

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

AB-9806

File: 20-448527; Reg: 18087209

7-ELEVEN, INC, VIJAY KUMAR, and URMILLA DEVI KUMAR,
dba 7-Eleven Store #2237 24490E
711 East F Street
Oakdale, CA 95361,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Alberto Roldan

Appeals Board Hearing: November 7, 2019
Los Angeles, CA

ISSUED NOVEMBER 19, 2019

Appearances: *Appellants:* Ralph Barat Saltsman and Donna J. Hooper, of
Solomon, Saltsman & Jamieson, as counsel for 7-Eleven, Inc, Vijay
Kumar, and Urmilla Devi Kumar,

Respondent: John P. Newton, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc, Vijay Kumar, and Urmilla Devi Kumar, doing business as 7-Eleven
Store #2237 24490E, appeal from a decision of the Department of Alcoholic Beverage
Control¹ suspending their license for 5 days because their clerk sold an alcoholic
beverage to a police minor decoy, in violation of Business and Professions Code

¹The decision of the Department under Government Code section 11517,
subdivision (c), dated April 11, 2019, is set forth in the appendix.

section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 23, 2007. There is one prior instance of departmental discipline against the license.

On July 20, 2018, the Department filed a single-count accusation against appellants charging that, on November 16, 2017, appellants' clerk, Deelanya Laneo Hunter (the clerk), sold an alcoholic beverage to 19-year-old Madyson Falconi (the decoy). Although not noted in the accusation, the decoy was working for the Oakdale Police Department (OPD) at the time.

At the administrative hearing held on October 9, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy and Department Agent Monica Molthen.

Testimony established that on November 16, 2017, the decoy entered the licensed premises and selected a six-pack of Corona beer bottles. She took the beer to the counter and the clerk asked for her identification. The decoy handed the clerk her California driver's license, which had a portrait orientation and contained a red stripe indicating "AGE 21 IN 2019." (Exh. D-3.) The clerk looked at the ID, looked at the decoy, and then completed the sale without asking any age-related questions. The decoy exited, then later re-entered the premises to make a positive identification of the clerk. The two of them were photographed (exh. D-4) and the clerk was issued a citation.

The administrative law judge (ALJ) issued his proposed decision on October 19, 2018, sustaining the accusation and recommending a 15-day suspension. The Director

declined to adopt the proposed decision on November 28, 2018. On December 19, 2018, in its Notice Pursuant to Government Code section 11517(c)(2)(E)(i), the Department invited the parties to submit comments on the case — “including, but not limited to, the findings of fact, determination of issues and the penalty or recommendation.” Both parties submitted comments. Thereafter, on April 11, 2019, the Director issued his decision pursuant to Government Code section 11517(c), sustaining the accusation and imposing a 5-day suspension.

Appellants then filed a timely appeal contending the Department’s finding — that the decoy displayed the appearance which would generally be expected of a person under the age of 21 — was not supported by substantial evidence.

DISCUSSION

ISSUE CONCERNING DECOY’S APPEARANCE

Appellants contend that the Department’s finding — that the decoy displayed the appearance which would generally be expected of a person under the age of 21 — was not supported by substantial evidence. They maintain that her eye make-up, dark circles under her eyes, and hair covering half her face caused the decoy to look too mature to comply with rule 141(b)(2). (AOB at p. 2.)

Rule 141(b)(2)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 appellants.

²References 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.

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

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 212 Cal.App.2d 106, 112.)

This Board has stated many times that, in the absence of compelling reasons, it will ordinarily defer to the Department's findings on the issue of whether there was compliance with rule 141(b)(2). The Department made the following findings of fact regarding the decoy's appearance:

4. Falconi appeared and testified at the hearing. On October 9, 2018, her appearance was generally as depicted in an image that was taken during the operation on November 16, 2017. (Exhibit D-4.) Falconi had long, brown hair that was worn down below the shoulders. Her face was fully exposed. Falconi wore jeans and brown boots on her lower body and a tan, long sleeved t-shirt and a dark cardigan on her upper body. Falconi had no visible tattoos. Falconi was approximately 5 feet, 8 inches tall and 135 pounds at the hearing. Falconi credibly testified that her size and appearance on the date of the operation were essentially the same except that she was an inch shorter.

[¶ . . . ¶]

12. Falconi, in addition to serving as a decoy on November 16, 2017, had also assisted in multiple "Shoulder Tap" operations before this operation. She became involved in the decoy program through her participation as an Explorer with OPD for approximately two years. Based on her overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Hunter at the Licensed Premises on November 16, 2017, Falconi displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Hunter.

