

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

AB-7637

STAR & CRESCENT BOAT COMPANY dba San Diego Harbor Excursion - Marietta
1050 North Harbor Drive, San Diego, CA 92101,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 54-51807 Reg: 99047743

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 3, 2001
Los Angeles, CA

ISSUED JUNE 21, 2001

Star & Crescent Boat Company, doing business as San Diego Harbor Excursion - Marietta (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its bartender, Eva Nell Cartwright, having sold alcoholic beverages to two persons under the age of 21, both acting as police decoys, the sale 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 Star & Crescent Boat Company, appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated May 4, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

The sale which gives rise to this proceeding took place on September 9, 1999, while appellant's excursion boat wended its way between the City of San Diego and the City of Coronado. Two decoys, both 19 years of age, were aboard. The decoys were part of a decoy operation under the direction of San Diego police officer Larry Darwent. Approximately 20 minutes after the boat was underway, the two decoys approached the bar counter in the middle of the boat, where one of the two ordered two beers, and the other paid for them. Neither were asked by the bartender for their age or for identification. The bartender was issued a citation, and an accusation was eventually filed.

Following an administrative hearing which took place on March 7, 2000, the Administrative Law Judge (ALJ) issued a proposed decision sustaining the charge of the accusation relating to the two decoys in question.²

In its timely appeal, appellant does not contest the fact that there was a sale of an alcoholic beverage to a minor, but contends that the San Diego police officer lacked jurisdiction to conduct the decoy operation because, at the time of the sale, the boat was in that part of San Diego Bay which is subject to the jurisdiction of the City of Coronado. Therefore, according to appellant, the officer lacked any authority under Penal Code §830.1 to act as a peace officer, and, consequently, lacked authority under

² The accusation also contained counts alleging sales to two additional minors. However, no evidence was presented with respect to those counts, and they were dismissed.

Business and Professions Code §25658, subdivision (f) to conduct a decoy operation, since such an operation could only be conducted by a peace officer. Appellant contends, additionally, that neither of the minor decoys involved displayed the appearance required by Rule 141(b)(2).

DISCUSSION

I

As we shall explain in part II, while we are satisfied that the police officer did not lose his authority to conduct the decoy operation simply because of the boat's movement into Coronado waters, we must, nevertheless, remand this case to the Department for further proceedings. We do so because it appears from appellant's request that the Board consider newly discovered evidence that the Department has, in a separate decision, taken an inconsistent position as to whether one of the decoys used in this case displayed the appearance which could generally be expected of a person under 21 years of age, as required by Rule 141(b)(2). In light thereof, we think it is incumbent upon the Department to reconsider this matter, taking into account its certified decision in Registration No. 00048164. When the appearance of a decoy is such that an administrative law judge concludes that the requirement of Rule 141(b)(2) has not been met, considerable doubt has been cast upon any other decoy operation involving that decoy.

II

The Department argued at the administrative hearing, and the proposed decision concluded, that the San Diego Police Department had jurisdiction to act because the

vessel had designated San Diego as its home port pursuant to Department Rule 55.5. In addition, Department counsel argued that the officer was so empowered by virtue of Business and Professions Code §25755.

The “home port” theory.

Appellant dismisses the home port theory of jurisdiction as illogical because it implies that only the San Diego Police Department could act against a crime even if the vessel was at a location as remote as Eureka. We think appellant’s argument incorrectly assumes that San Diego’s jurisdiction is exclusive. While it may seem unlikely that the San Diego Police Department would be seriously interested in pursuing an unlawful sale to a minor of an alcoholic beverage in the waters off Eureka (assuming the Marietta is an ocean-going vessel), we can think of no reason why Eureka law enforcement authorities could not take such action in waters within that city’s jurisdiction - unless barred by some principles of admiralty law of which we have not been apprised.

We read Rule 55.5 not as a limitation on enforcement activity but, instead, as a recognition of the fact that what is being licensed is a mobile facility, and that for purposes of effective and reasonable regulation, there must be at least one geographic site for enforcement activity. The rule allows for a limited number of additional such sites in acknowledgment of the fact that mobility is an element in the exercise of the privileges granted by the license. But we see nothing in the rule that excludes enforcement activity by any other law enforcement agency in whose jurisdiction a violation of the Alcoholic Beverage Control Act is committed.

In Lahey v. Gledhill (1983) 33 Cal.3d 884 [191 Cal.Rptr. 639], the issue was whether an exculpatory clause in a ship repair contract should be governed by maritime law, as argued by a San Diego ship repair yard, or by California common law, as apparently argued by the boat owner. The California Supreme Court, in a divided opinion, held that admiralty law governed, but, since the exculpatory clause did not clearly exclude the defendant's liability for negligence, it should not have been enforced. The court held irrelevant the fact that the yacht in question was home ported in Portland, Oregon.

We do not see the Lahey case as having any bearing on the home port issue of the present appeal. We could speculate that the defendant repair yard believed Oregon law might apply to the interpretation of the exculpatory clause at issue, but the court's opinion is silent as to the repair yard's reasoning on this point.

