

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

AB-7637a

File: 54-51807 Reg: 99047743

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

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 6, 2001
Los Angeles, CA

ISSUED FEBRUARY 21, 2002

Star & Crescent Boat Company, doing business as San Diego Harbor Excursion-Marietta (appellant), appeals from a Decision Following Appeals Board Decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for one of its employees having sold an alcoholic beverage 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).

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 Logan.

¹The Department's Decision Following Appeals Board Decision, dated July 31, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

In the initial appeal of this matter, the Appeals Board rejected the contention that a San Diego police officer lacked jurisdiction to conduct a decoy operation once appellant's vessel crossed from waters within the jurisdiction of the City of San Diego into waters subject to the jurisdiction of the City of Coronado. However, the Board ordered the matter remanded to the Department for further consideration of the issue whether the decoy's appearance complied with Department Rule 141(b)(2). In ordering the remand, the Board stated:

"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."

Following the Board's order of remand, the Department issued a second decision in which it again rejected appellant's contention that the decoy lacked the requisite appearance under Rule 141(b)(2), finding, in pertinent part:

"1. The sale of alcoholic beverages to the decoy in the instant case occurred on September 9, 1999. The sale of alcoholic beverages to the decoy in Registration No. 00048164 occurred almost three months later on December 4, 1999.

"2. The hearing date for the instant case was March 7, 2000 before Administrative Law Judge Rodolfo Echeverria. The hearing date for Registration No. 00048164 was June 23, 2000, before a different Administrative Law Judge, Sonny Lo.

"3. The actual circumstances presented to the seller of alcoholic beverages to the decoy differed in each case.

"4. The seller of alcoholic beverages in each case was a different person.

“5. Administrative Law Judge Rodolfo Echeverria made a Finding of Fact (II-E) in the instant matter that, ‘[a]fter considering the appearance of both decoys, their demeanor and the way they conducted themselves at the hearing as well as the testimony of the bartender ..., a finding is made that both decoys displayed the appearance of a person which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller at the time of the alleged offense.’ ALJ Lo’s contrary finding in a different case, regarding a sale at a later date and under different circumstances, has no bearing on how the minor decoy appeared before the seller in the instant case under the specific circumstances of the alleged offense herein.

“6. The Trier-of-Facts’ determinations are afforded great weight and deference, and his findings on the critical issue constitute substantial evidence.”

Appellant now contends that the Department is barred by principles of res judicata and collateral estoppel from reaching any result other than a determination that the decoy’s appearance did not comply with Rule 141(b)(2), because of the Department’s adoption of a decision of another Administrative Law Judge that the decoy lacked the appearance required by the rule.

Appellant relies on the Department's decision in Jug Liquor Limited Partnership (Registration No. 00048164), dated August 31, 2000, which also involved Crystal Hernandez as the minor decoy. In that case, ALJ Sonny Lo found that,

"in the context of promoting fairness, and in the application of a 'strict adherence' standard to Rule 141, the Administrative Law Judge concludes that the decoy, with her relatively large physical stature and her mature and serious countenance did not display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to Respondent's clerk at the time of the sale of the beer."

The accusation in Jug Liquor was dismissed, so there was no appeal to this Board. However, this Board has recently considered two other cases involving Crystal

Hernandez: 7-Eleven/ Smith (2001) AB-7740, and O'Brien (2001) AB-7751.² In both cases, the appellants contended that the Department was estopped from asserting compliance with Rule 141 because it had already determined, in the Jug Liquor matter, that the appearance of Crystal Hernandez did not comply with the requirement of Rule 141(b)(2).

Jug Liquor was a decision by ALJ Lo; 7-Eleven/Smith, O'Brien, and the proposed decision in the present case were all by ALJ Echeverria. The sales to Hernandez were made on September 9, 1999 (the present matter); November 13, 1999 (7-Eleven and Smith); December 4, 1999 (Jug Liquor Limited Partnership); and January 5, 2000, (O'Brien).

In 7-Eleven/Smith, this issue was raised at the administrative hearing. The Board ordered the matter reversed, not because ALJ Lo had a different opinion as to the appearance of Crystal Hernandez, but because of the absence of support in the record for ALJ Echeverria's findings regarding the decoy's appearance.