(Findings of Fact, ¶¶ 4-12 .) Based on these findings, the Department addressed appellant's rule 141(b)(2) defense:

10. Respondents also asserted that the appearance of the decoy did not comply with rule 141(b)(2). As noted above, Hunter did not testify in this matter to establish that her error was the result of Falconi's appearance or demeanor. Hunter, in fact, asked for Falconi's identification which suggests that she had reason to believe that Falconi might be underage. Hunter did not ask any follow up questions after asking Falconi for her identification, so the exchanges between her and Falconi were minimal. Further, Falconi testified in this matter and her appearance matched the appearance she presented to Hunter on the date of the operation. Falconi had an appearance "which could generally be expected of a person under 21 years of age" which is the standard required by rule 141(b)(20) As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in Falconi's actions, manner, or appearance that led Hunter to reasonably conclude that Falconi was over 21. The Department has established compliance with rule 141(b)(2) and the Respondents have failed to rebut this evidence.

(Conclusions of Law, ¶ 10.)

With regard to the decoy's makeup, appellants appear to suggest that individuals under the age of 21 do not ordinarily wear make-up. This has not been our experience. This Board wrote, in a similar case:

Appellant appears to assert that a decoy violates the rule by the mere fact of wearing make-up during a decoy operation. Make-up only has significance in this context, however, if it makes the decoy appear to be older, specifically, over the age of 21. Whether it is light or heavy is really irrelevant. It is the impact on a decoy's apparent age that matters. Appellant has made no showing that this decoy's make-up made her appear older than 21.

(*Circle K Stores, Inc.* (2001) AB-7677.) The same reasoning applies here.

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.” In Findings of Fact paragraphs 4 through 12, and Conclusion of Law paragraph 10, the Department found that the decoy met this standard.

Appellants presented no evidence that the decoy’s make-up, dark circles, or hair *actually resulted* in her displaying an appearance of a person 21 years old or older on the date of the operation in this case. The clerk did not testify. We cannot know what went through her mind in the course of the transaction. Appellants rely entirely on a difference of opinion — theirs versus that of the Department — as to what conclusion the evidence in the record supports. Absent an evidentiary showing, this argument must fail. Ultimately, appellants are asking this Board to consider the same set of facts and reach a different conclusion, despite substantial evidence to support those findings. This the Board cannot do.

ORDER

The decision of the Department is affirmed.³

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, 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.

APPENDIX

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

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

7 Eleven, Inc., Vijay Kumar,
Urmilla Devi Kumar
DBA: 7 Eleven Store 2237 24490E
711 East F Street
Oakdale, CA 95361

Respondent(s)/Licensee(s).

File No.: 20-448527

Reg. No.: 18087209

DECISION UNDER GOVERNMENT CODE SECTION 11517(c)

The above-entitled matter having regularly come before the Department on April 11, 2019, for decision under Government Code Section 11517(c) and the Department having considered its entire record, including the transcript of the hearing held on October 9, 2018, before Administrative Law Judge Alberto Roldan, and the written argument of the parties, and good cause appearing, the following decision is hereby adopted:

The Department seeks to discipline the Respondents' license on the grounds that, on or about November 16, 2017, the Respondents, through their agent or employee, Deelayna Lanea Hunter, sold, furnished, or gave alcoholic beverages to Madyson Paige Falconi, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ The Department further alleged that there is cause for suspension or revocation of the license of the Respondents in accordance with section 24200 and sections 24200(a) and (b). The Department further alleged that the continuance of the license of the Respondents would be contrary to public welfare and/or morals as set forth in Article XX, Section 22 of the California State Constitution and sections 24200(a) and (b). (Exhibit D-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 9, 2018. The proposed decision of the Administrative Law Judge was rejected for review pursuant to Government Code section 11517(c) on January 7, 2019. Written arguments were received from both the Department and the Respondents.

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

FINDINGS OF FACT

1. The Department filed the accusation on July 20, 2018. (Exhibit D-1.)
2. On March 23, 2007, the Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location (Licensed Premises). The following is the record of prior Department discipline against the Respondents' license as established by official records introduced by the Department (Exhibit D-2):

Violation Date	Violation	Registration Date	Registration Number	Penalty
4/14/2007	25658(a)	5/30/2007	07065945	15 day suspension

