ISSUED MARCH 21, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DALOUR YOUNAN, G.P., and YOUNAN BROTHERS 1993 TRUST, by DALOUR YOUNAN as TRUSTEE, L.P. dba Farmers Market #2 2045 University Avenue San Diego, CA 92104, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-7195 File: 21-296473 Reg: 97041001 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: January 20, 2000 Los Angeles, CA

Dalour Younan, G.P., and Younan Brothers 1993 Trust, by Dalour Younan as Trustee, L.P., doing business as Farmers Market #2 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 35 days for their clerk having sold an alcoholic beverage (a six-pack of Coors beer) to a minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

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[1]The decision of the Department, dated July 16, 1998, is set forth in the appendix.

Appearances on appeal include appellant Dalour Younan, G.P., and Younan Brothers 1993 Trust, by Dalour Younan as Trustee, L.P., appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 17, 1994. Thereafter, the Department instituted an accusation charging that appellants' clerk, Tony S. Behnan ("Behnan"), sold an alcoholic beverage (beer) to Matthew J. Flores ("Flores"), a minor.

An administrative hearing was held on January 15, 1998, and April 21, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and ordered a 35-day suspension.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) there was no compliance with Rule 141(b)(4); and (2) there was no compliance with Rule 141(b)(2).

DISCUSSION

I

Appellants contend that Rule 141(b(4) was violated. They claim that Flores, the decoy, falsely represented himself as being 21 years of age.

Behnan, the clerk, and Ana Chairez, another employee, testified that Flores twice said he was 21 when he was asked his age. Flores insisted that he said

only “hello” to the clerk, and denied telling Behnan he was 21, testifying that he specifically recalled that he had not done so. Flores testified that the clerk asked him for identification, and was given Flores’ driver’s license.

Maura Mekenes Parga, a San Diego police officer, observed the transaction from outside the doorway of the store, but was unable to hear either the decoy or the clerk speaking. She testified, however, that when Behnan was advised he had just sold an alcoholic beverage to a minor, he claimed he had seen identification which showed Flores to be 21, and that Flores appeared to be 21. Flores was searched, and no other identification was found.

This is simply another instance where an administrative law judge elected to believe the testimony of one witness over that of others.

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].)

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].)

We are unpersuaded by appellants' suggestion that the silent video recording of the transaction, by the fact that it purportedly shows conversation, should lead us to conclude that the decoy misstated his age. The ALJ was required to resolve the conflict in testimony, and the Board is not permitted to second guess his judgment on the issue of credibility. He had the opportunity, which this Board does not, to observe the witnesses as they testified, take note of their demeanor, and assess the force of their testimony as a whole.

We are content with the ALJ's findings on the issue of the decoy's alleged misstatement of his age.

II

Appellants also contend that the Department failed to comply with Rule 141(b)(2), by its use of an improper standard in its consideration of the appearance of the decoy. Appellants contend that by limiting his assessment to the physical aspects of the decoy's appearance the Administrative Law Judge (ALJ) overlooked all other age-indicative considerations contemplated by the rule.

This is, as the Board has said on other occasions, a frequently recurring issue on appeal, and one in which the Department has had no reluctance in expressing its disagreement with the Board's reading of the rule.

In Circle K Stores, Inc. (1999) AB-7080, the Board stated:

"Nonetheless, while an argument might be made that when the ALJ

uses the term "physical appearance," he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what he did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.

"It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.

"Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department's concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126])."

The issue is whether a correct legal standard was applied. It is this Board's belief that, without illuminating findings brought to us by the Department, and with a qualifying term engrafted upon the rule at issue, we are unable to satisfy ourselves that there has been compliance with the rule.

The Board's position finds its support in the teachings of the California Supreme Court in Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836] that "the 'accepted

ideal is that the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.'"

We believe that this case is no different than the earlier Rule 141(b)(2) cases in which the Board reversed the Department, and deserves no different treatment.

ORDER

The decision of the Department is reversed. The case is remanded to the Department for such further proceedings as may be necessary and appropriate in light of our comments regarding Rule 141(b)(2).[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

Any party may, before this final decision becomes effective, apply to the appropriate district 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.