

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

CASA MARGARITAVILLE, INC.	)	AB-7011
dba Margaritaville)	
221 Esplanade	)	File: 47-162544
Capitola, CA 95010,	)	Reg: 97039578
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Michael B. Dorais
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	September 2, 1998
	)	Los Angeles, CA
<hr/>	)	Resubmitted January 6, 1999

Casa Margaritaville, Inc., doing business as Margaritaville (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, with 5 days stayed for a two-year probationary period, for appellant's bartender selling an alcoholic beverage (ale) to a 19-year-old police decoy, 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).

Appearances on appeal include appellant Casa Margaritaville, Inc., appearing through its counsel, Paul B. Meltzer and Rosemarie Braz, and the

¹The decision of the Department, dated January 8, 1998, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on October 2, 1984. Thereafter, the Department instituted an accusation against appellant charging that, on December 7, 1996, appellant's bartender, Scott Edward Stevens, sold an alcoholic beverage to Jose L. Garcia, a 19-year-old decoy working for the City of Santa Cruz Police Department and the Santa Cruz County Sheriff's Department.

An administrative hearing was held on August 21, 1997, at which time testimony was presented by Garcia, the decoy, and by Santa Cruz Police Officer Michael J. Pruger, concerning what transpired during the transaction and immediately afterward.

Subsequent to the hearing, the Department issued its decision which determined that the charge had been proven.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: 1) The factual finding that Rule 141(b)(5) was not complied with is a defense to the accusation; 2) the finding that the decoy displayed the appearance of a person under the age of 21 years is not supported by substantial evidence; and 3) the Department is collaterally estopped from maintaining this action by a judge's decision, in the criminal case against appellant's bartender, holding that the decoy appeared to be 21 years of age, in violation of Rule 141(b)(2).

DISCUSSION

Appellant contends the Administrative Law Judge (ALJ) made a finding that Rule 141(b)(5) (4 Cal. Code Regs., §141, subd. (b)(5)) was not complied with and this provides appellant a defense to the Department's disciplinary action.

Both officer Pruger and the decoy, Jose Garcia, testified that officer Pruger was seated near the decoy during the entire transaction, in a position to view and hear all that occurred [RT 13, 27-28]. After receiving and paying for the ale, the decoy gave the officer the change, the glass of ale, and his California identification [RT 14, 29]. Then, as the decoy got up to leave and began walking out of the premises, the officer "indicated to the bartender that that was our minor decoy and that he had just sold a beer to him" [RT 29]. The decoy left the premises, and did not return during the remainder of the time the officer was talking to the bartender [RT 13-14].

In Determination V.I, the ALJ stated: ". . . although there was not strict compliance with the letter of the Rule, there is substantial compliance with the spirit of the Rule and no reasonable basis for dismissal by reason of lack of compliance."

On October 28, 1998, the Second District Court of Appeal issued its decision in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575. That decision reversed the Appeals Board's decision upholding the action of the Department based on substantial compliance with Rule 141(b)(5). The court stated that "rule 141(b)(5) means what it says," i.e., strict compliance with the face-to-face identification provision is required. No face-to-face identification of the seller by the decoy was made in this case. Pursuant to Rule 141(c), the failure of the police to comply with 141(b)(5) provides a defense to the accusation issued by the Department. Therefore, the decision of the Department must be reversed.

In light of our decision on this issue, it is not necessary to discuss the other issues raised by appellant.

ORDER

The decision of the Department is reversed.²

²*This 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 order as provided by §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 §23090 et seq.

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