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

AB-8622
File: 47-396007 Reg: 06062206

MONTAGE HOTELS & RESORTS LLC, dba Montage Resort & Spa
30801 Coast Highway, Laguna Beach, CA 92651,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: August 2, 2007
Los Angeles, CA

ISSUED OCTOBER 26, 2007

Montage Hotels & Resorts LLC, doing business as Montage Resort & Spa (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's bartender selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Montage Hotels & Resorts LLC, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated September 21, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on February 3, 2003. On March 20, 2006, the Department filed an accusation against appellant charging that, on December 29, 2005, appellant's bartender, Aaron Huisenfeldt (the bartender), sold an alcoholic beverage to 17-year-old Sarah Vertelka. Vertelka was working as a minor decoy for the Department at the time.

At the administrative hearing held on July 14, 2006, documentary evidence was received and testimony concerning the sale was presented by Vertelka (the decoy); Department investigator Tom Pellegrini; appellant's lobby lounge manager, Debbie Whellehan; and the bartender.

On the night of the decoy operation, the decoy walked into the lobby of Montage Resort & Spa wearing a sweatshirt, jeans, and tennis shoes. Whellehan saw the decoy from about 20 feet away as the decoy walked across the lobby. The decoy went to the bar in the lobby lounge, took a seat, and asked the bartender for a Bud Light beer. The bartender opened a 12-ounce bottle of Bud Light beer and placed it on the counter in front of the decoy. He did not ask the decoy her age or for identification.

Department investigators retrieved the bottle of beer and walked out of the bar area with the decoy. Shortly thereafter, the investigators returned to the bar with the decoy and she identified the bartender as the one who sold beer to her.

Subsequent to the hearing, the Department issued its decision which determined the violation charged was proved and no affirmative defense was established. Appellant filed an appeal contending: (1) The Department violated due process and prohibitions in the Administrative Procedure Act (APA) (Gov. Code, §§ 11340-11529)

against ex parte communications;[2] (2) the administrative law judge (ALJ) erroneously denied appellant's motion to compel discovery; (3) the ALJ failed to explain the factors that led to his credibility determinations; (4) the decision fails to address conflicts in the testimony; (5) the findings are not supported by substantial evidence; and (6) the decoy's appearance violated the standard of rule 141(b)(2).[3]

DISCUSSION

I

Appellant contends the Department violated due process and the APA by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision, citing the California Supreme Court's holding in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*). Appellant argues that this violation of the APA is ipso facto a violation of due process. Due process was also violated, appellant asserts, because the Department's attorney assumed the roles of both advocate and advisor to the decision maker.[4]

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[2]Appellant also filed a motion asking the Board to augment the record with any Report of Hearing for this case in the Department's file. Our decision regarding ex parte communication makes augmentation unnecessary, and the motion is denied.

[3]References 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.

[4]In *Quintanar*, *supra*, on page 17, footnote 13, the Court stated:

> Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

We also decline to address appellant's due process contention.

We agree with appellant that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar*, *supra*.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.[5]

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[5]The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

II

Appellant asserts in its brief that the ALJ improperly denied its pre-hearing motion to compel discovery. Its motion was brought in response to the Department's failure to comply with those parts of appellant's discovery request that sought copies of findings or decisions which determined that the present decoy's appearance was not that which could be generally expected of a person under the age of 21 and all decisions certified by the Department over a four-year period which determined that any decoy failed to comply with rule 141(b)(2). For all of the decisions specified, appellant also requested all photographs of the decoys in those decisions.

ALJ Gruen, who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellant failed to show that the requested items were relevant or would lead to admissible evidence. Appellant argues that the items requested are expressly included as discoverable matters in the APA and the ALJ used erroneous standards in denying the motion.

"[T]he exclusive right to and method of discovery as to any proceeding governed by [the APA]" is provided in section 11507.6. (Gov. Code, § 11507.5.) The plain meaning of this is that any right to discovery that appellants may have in an administrative proceeding before the Department must fall within the list of specific items found in Government Code section 11507.6. Appellant asserts that the items requested are discoverable under the provisions of subdivisions (b) through (e) of section 11507.6. Those paragraphs provide that a party

> is entitled to . . . inspect and make copies of . . . :
> (b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

> (c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;
> (d) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;
> (e) Any other writing or thing which is relevant and which would be admissible in evidence; . . .