3. Madyson Paige Falconi (Falconi) was born on July 26, 1998, and was 19 years old on November 16, 2017. On that date, Falconi served as a minor decoy in an operation conducted by agents of the Department and officers of the Oakdale Police Department (OPD) at multiple locations, including at the Licensed Premises.
4. Falconi appeared and testified at the hearing. On October 9, 2018, her appearance was generally as depicted in an image that was taken during the operation on November 16, 2017. (Exhibit D-4.) Falconi had long, brown hair that was worn down below the shoulders. Her face was fully exposed. Falconi wore jeans and brown boots on her lower body and a tan, long sleeved t-shirt and a dark cardigan on her upper body. Falconi had no visible tattoos. Falconi was approximately 5 feet, 8 inches tall and 135 pounds at the hearing. Falconi credibly testified that her size and appearance on the date of the operation were essentially the same except that she was an inch shorter.
5. On November 16, 2017 Falconi went to the Licensed Premises with agents of the Department and officers of the OPD for the purpose of trying to buy alcohol. Falconi was given \$20 cash for the transaction. Falconi was instructed to carry her identification, show it if requested, and to be truthful regarding her age if asked. Falconi carried her California driver license as the identification she would produce if asked.
6. Falconi entered the Licensed Premises alone and searched for the refrigerated coolers. Once she found them, Falconi selected a six pack of Corona beer bottles. Falconi took the beer to the counter for the register. Falconi presented the beer to the clerk for purchase.

7. This clerk was the same individual in the image that was later taken of Falconi standing next to the clerk who served her. (Exhibit D-4) The clerk asked Falconi for identification. Falconi handed her California driver license to the clerk. (Exhibit D-3) The clerk took the identification and appeared to look at it and then at Falconi.

8. Because Falconi was under 21 until 2019, the California driver license Falconi presented was in portrait form with a red highlighted area that said she would not be 21 until 2019. (Exhibit D-3.) Despite this information, the clerk asked no questions of Falconi about her age during their interaction. The clerk rang up the beer and told Falconi the price. Falconi paid the clerk for the beer, took possession of it, and then left.

9. After leaving, Falconi approached the vehicle where the law enforcement officers were waiting. After the officers learned of the sale, they went into the Licensed Premises with Falconi. Upon entering, one of the officers asked Falconi about which clerk made the sale. Falconi pointed out the clerk to the officers. After this initial identification, Department Agent Monica Molthen (Molthen) approached the clerk and identified herself. Molthen explained why they were present and told the clerk she had sold beer to a minor.

10. After Molthen told the clerk they were there because she had sold alcohol to a minor, Molthen asked Falconi to identify the clerk who sold the beer. Falconi responded by pointing at the clerk from approximately two feet away while the clerk was looking at Falconi and the officers. The clerk was identified as Deelayna Lanea Hunter (Hunter) during Molthen's investigation of the sale to Falconi

11. Hunter was subsequently photographed while standing next to Falconi while she held her identification and the six pack of Corona beer bottles. (Exhibit D-3.) From the initial law enforcement contact with Hunter until after this photograph was taken. Falconi was in the immediate presence of Hunter and the officers. Hunter was subsequently issued a citation for the sale.

12. Falconi, in addition to serving as a decoy on November 16, 2017, had also assisted in multiple "Shoulder Tap" operations before this operation. She became involved in the decoy program through her participation as an Explorer with OPD for approximately two years. Based on her overall appearance, i.e., her physical appearance, clothing, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in front of Hunter at the Licensed Premises on November 16, 2017, Falconi displayed the appearance which would generally be expected of a person less than 21 years of age during her interactions with Hunter.

13. Hunter did not testify in this matter to explain her age related impressions of Falconi nor why she sold Falconi alcohol after Falconi presented a California driver license that identified her as being 19 years of age.

14. 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 November 16, 2017, the Respondents' clerk, Deelayna Lanea Hunter, inside the Licensed Premises, sold an alcoholic beverage to Madyson Paige Falconi, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 2-12)

5. The Respondents generally argued that the decoy operation at the Licensed Premises failed to comply with rule 141² and, therefore, the accusation should be dismissed. Specifically, the Respondents argued that the appearance of the decoy did not comply with rule 141(b)(2). This alleged violation, if established, would be an affirmative defense and require dismissal of the accusation pursuant to rule 141(c).

6. There is no credible evidence supporting the assertions by the Respondents that there was a failure to comply with rule 141. The Department used an appropriate decoy, she conducted herself properly during the operation, and there was a compliant face to face identification made that put the clerk on notice as to who the decoy at issue was. *Department of Alcoholic Beverage*

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

Control v. Alcoholic Beverage Control Appeals Board (2017) 18 Cal.App.5th 541 is a particularly helpful guide since the identification by Falconi of Hunter in this matter was substantively similar to the identification that was found to be compliant with rule 141(c) in that case. In finding that identification compliant, that court ruled:

“Here there is no violation of Rule 141, as explained above, because the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation. The identification here meets the letter and the spirit of Rule 141.” *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541, 547

7. While general due process considerations demand a fair identification be facilitated by law enforcement, this case makes clear that this particular regulation is focused on the more narrow concern of allowing the *seller* the opportunity to be aware of the identity of the decoy. It stands to reason that compliance with Rule 141, subdivision (b)(5), occurs if the clerk and the decoy, during the process of the investigation, prior to the citation being issued or departure of the decoy, are brought in reasonable proximity to each other to assure that the seller knows (or reasonably ought to know) that he or she is being identified as the seller by the decoy.

