

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

AB-7992

File: 41-249456 Reg: 01050666

CEC ENTERTAINMENT INC., dba Chuck E. Cheese's
71 Tierra Rejada Rd., Ste. B, Simi Valley, CA 93065,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: February 13, 2003
Los Angeles, CA

ISSUED APRIL 3, 2003

CEC Entertainment Inc., doing business as Chuck E. Cheese's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant CEC Entertainment Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine eating place license was issued on November 2, 1990. Thereafter, the Department instituted an accusation against appellant charging that, on February 12, 2001, appellant's employee, Cecilia Hernandez, sold an

¹The decision of the Department, dated June 6, 2002, is set forth in the appendix.

alcoholic beverage to 18-year-old Kit Gruppie. Gruppie was acting as a decoy for the Simi Valley Police Department at the time of the sale.

An administrative hearing was held on May 1, 2002, at which time documentary evidence was received and testimony concerning the transaction was presented by Gruppie (the decoy), Simi Valley police officer Paul Fitzpatrick, appellant's assistant manager Raymond Guyala, and Hernandez.

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

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) The decoy failed to make a face-to-face identification of both "sellers," in violation of Rule 141(b)(5) (4 Cal. Code Regs., §141, subd. (b)(5)); (2) the decoy's appearance did not comply with the requirement of Rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2)); (3) Rule 141(b)(4) (4 Cal. Code Regs., §141, subd. (b)(2)) was violated; and (4) the ALJ failed to make a credibility determination.

DISCUSSION

I

Appellant argues that the sale to the decoy was a "collaborative effort" by Hernandez, who was the cashier at the counter where the decoy placed and paid for his order, and by assistant manager Guyala, who, appellant asserts, poured the beer from the tap and placed the filled glass on the counter. Appellant contends that Rule 141(b)(5) was not complied with because both Hernandez and Guyala were "sellers," but the decoy made a face-to-face identification only of Hernandez. Appellant also argues that the ALJ erred by determining that he did not need to determine which of the two sold the beer.

Appellant's argument is based on two assumptions: that Guyala poured the beer and placed it on the counter for the decoy, and that there was no "completed sale" until delivery of the beer by placing it on the counter.

The ALJ noted that the decoy and the police officer testified that Hernandez poured and served the beer, while Hernandez and Guyala testified that Guyala poured and served the beer. (Finding IV. A.) The ALJ then stated that it was immaterial whether Hernandez or Guyala had actually done the pouring and serving, since the actions of either would have been imputed to appellant. (Finding IV. B.) Appellant appears to equate the ALJ's failure to determine who poured and served the beer with a failure to determine who the seller of the beer was.

Appellant is mistaken, however, in asserting that the ALJ did not identify the seller of the beer. In Finding VI, the ALJ stated: "Since Ms. Hernandez took the decoy's order, asked to see his identification, checked his driver [sic] license, and accepted payment for the beer, she was the person who sold, or caused to be sold, the beer to the decoy." We agree with the ALJ that Hernandez was the seller of alcoholic beverages within the meaning of the rule.

Appellant asserts however, that to sustain an accusation for violation of section 25658, subdivision (a), there must be a "completed" sale, which does not occur until there has been both payment for and delivery of the purchased product. Appellant does not argue that the sale was not completed, only that, since the sale was completed by Guyala's delivery of the beer, Guyala must have been a "seller" and the decoy was thus required to identify him as such in order to comply with the statute. Appellant's reasoning, however, escapes us. Goods need not be delivered by the seller of the goods in order for the sale to be completed. Guyala's "collaboration" in the

transaction does not make him "the seller" (or even "a seller") and does not cause Hernandez not to be the seller. The decoy's identification of Hernandez complied with Rule 141(b)(5).

II

Appellant contends that this decoy, who was 5'10" tall and weighed 230 pounds at the time of the decoy operation, was "overly large," and thus "inappropriate" to use as a decoy.