The Board has discussed and rejected, many times, almost all the arguments made here by appellants. We reject them again in this case, and refer appellant to this Board's prior decisions for our reasons. (See, e.g., *7-Eleven, Inc./Virk* (2007) AB-8577; *7-Eleven, Inc./Wang* (2007) AB-8573; *7-Eleven, Inc./Shaw* (2007); *To & Wang* (2007) AB-8513; *7-Eleven, Inc./Kamboj* (2006) AB-8501.)

Besides the issues that have been previously addressed in the cases cited above (and many others), appellant also contends that its motion was improperly denied because the items it requested are "relevant" and "admissible in evidence." (Gov. Code, § 11507.6, subd. (e).) It argues that "relevant evidence" is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Cal. Evid. Code, § 210.) The apparent age of the decoy in a case is clearly a matter of consequence in the action. However, findings in other cases regarding the apparent age of the same decoy, or such findings with regard to other decoys, are not relevant to the determination of apparent age of this decoy in this case. We have rejected this contention in previous cases, such as *Askar & Mbarkeh* (2004) AB-8182, where the Board said:

> In every 141(b)(2) case, the ALJ is being asked, on the basis of his own life experience, whether, based upon the evidence he has seen and heard, he believes the decoy could generally be thought to have displayed the appearance of a person under 21 years of age. Every case is different, even when it is the same decoy in more than one case. It is a

> subjective determination on the part of the ALJ, just as it is a subjective determination on the part of the seller of alcoholic beverages.

(See also *O'Brien* (2001) AB-7751 and *7-Eleven, Inc./Amroli* (2002) AB-7784.)

Appellant also contends that the discovery provisions of the APA must be construed liberally to promote fairness at trial. Because Government Code section 11507.6 provides "the exclusive right to and method of discovery" in the APA, it argues, "it is incumbent upon the Board to construe [section 11507.6] liberally." (App. Br. at p. 17.) It quotes language from *County of San Diego v. Superior Court* (1986) 176 Cal.App.3d 1009 [222 Cal.Rptr.484], in support of its position. The court in that case used "the principle of statutory construction in discovery matters which requires a presumption in favor of the most liberal rights of discovery, absent compelling countervailing considerations or explicit statutory language." (*Id*., p. 1021.) Appellant, naturally, emphasizes the part about favoring liberal construction of discovery rights.

We disagree with appellant's contention. In the first place, the cases cited by appellant all deal with the Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.), while Government Code section 11507.6 provides the exclusive right to discovery in administrative proceedings conducted under the APA. Secondly, the language quoted above clearly states that "explicit statutory language" can create an exception to liberal construction of discovery provisions. We find the language of section 11507.5 – "The provisions of Section 11507.6 provide the *exclusive* right to and method of discovery as to any proceeding governed by this chapter [italics added]" – to be explicit statutory language that signals a restrictive, rather than a liberal, construction of the discovery rights provided in section 11507.6.

Appellant's arguments are unavailing. We see no reason to conclude that the denial of appellant's motion to compel was error.

III

Appellant contends the decision must be reversed because the ALJ did not explain the basis for his credibility determinations. Citing Government Code section 11425.50, subdivision (b),[6] and *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 596 [128 Cal.Rptr.2d 514], appellant argues that the ALJ "cannot merely believe certain witnesses and disbelieved [*sic*] other [*sic*], without identifying any 'observed demeanor, manner, or attitude' of the witnesses." (App. Br., p. 29.)

Additionally, appellant asserts that by failing to address what it calls "the conflict between . . . materially divergent accounts" in testimony, the ALJ violated the precept of the California Supreme Court in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*), that an agency decision must include findings that "bridge the analytic gap" between the purportedly "divergent accounts of the decoy's appearance."

Neither of appellant's arguments has merit.

We begin by stating the general principle that it is the province of the ALJ, as the trier of fact, to make determinations as to witness credibility. *(Lorimore v. State Personnel Bd.* (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].) The Appeals

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[6] Section 11425.50, subdivision (b), a part of the APA's Administrative Adjudication Bill of Rights provides, in pertinent part:

> If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

Board will not interfere with those determinations in the absence of a clear showing of abuse of discretion.

