

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

AB-7751

LINDA C. O'BRIEN dba 7-Eleven #13633
5141 College Avenue, San Diego, CA,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 21-215788 Reg: 00048410

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED DECEMBER 20, 2001

Linda C. O'Brien, doing business as 7-Eleven #13633 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended her license for 30 days, with 10 days thereof stayed for a probationary period of one year, for appellant's clerk selling an alcoholic beverage to a minor 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 Linda C. O'Brien, appearing through her counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele Wong.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated December 14, 2000, is set forth in the appendix.

Appellant's off-sale general license was issued on June 21, 1988. Thereafter, the Department instituted an accusation against appellant charging that, on January 5, 2000, appellant's clerk, Shannon Stanley ("the clerk"), sold an alcoholic beverage (beer) to 19-year-old Crystal Hernandez. Hernandez was working as a minor decoy for the San Diego Police Department at the time.

An administrative hearing was held on June 21 and September 20, 2000, at which time documentary evidence was received and testimony was presented concerning the alleged illegal sale.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained and no defenses had been established.

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant raises the following issues: (1) the Department is collaterally estopped from rendering a finding of compliance with Rule 141(b)(2); (2) the Department's request for disqualification of the ALJ constitutes an unlawful ex-parte communication; and (3) the decoy's appearance violated Rule 141(b)(2).

DISCUSSION

I

Rule 141(b)(2) requires that "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." Appellant contends the Department may not assert that this decoy, Crystal Hernandez, complied with Rule 141(b)(2) because the Department, in a certified final decision, has determined that Hernandez did not display the appearance that could

generally be expected of a person under the age of 21.

PRIOR CASES

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 and Smith (11/01) AB-7740, and Star & Crescent Boat Company (6/21/01) AB-7637.² 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 and Smith, Star & Crescent, and the proposed decision in the present case were all by ALJ Echeverria. The sales to Hernandez were made on September 9, 1999 (Star & Crescent Boat Company); November 13, 1999 (7-Eleven and Smith); December 4, 1999 (Jug Liquor Limited Partnership); and January 5, 2000, in the present case.

In Star & Crescent Boat Company, this issue was first raised on appeal, and the

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

Board ordered the matter remanded to the Department for reconsideration. The Board explained its remand as follows:

"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."

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 the ALJ Echeverria's findings regarding the decoy's appearance.

COLLATERAL ESTOPPEL

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 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 Shannon Stanley in a San Diego convenience store on January 5, 2000. The appeals court in Acapulco 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 and could affect a clerk's reasonable perception of a decoy's apparent age, 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 Hernandez 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.

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 (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] 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.

We reject appellant's contention that the Department is collaterally estopped from determining that Crystal Hernandez complied with Rule 141(b)(2).

II

Appellant contends the Department engaged in an unlawful ex-parte communication with the ALJ Echeverria when it made its Request for Disqualification ("the Request") of that ALJ. This issue, like the previous one, is one the Board has seen recently in another case, 7-Eleven, Inc. & Burges (11/01) AB-7690.

The Department filed its Request (Hearing Exhibit 8, a copy of which is included in the appendix) at the commencement of the hearing, without providing appellant or

her counsel with a copy. Appellant's counsel was not provided an opportunity to review or comment upon the Request before ALJ Echeverria made his ruling denying the Request. [RT 7.] Counsel was later given an opportunity to review a copy of the Request during a break in the proceedings.

Article 7 of the Administrative Procedure Act (Gov. Code §§11430.10-11430.80) prohibits ex parte communications from a party to the presiding ALJ while a matter is pending and prescribes the actions to be taken if ex parte communications occur.³

In 7-Eleven, Inc. & Burges, *supra*, this Board rejected the Department's argument that appellants were not prejudiced because they sought no relief under Government Code §11430.50, subdivision (c). We reject that argument again here.

³Government Code §11430.10 provides, in part:

“While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.”

Government Code §11430.50 provides:

“(a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:

- (1) If the communication is written, the writing and any written response of the presiding officer to the communication;
- (2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received the communication

(b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.

(c) If a party requests an opportunity to address the communication within 10 days after receipt of notice of the communication:

- (1) The party shall be allowed to comment on the communication;
- (2) The presiding officer has the discretion to allow the party to present evidence concerning the subject of the communication, including the discretion to reopen a hearing that has been concluded.”

Given the nature of the Request, we think the relief afforded by that section would have been meaningless, and appellant did not waive her objection to what had occurred by not resorting to that section's provisions.

In Burges, we outlined the error in the Department's position regarding guilty pleas by licensees' clerks. In the present case, we have examined more carefully the Department's other complaint against ALJ Echeverria, that he dismissed minor decoy cases because the decoy appeared to be over 21. The present case, of course, involves a minor decoy whom another ALJ found to appear over the age of 21, although the Department did not know that at the time the Request was made. In its Request, the Department, referring to the present case, asserted:

"the decoy is female, 5-10, 165 lbs which is taller than the decoy in previous cases dismissed by ALJ Echeverria. This decoy is similar in appearance as decoys dismissed in other cases and was 19 years old on the date of the violation. It is likely given the track record of this ALJ that the accusation will be dismissed." [Request, p. 9.]

ALJ Echeverria's "track record" complained about in the Request consists of three minor decoy cases that he dismissed: Sunroad Restaurant Concepts, LLC dba Peter Piper Pizza (heard 2/8/00),⁴ Bill R. Baxter, dba Kahuna's Coral Inn (heard 5/3/00), and Circle K Stores, Inc. dba Circle K #5095 (heard 5/18/00).

We note that ALJ Echeverria found that Hernandez complied with Rule 141(b)(2) in this case after being told by the Department, in no uncertain terms, that it did not approve of his decisions finding that decoys looked older than 21. (7-Eleven & Smith,

⁴ With regard to Sunroad Concepts, the Request states that Department later filed its own decision under Gov. Code 11517(c) "to correct errors made by ALJ Echeverria." In fact, the Department withdrew its notice rejecting ALJ Echeverria's proposed decision, and adopted ALJ Echeverria's decision, without change, on August 7, 2000 (after the date of the Request). The Department adopted ALJ Echeverria's proposed decisions dismissing the other two cases on August 3, 2000.

supra, in which ALJ Echeverria also found Hernandez to comply with the rule, was heard by him in October 2000, several months after he received the Request.) We need not reach any question about whether or not the ALJ's proposed decision was actually affected by the Department's Request; the Department's attack on its own ALJ in this manner so taints this proceeding that we are compelled to the conclusion that appellant was prejudiced. The Department acts not only as administrator, investigator, and enforcer in alcoholic beverage matters, but as adjudicator. It must conduct itself with its own ALJ's in a manner that is above reproach in order to maintain any semblance of fairness in this system. It has not done so here. The interests of justice require that a new hearing be conducted with a new Administrative Law Judge.

III

Appellant contends the decoy did not comply with the requirement of Rule 141(b)(2).

In light of our conclusion above that this matter must be remanded for a hearing before an ALJ other than ALJ Echeverria, we need not address this issue.

ORDER

The decision of the Department is reversed and remanded to the Department for further proceedings in accordance with this opinion.⁵

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

⁵This 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.