; that the clerk would be a better judge of the decoy's apparent age during the decoy operation than the ALJ; and that the decoy's hope that she would be able to purchase an alcoholic beverage made her convey the appearance of someone over the age of 21.

The ALJ found the following with respect to the decoy's appearance (Findings of Fact V-IX):

V. The decoy was an explorer with the Westminster Police Department and had volunteered to be a decoy for the Los Angeles Police Department. Prior to July 19, 2003, the decoy had participated in more than three decoy operations. Because of this experience, the decoy was "confident" while purchasing the beer at Respondents' store. There is no evidence that this confidence made the decoy appear older, or younger, than her age.

VI. The decoy was 5'2" tall and weighed 110 pounds on July 19, 2003. She wore blue jeans, a short-sleeve white top, no make up, and no jewelry. Four photographs were taken of the decoy that day, two of them showing the decoy pointing at Valdez. Copies of the photographs were admitted into evidence as State's Exhibits 3 and 4 and Respondents' Exhibit A. These copies of the photographs show that the decoy displayed the physical appearance which could generally be expected of a person under twenty-one years old.

VII. The decoy was 5'2" tall and weighed 110 pounds on the day of the hearing. She appeared very similar to the copies of the photographs of her taken on July 19. She displayed the physical appearance which could generally be expected of a person under twenty-one years old while she testified. While testifying, the decoy sat with her hands on her lap and appeared a little nervous.

VIII. The Administrative Law Judge observed the decoy's mannerism, demeanor, poise, and maturity while she testified. Based on this observation, the testimony about the decoy's appearance, and Exhibits 3, 4, and A, the Administrative Law Judge finds that the decoy displayed the appearance which could generally be expected of a person under twenty-one years old when she purchased the beer at Respondents' store.

IX. The decoy testified that while in Respondents' store, she hoped she would be "successful" in her attempt to purchase the beer. There is no evidence that this hope made the decoy appear either older or younger than her age. And, there is no evidence that the decoy did anything improper to achieve this hope. Accordingly, the decoy's hope is irrelevant.

Appellant's arguments are premised on the alleged insufficiency of the evidence. Thus, the Appeals Board must determine, after considering the entire record, whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) In making that determination, the Board is guided by fundamental principles.

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) 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 Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (positions of both the Department and the license-applicant supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *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. (*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].)

Appellants contend that the decoy's physical appearance and demeanor were different at the hearing than on the night of the decoy operation, and the ALJ abused his discretion in relying on the decoy's appearance at the hearing, when he is required to determine her apparent age "under the circumstances presented to the seller of alcoholic beverages." This Board has rejected this argument before:

We are well aware that the rule requires the ALJ to undertake the difficult task of assessing that appearance many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date. A specific finding by the ALJ to the effect that the minor's appearance was substantially the same at both times shows that the ALJ was aware of, and took into consideration, the rule's requirement that the minor's apparent age must be judged as of the time, and under the actual circumstances, of the alleged sale.

(*The Southland Corporation & Kim* (2000) AB-7267, fn. 2.)

The ALJ made sufficiently clear in this case that he had undertaken that "difficult task" of assessing the decoy's appearance to determine if she met the requirement of rule 141(b)(2) at the time of the illegal sale. He must be assumed to have taken into consideration the difference in setting and minor differences in the decoy's hair and dress in making this determination.

Appellants assert that the decoy "approached the clerk with self-assurance and bravado that the normal underage non-decoy could not maintain," fueled in part by her

hope that she would make a purchase and impress the officers with whom she was working. This, appellants argue, "cannot help but affect the manner in which she would approach a clerk and convey a [sic] appearance of someone who might be twenty-one or over." (App. Br. at p. 5.) They contend that, contrary to the finding that "[t]here is no evidence that this confidence made the decoy appear older, or younger, than her age" (Findings of Fact V), the clerk presented such evidence, testifying that he thought the decoy was 22 or 23 years old. Who better to determine the decoy's apparent age at the time of the sale, ask appellants, than the clerk?

This is also an argument that this Board has heard, and rejected, numerous times before. For example, addressing a similar argument in *7-Eleven, Inc. & Virk* (2001) AB-7597, the Board said:

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected . . . of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older.

Similarly, in *Prestige Stations, Inc.* (2000) AB-7248, footnote 2, the Board stated:

The decoy must only present an appearance which could generally be expected of a person under the age of 21 years. If the clerk, observing a decoy who presents such appearance generally, perceives the decoy to be older than 21, he does so at his peril. A licensee cannot escape liability by employing clerks unable to make a reasonable judgment as to a buyer's age.

Appellants are really asking this Board to reweigh the evidence and reach a conclusion different from that reached by the ALJ and the Department. As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity to

observe the decoy as he or she testifies, and the Board, having no more than a photograph and a cold record, is not in a position to substitute its judgment for that of the trier of fact.

ORDER

The decision of the Department is affirmed.³

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, 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.