The issue raised by appellant in this case has been before the Board on a number of occasions, and the arguments made by appellant have been rejected without exception. The issue was discussed at length in *7-Eleven, Inc./Navdeep Singh* (2002) AB-7792, a case where the appellants argued that, because the decoy was the only witness to testify about what occurred in the premises during the sale of the alcoholic beverage, and his testimony suffered from striking credibility defects, the ALJ was required to explain why the decoy's testimony was sufficient to support the Department's accusation. The Board rejected this argument, stating:

> Section 11425.50 is silent as to the consequences which flow from an ALJ'S failure to articulate the factors mentioned.[7] However, we do not think that any failure to comply with the statute means the decision must be reversed. It is more reasonable to construe this provision as saying simply that a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all. [¶] . . . . [¶]
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> This Board has consistently rejected counsel's insistence, in other appeals, that the federal appeals court case of Holohan *v.* Massanari (9th Cir. 2001) 246 F.3d 1195 requires reversal of a decision that does not explicitly explain the basis of a credibility determination. (See, e.g., *7-Eleven and Huh* (2001) AB-7680.) There is no reason to decide differently in the present appeal.

(See also *Chuenmeersi* (2002) AB-7856, and *7-Eleven, Inc./Janizeh* (2005) AB-8306.)

Appellant's reliance on *California Youth Authority v. State Personnel Bd.*, *supra*, is also misplaced. In that case, the court determined that section 11425.50 did not

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[7] The Law Revision Comments which accompany this section state that it adopts the rule of *Universal Camera Corp. v. National Labor Relations Board* (1951) 340 U.S. 474 [71 S.Ct. 456], requiring that the reviewing court weigh more heavily findings by the trier of fact (here, the administrative law judge) based upon observation of witnesses than findings based on other evidence.

"come into play" because the ALJ did not identify the witnesses' demeanor, manner, or attitude that supported his credibility determinations; therefore, the court said, it would not give special weight to those determinations when considering whether substantial evidence supported the administrative decision. Since neither party had argued that the decision was defective due to the ALJ's failure to identify the specified factors, the court declined to express a view on the matter. (*California Youth Authority*, *supra*, 104 Cal.App.4th at 596, n. 11.)

Our review of the hearing transcript and the ALJ's reason for rejecting Whellehan's testimony convinces us that the ALJ's credibility determinations were reasonable and not an abuse of discretion.

As for appellant's contention that conflicts in the testimony must be addressed, this has been rejected by the Appeals Board numerous times before. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181 (fns. omitted), the Board explained:

> Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.) [¶] . . . [¶]
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> Appellants' demand that the ALJ "explain how [the conflict in testimony] was resolved" (App. Br. at p. 2) is little more than a demand for the reasoning process of the ALJ. The California Supreme Court made clear in *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543], that, as long as findings are made, a party is not entitled to attempt to delve into the reasoning process of the administrative adjudicator:
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> > As we stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12]: "implicit in [Code of Civil Procedure] section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."

> In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

The language quoted above makes it clear that if findings are made, no further inquiry may be made into how those findings were reached. The Department decision contains findings, and the inquiry ends there.

IV

Appellant contends that certain findings in the decision are not based on substantial evidence. The three items appellant includes under this heading are: 1) the decision erroneously ignores the testimony of the bartender; 2) the decision erroneously found Whellehan did not have an opportunity to observe the decoy; and 3) the finding that the decoy complied with rule 141(b)(2) was based on facts not in evidence. We will discuss the first two items here and address the third in the following discussion regarding the appearance of the decoy.

"Substantial evidence" is relevant evidence which reasonable minds would accept as 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].) When the Board must determine if substantial evidence exists to support the Department's findings, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*.

(*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *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, 826-827 [40 Cal.Rptr. 666].)

In *Circle K Stores, Inc*. (2002) AB-7817, the Appeals Board addressed an argument very similar to that appellant makes here regarding the bartender's testimony:

> Appellant contends that the ALJ erroneously disregarded the testimony of one of appellant's witnesses, Suzy Prasad. It asserts that the ALJ was required to make a finding regarding that testimony, even if the finding is to reject that testimony as not credible. Appellant contends that the failure to make such a finding is reversible error.
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> Appellant cites no authority, and we know of none, that requires an ALJ to make a finding regarding the testimony of every witness who testifies. Findings are made as to facts, and the factual question Prasad's testimony addressed was that of the apparent age of the decoy. The ALJ found that the decoy displayed the appearance of a person under the age of 21, and he provided his reasons for that finding. He did not need to review in his findings all the evidence presented with regard to the decoy's appearance, and explain why he rejected some and accepted others.[8]
> [¶] . . . [¶]
>
> If ALJ's were required to discuss in their decisions all the testimony they heard, even if irrelevant, immaterial, or incredible, very few matters would be adjudicated. Appellant's argument makes no sense, either theoretically or practically.