Collateral estoppel precludes re-litigation of issues litigated in a prior action as long as certain criteria are met. In Bernhard v. Bank of America (1942) 19 Cal.2d 807, 813 [122 P.2d 892], the California Supreme Court held that three questions are pertinent in determining whether collateral estoppel may be used as a defense: "Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" The

²Appellants' counsel was the same in all three of the prior cases discussed, as well as the present case.

Department contends that the criteria are not all met here, because the issue decided in the prior action (Jug Liquor) is not identical to the one presented in the present action for which the defense is asserted.

Appellant argues that the issue is the same in both cases: whether Crystal Hernandez displayed the appearance which could generally be expected of a person under the age of 21. However, appellant ignores the final part of the requirement of Rule 141(b)(2): "under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged sale." This specification means that the issue is not the same in the present case as it was in Jug Liquor.

In Jug Liquor, ALJ Lo determined that Hernandez did not display the appearance of a person under the age of 21 under the actual circumstances presented to Leslie Lukach in a San Diego liquor store on December 4, 1999. In the present case, ALJ Echeverria determined that Hernandez did display the appearance of a person under the age of 21 under the actual circumstances presented to Nell Cartwright on appellant's excursion boat on September 9, 1999.

The appeals court in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126] has told us that Rule 141 must be strictly applied, and therefore, the actual circumstances of each sale must be considered. Because these circumstances will be different in each sale, the issue of the decoy's appearance will necessarily be different in each sale. That is not to say that one ALJ must ignore the finding of another ALJ with regard to the appearance of a particular decoy. An earlier finding by another ALJ, however, would not be in any way binding on an ALJ considering the same decoy in another situation, even if the finding

of the other ALJ had been adopted by the Department. Even the same ALJ might find a decoy's appearance complied with Rule 141(b)(2) in one case, and then find it did not comply in another case. Under the "strict adherence" standard set by Acapulco, each violation must be evaluated separately to take into account the actual circumstances presented to the seller in each sale.

The consideration of a decoy's appearance independently in each case makes practical sense as well. Even if two violations involving the same decoy occur within a short time of each other, the physical situation will be different, the clerk will certainly be different, and the time of day may be different. The wide variety of factors that could differ in each sale require that an independent evaluation be made of the decoy's appearance for each sale.

Certainly an ALJ who has seen a particular decoy testify at a hearing previously, perhaps more than once, will have formed some general impression of that decoy's appearance. We must rely on the integrity of each ALJ to separate out any previous impression and judge the decoy's appearance solely in the context of the case then before the ALJ. We have said that we trust the ALJ's to do the difficult task of judging how the decoy appeared on the day of the sale when the ALJ sees the decoy in person months after the sale and may or may not have the benefit of a photograph taken near the time of the sale to help make that judgment as to the decoy's physical appearance. We have also said that we are not in a position to second-guess the determination of an ALJ as to a decoy's appearance, since the ALJ will have had the opportunity to see the decoy in person, which we have not. Without some substantial indication that an ALJ has not done his or her job properly, this Board has neither the power nor the inclination

to overturn an ALJ's determination as to the apparent age of the decoy.

In one sense, we are not at all disturbed that an ALJ at one hearing found that a decoy did not comply with Rule 141(b)(2), while another ALJ at another hearing, regarding a different violation, found that the same decoy did comply with the rule. An 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 ALJ's are reasonable and not arbitrary or capricious, we will uphold them.³

In another sense, however, disparities in findings about a decoy's appearance concern us. We fear that such disparities may be due to the selection of decoys whose appearance is so close to what is, after all, a rather hazy line, that the decoys will often be perceived to be over that line.

The court in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board, supra, said, "The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public and the decoys themselves." Rule 141(b)(2), by using the phrase "could generally be expected," makes clear that a decoy is not required to display an appearance that causes every person who sees the decoy to agree that the decoy looks under 21. However, to ensure compliance with Rule 141(b)(2) and the requirement in Rule 141(a) that decoy operations be conducted "in a fashion that promotes fairness," law enforcement agencies would do well to choose minor decoys who clearly appear to be under 21.

³ Upon reflection, we now believe the concerns we expressed in our original decision were somewhat overstated.

ORDER

The decision of the Department is affirmed.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.