8. Falconi testified to first identifying Hunter to the officers at the entranceway of the Licensed Premises. This alone would have been insufficient because Hunter was not clearly aware of their presence at this time. However, much more occurred in this case to put Hunter on notice that she was accused of selling beer to Falconi. Molthen then approached Hunter at the counter, got her attention, and identified herself as a law enforcement officer investigating a sale of alcohol to a minor. While the sale to Falconi was discussed between Molthen and Hunter at the counter, Falconi stood in the immediate presence of Molthen. Right after this discussion, while in the immediate presence of Hunter, Falconi again pointed out Hunter as the seller from two feet away. Before Hunter was cited on November 16, 2017, Falconi and Hunter were photographed next to each other. (Finding of Fact ¶ 11 and Exhibit D-4.) Hunter clearly came face to face with Falconi under circumstances that made it clear that Hunter had been identified as the person who sold Falconi beer and that Falconi was the minor at issue. (Findings of Fact ¶¶ 3-12.)

9. None of the evidence presented by the Respondents rebutted the credible evidence presented by the Department that this was a fully compliant identification that allowed Hunter to become aware that Falconi was the decoy. Respondents have offered no evidence or argument suggesting that the identification violated state or federal due process considerations. Given the totality of

the evidence presented by the Department credibly establishing compliance with rule 141(b)(5), the Respondents' assertions that compliance did not occur are unsupported.

10. Respondents also asserted that the appearance of the decoy did not comply with rule 141(b)(2). As noted above, Hunter did not testify in this matter to establish that her error was the result of Falconi's appearance or demeanor. Hunter, in fact, asked for Falconi's identification which suggests that she had reason to believe that Falconi might be underage. Hunter did not ask any follow up questions after asking Falconi for her identification, so the exchanges between her and Falconi were minimal. Further, Falconi testified in this matter and her appearance matched the appearance she presented to Hunter on the date of the operation. Falconi had an appearance "which could generally be expected of a person under 21 years of age" which is the standard required by rule 141(b)(2). As previously noted, the clerk did not testify to establish facts suggesting an identification issue or whether there was anything in Falconi's actions, manner, or appearance that led Hunter to reasonably conclude that Falconi was over 21. The Department has established compliance with rule 141(b)(2) and the Respondents have failed to rebut this evidence.

PENALTY

The Department recommended that the Respondents' license be suspended for the standard penalty of 15 days. The prior history of discipline for the same conduct was cited as an aggravating factor that weighed against mitigation.

The Respondents argued for a mitigated penalty if the Accusation were sustained based on the long period of licensure and the lack of discipline since 2007.

No evidence was presented regarding the Respondents' policies to prevent sales of alcoholic beverages to underage individuals. The Respondents have been licensed since March 2007 and this is their second incident of an alcohol sale to a minor. The prior incident occurred in 2007 and the Respondents have been discipline free since then. Length of licensure without discipline is one of the specifically identified mitigating factors under rule 144.

Although Respondents have suffered prior disciplinary action, that violation was over 10 years prior to the violation here. It is true that Respondents presented no evidence of steps taken subsequent to that prior violation to prevent a reoccurrence. While this certainly precludes Respondents from arguing that the discipline should be mitigated based upon actions taken after the first violation, it is not in and of itself cause for aggravation. Ten years of discipline-free history warrants mitigation here.

7 Eleven, Inc., Vijay Kumar, Urinilla Devi Kumar
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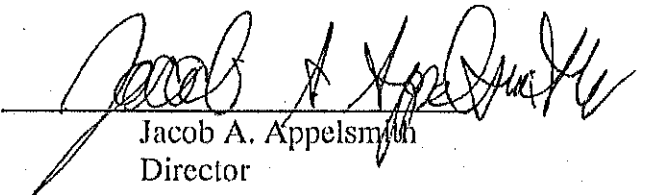
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ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 5 days.

Sacramento, California

Dated: April 11, 2019



Jacob A. Appelsman
Director

Pursuant to Government Code section 11521(a), any party may petition for reconsideration of this decision. The Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or on the effective date of the decision, whichever is earlier.

Any appeal of this decision must be made in accordance with Chapter 1.5, Articles 3, 4 and 5, Division 9, of the Business and Professions Code. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005.