The ALJ did not err in failing to comment on the bartender's testimony.

Appellant also contends it was error for the ALJ to find that the bar manager "did not have an opportunity to observe the decoy" when she was in the premises. However, no such finding exists in the Appeals Board's copy of the decision. The only reference to Whellehan's testimony is in Conclusion of Law 5:

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[8]"If a full finding is made on an issue, it is not necessary expressly to negative contradictory issues, for the finding made is an implied negation of all facts to the contrary that are not found." (59 Cal.Jur.3d §145.)

> Respondent argued that Rule 141(b)(2) was violated. Respondent relies on the testimony of [Debbie Whellehan], respondent's lobby lounge manager, who testified that she observed Vertelka walk through the lobby and believed her to be in her mid 20's. [Whellehan] also testified that Vertelka was wearing a great deal of make up. However, on cross examination it was determined that Whellehan only saw the side profile of Vertelka as she walked through the lobby from a distance of about 20 feet. As such, this testimony has very little or no value and is rejected. Vertelka's appearance, including her giggling, was that of a very young teenage girl. (Findings of Fact, ¶¶ 5 and 9.)

Appellant argues that the ALJ ignores testimony showing that Whellehan had the opportunity later on, after the violation, to see the decoy. In support of this, appellant cites testimony of Whellehan saying that she talked to the investigators at the bar at some time after the incident, and the decoy's testimony that she left the hotel with investigators after she had purchased the beer and then reentered the bar area where she identified the bartender and had a photograph taken. We fail to see how this establishes that Whellehan saw the decoy a second time.

Even if appellant were able to establish that Whellehan saw more of the decoy than her profile from 20 feet away, appellant has not shown how that would make the ALJ's determination of the decoy's apparent age wrong, as we discuss in the next section of this opinion.

V

Appellant contends the determination that the decoy displayed the appearance of a person under the age of 21 was erroneous because the ALJ relied on the decoy's giggling at the hearing and because the bar manager and the bartender both testified they thought the decoy looked as if she were in her mid-20's.

Appellant states that the ALJ based his finding about the decoy's appearance on the decoy's giggling at the hearing, making the finding "based on facts not in evidence."

We are at a loss to know what appellant means, since "[t]he decoy [her]self provides the evidence of [her] appearance." *(Circle K Stores, Inc*. (2001) AB-7498.)

Although the ALJ did mention that the decoy giggled during her testimony, he based his finding on "her overall appearance, *i.e*., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance/conduct in front of bartender Huisenfeldt at the Licensed Premises." (Finding of Fact 9.) He also compared her appearance at the hearing with her appearance during the decoy operation as shown in the photographs of her that were entered into evidence, and concluded she looked substantially the same at both times.

Appellant's reliance on the opinions of the bar manager and the bartender as to the apparent age of the decoy is misplaced. As the Appeals Board has said before, "it is not the belief of the clerk that is controlling, it is the ALJ's reasonable determination of the decoy's apparent age based upon the evidence and his observation of the decoy at the hearing." (*7-Eleven, Inc./Paul* (2002) AB-7791; see also *Circus Liquors* (2005) AB-8259; *7-Eleven, Inc./Jain (2004) AB-8082; 7-Eleven, Inc./Ryberg* (2002) AB-7847.)

The ALJ had before him the decoy herself and two photographs of the decoy taken immediately before the decoy operation began.[9] As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does

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[9]One appellate court has called a "photograph of the decoy taken immediately after the sale, . . . arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (*Southland*) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652].) Although the photograph in the present case was taken before the decoy operation rather than after the violation, appellant has not disputed that the photograph accurately displays the decoy's appearance at appellant's premises. We do not believe the timing of the photography reduces the importance of the photograph in this instance.

not, of observing the decoy as she testifies, and we are not in a position to second-guess the trier of fact. The ALJ's findings show that he properly evaluated the decoy's appearance under the rule, and it would take something more than appellant's opinion to convince the Board that it should question the ALJ's determination.

Even if the ALJ had given credence to the testimony of appellant's witnesses, the decoy and the photographs would still provide substantial evidence supporting the ALJ's determination that the decoy presented the appearance of a person under the age of 21.

ORDER

The decision of the Department is affirmed as to all issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[10]

TINA FRANK, ACTING CHAIRPERSON
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[10]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.