Appellant does not even allege specifically that the decoy failed to display the appearance generally to be expected of a person under the age of 21, which is the standard under Rule 141(b)(2). It only asserts that it is "obvious" that the decoy's size made him inappropriate as a decoy.

The ALJ, in Finding VIII, noted the decoy's height, weight, hair, and attire during the decoy operation, and his height, weight, and behavior at the hearing. After considering the photograph of the decoy taken two weeks after the decoy operation, the testimony regarding the decoy's appearance while at appellant's premises, and his overall appearance and demeanor at the hearing, the ALJ concluded that the decoy displayed the appearance generally to be expected of a person under the age of 21 when he purchased beer at appellant's premises.

We have said repeatedly that we will defer to the ALJ's findings regarding the apparent age of the decoy, except in the most unusual circumstances. Appellant has pointed out no circumstances in the present case that compel us to re-examine the ALJ's finding in this regard.

III

Appellant contends that Rule 141(b)(4) was violated by the decoy telling Guyala that he was meeting his cousin at the premises. Appellant appears to believe that, because that statement was untrue, the decoy somehow did not "answer truthfully any questions about his or her age," as required by the rule.

During direct examination, Guyala testified that when the decoy entered the premises, Guyala asked the decoy if he was coming in to buy some food, and the decoy said he was meeting his cousin there. Guyala said he asked the question because they were in the process of closing the store.² [RT 99.] The decoy also told Guyala that he was going to order something. [RT 107.]

Although appellant complains about it, it is not remarkable that the ALJ failed to address any Rule 141(b)(4) issue, since appellant never raised the argument at the hearing. In fact, appellant made no closing argument at all, but merely submitted the matter on the record at the close of testimony. Under the circumstances, this issue is improperly raised for the first time on appeal and the Board need not consider it.

However, even if this issue had been raised at the hearing, we would reject appellant's argument on appeal. Rule 141(b)(4) only requires a truthful answer to a question about a decoy's age, and Guyala's inquiry had nothing to do with the decoy's age. Because the question asked was not about the decoy's age, Rule 141(b)(4) is not relevant, regardless of the veracity of the decoy's answer.

Appellant likens this case to *Mauri Restaurant Group* (1999) AB-7276. In that case the decoy, who was 6'1" tall and weighed 190 pounds, went into the appellant's

²Guyala testified later that the premises closed at 10:00 p.m. and that the decoy entered about 9:00 p.m. [RT 107.] The officer also testified that the decoy entered at about 9:00 p.m. [RT 69.]

expensive Italian restaurant, where he was asked by the maitre d', "One for dinner?" The decoy responded affirmatively, and when he was seated, he told the waiter he was expecting two more people to join him and said he was staying at the nearby (and expensive) Hyatt Hotel. None of these things the decoy told the maitre d' and the waiter were true. The Board concluded that the decoy's misrepresentations, which were designed to give the impression that the decoy was old enough to stay in an expensive hotel and to patronize an expensive restaurant, "[could] fairly be equated with a misrepresentation as to his age, a violation of Rule 141(b)(4)."

Mauri Restaurant Group is readily distinguishable from the present case. In *Mauri*, the decoy's statements were designed to make him appear older. In the present case, nothing about meeting his cousin made, or was designed to make, the decoy look older. *Mauri* does not stand for the proposition that *any* misrepresentation by a decoy will violate Rule 141(b)(4).

IV

Appellant contends the ALJ failed to make a credibility determination that he should have with regard to the witnesses. Appellant argues that the credibility determination was necessary to resolve the Rule 141(b)(5) issue (decoy's identification of seller), and calls the ALJ's failure to do so "inexcusable."

We rejected appellant's argument regarding Rule 141(b)(5) earlier in this decision. Appellant presents no reason for making this argument other than the Rule 141(b)(5) issue, and we see none. In any case, "inexcusable" is not a legally cognizable basis for reversing the Department's decision.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, 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.