In County of San Diego v. Lafayette Steel Co. (1985) 164 Cal.App.3d 690 [210 Cal.Rptr. 493], the court ruled that a vessel which was used and employed in San Diego County in the 1978 tax year was subject to the County's unsecured property tax for that year, despite the fact that the vessel was registered in Sitka, Alaska and owned by a foreign corporation not domiciled in San Diego. The court explained that the taxable situs of a vessel is not determined by the owner's designation of a home port, and if an owner locates the vessel in another port under circumstances suggesting a permanent base, the situs of the domicile yields to the second port and the vessel may be taxed by the other entity.

Again, we do not find this case of any assistance. What may constitute a sufficient base for the assessment of a tax is totally unrelated to what may be relevant to the enforcement of the alcoholic beverage control laws, where, at least with respect to sales to minors, the issue is conduct rather than status. A vessel's home port may be of special significance with respect to its susceptibility to being taxed (see Scandinavian Airlines Sys. v. County of Los Angeles (1961) 56 Cal.2d 11 [14 Cal.Rptr. 25]) but does not protect it from another port's enforcement of its penal laws.

In any event, we think there is a stronger base for the San Diego police officer to have acted.

Business and Professions Code §25755

Appellant characterizes the Department argument that officer Darwent's authority was derived from Business and Professions Code §25755³ as an "implausible proposition." Appellant argues that because §25755 requires that the peace officer be acting within the scope of his employment, once the vessel left that part of San Diego Bay which was under the jurisdiction of the City of San Diego, the officer was no longer

³ Business and Professions Code §25755 provides, in pertinent part:

"(b) The director, the persons employed by the department for the administration and enforcement of this division, peace officers listed in Section 830.1 of the Penal Code, and those officers listed in Section 830.6 of the Penal Code while acting in the course and scope of their employment as peace officers may, in enforcing the provisions of this division, visit and inspect the premises of any licensee at any time during which the licensee is exercising the privileges authorized by his or her license on the premises."

Although the "acting in the course and scope" requirement of this section could be construed narrowly to apply only to those persons deemed to be peace officers by Penal Code 830.6, we see no need to do so given the facts of this case.

acting within the course and scope of his employment. Appellant argues that, because the vessel may have been sailing in waters within the jurisdiction of neighboring Coronado at the time of the transaction, officer Darwent was no longer a peace officer as defined in Penal Code §830.1, and, consequently, could not have been acting in the course and scope of his employment so as to be a peace officer within the meaning of Business and Professions Code §25755. Ergo, argues appellant, the decoy operation itself was fatally flawed because it was not operated by a peace officer, as required by Business and Professions Code §25658, subdivision (f).

We find appellant's argument interesting, but unpersuasive.

In Sandelin v. Collins (1934) 1 Cal.2d 147 [33P.2d 1009], the California Supreme Court said, with reference to §25755's predecessor:

"The foregoing is ample authority for the board and its investigators to investigate alleged or threatened violations of the law, a necessary element of which is the policing of the premises where such violations may be committed." (Emphasis added.)

Officer Darwent was engaged in policing a premises where violations may be committed.

There has been no suggestion that officer Darwent lacked authority when he boarded the vessel Marietta accompanied by the two decoys and others. Nor has there been any suggestion that, at any time during the voyage, his conduct or authority was in contravention of any term of employment, order of a superior officer, or rule of conduct. For all intents and purposes, he was acting fully within the course of his employment as understood by him and by his employer.

We believe that, once a peace officer within the meaning of that term as used in

Penal Code §830.1 embarks upon a visit to or inspection of a licensed premises pursuant to Business and Professions Code §25755, he remains within the course and scope of his employment despite the fact that the premises he has visited or is in the process of inspecting - in this case, to determine compliance with Business and Professions Code §25658, subdivision (a) - as a result of its mobility, may temporarily become located outside the jurisdiction where the visit or inspection began. We are unwilling to accept the proposition that his enforcement ability under §25755 will be dependent upon the fortuitous timing of a transaction that occurs after the vessel has left the dock and is in waters adjacent to those governed by the city by which he is employed and from whence he departed.

In Mclvor v. Savage (1963) 220 Cal.App.2d 128 [33 Cal.Rptr. 740, 745], a personal injury action arising from an accident on an employer's parking lot, the court addressed the meaning of the term "scope of employment." Its discussion of that term provides guidance in the present appeal:

"A determination of the issue as to whether an employee was acting within the scope of his employment involves a consideration of many factors, including, among others, whether his conduct was authorized by his employer, either expressly or impliedly ... ; the nature the employment, its object and the duties imposed thereby; whether the employee was acting in the discharge thereof; whether his conduct occurred during the performances of services for the benefit of the employer, either directly or indirectly, or of himself, or of another person ... whether his conduct, even though not expressly or impliedly authorized, was an incidental event connected with his assigned work ... ; and many other things besides the time and place of performance of his duties as an employee."
(Internal citations omitted.)

We think it almost undeniable that, applying the broad tests referred to in that case, officer Darwent was acting within the course and scope of his employment.

We think that in the circumstances of this case, officer Darwent must be considered as having acted as a peace officer, within the course and scope of his

employment, while on an assigned task such as the one here, and empowered by Business and Professions Code §25755, regardless of the fact that he may conceivably be without equivalent authority under Penal Code §830.1.

ORDER

The decision of the Department is affirmed as to the issue involving the authority of the police officer only. The case is remanded to the Department for such further proceedings as may be appropriate in light of our comments herein regarding Rule 14 1(b)(2).⁴

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ 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.