

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

AB-8057

File: 47-382711 Reg: 02053190

SQUID JOES, LLC, dba Squid Joes
850 Tamarack Avenue, Carlsbad, CA 92008,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED JANUARY 21, 2004

Squid Joes, LLC, doing business as Squid Joes (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its bartender selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Squid Joes, LLC, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Jessica Brown, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on February 14, 2002. On June 20, 2002, the Department filed an accusation against appellant charging that, on March 8, 2002, appellant's bartender, Paul Vega (the bartender), sold an alcoholic beverage to 18-year-old Gina Glasby. Although not noted in the

¹The decision of the Department, dated November 14, 2002, is set forth in the appendix.

accusation, Glasby was working as a minor decoy for the Carlsbad Police Department at the time.

At the administrative hearing on October 3, 2002, documentary evidence was received, and testimony concerning the sale was presented by Glasby (the decoy) and by Scott Meritt, a Carlsbad police officer, for the Department, and by Don Logan, Sr., Barrie Logan, and Charles Skiff.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense was established. Appellant has filed a timely appeal raising the following issues: The decoy violated rules 141(b)(2), 141(b)(3), 141(b)(4), and 141(b)(5);² and the decoy operation was not conducted in a fashion that promoted fairness, in violation of rule 141(a).

DISCUSSION

I

Appellant contends the decoy violated rules 141(b)(2), 141(b)(3), 141(b)(4), and 141(b)(5). To aid in understanding the following discussion, it is helpful to look at Findings of Fact II-A and II-B in the proposed decision of the administrative law judge (ALJ), which the Department adopted.

In Finding of Fact II-A, the ALJ acknowledged that there was conflict in the testimony about what happened after the decoy went up to the bar counter. The ALJ explained that he evaluated the credibility of the witnesses and concluded that "greater weight was given to the testimony of the decoy than to that of the Respondent's witnesses in resolving the conflict in the evidence."

²References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

In Finding of Fact II-B, the ALJ described the sale to the minor decoy:

The decoy credibly testified that she sat down at the bar, that a male bartender came up to her, that she ordered a Corona, that the bartender retrieved a bottle of Corona beer from behind the bar, that he opened the bottle, that he placed a lime on the top of the bottle, that he placed the bottle of beer in front of her, that she handed a twenty-dollar bill to the bartender, that he rang up the beer and that he gave her some change.

A. Rule 141(b)(2) – This rule requires the decoy to "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 decoy did not meet that standard because there was evidence that, during the decoy operation, she was wearing eye make-up and a "mature haircut" and she had a "pushy, aggressive demeanor." (App. Br. at 13-14.)

The ALJ found that the decoy was not wearing any make-up while in appellant's premises and her hair was colored blond with brown streaks. (Finding II-E.) She had been wearing make-up before the decoy operation began, but she washed her face and removed the make-up at the request of the police officers before going out on the decoy operation. She was wearing make-up on the day of the hearing. (Finding II-F.)

The ALJ found that the decoy's physical appearance was that generally expected of a person under 21 years of age. (Finding II-G.) He then discussed her experience as a decoy and her demeanor at the hearing. He concluded:

After considering the photograph (Exhibit 2), the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellant's argument depends entirely on the testimony of appellant's witnesses, Mr. and Mrs. Logan, long-time customers of the premises under its former owner, and Charles Skiff, a bartender at the premises who was there that night, but not working as a bartender. The ALJ found their testimony not credible, and rejected their version of events, basing his findings on the decoy's testimony, which he found to be credible.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.2d 315, 323 [314 P.2d 807]; *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].) This Board will not interfere with the credibility determinations of the trier of fact absent a clear showing of abuse of discretion. Having reviewed the record, including the transcript of testimony, we cannot disagree with the ALJ's determinations of credibility.

B. Rule 141(b)(3) – This rule provides that "A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages." Appellant asserts that three witnesses testified that the bartender asked the decoy for identification, but she did not answer or present her identification.

The three witnesses were appellant's witnesses, whose testimony was rejected by the ALJ as not credible. The decoy testified that the bartender did not ask for her identification, and the ALJ so found. (See Finding II-B.) If no identification is asked for, there can be no violation of rule 141(b)(3).

C. Rule 141(b)(4) – This rule provides that "A decoy shall answer truthfully any questions about his or her age." The decoy violated this rule, according to appellant, by avoiding the bartender's request for identification, walking away from the bar and mingling with other patrons as if she knew them.

Again, appellant relies for this contention on the discredited testimony of the Logans and Skiff. The decoy testified, and the ALJ found, that she sat at the bar counter while she ordered, received, paid for, and received change for the beer. In any case, the decoy was not asked a question about her age, so there could be no violation of rule 141(b)(4).

D. Rule 141(b)(5) – This rule provides that, after a sale, the officer directing the decoy should have the decoy make a face-to-face identification of the alleged seller of the alcoholic beverage. Appellant argues that there was no acknowledgment by the bartender that the identification was being made and this did not constitute an adequate face-to-face identification under this Board's decision in *Chun* (1999) AB-7287. In *Chun*, the Board said a face-to-face identification means that

the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

In Finding of Fact II-D, the ALJ found that a proper face-to-face identification of the seller took place, and,

[a]t the time of this identification, the bartender was standing behind the bar directly in front of the decoy and about three and one half feet from the decoy. Although Officer Meritt was equivocal as to what the bartender was doing at the time of the identification, the decoy convincingly testified that the bartender's attention was directed to her and Officer Meritt at the time of the identification. The preponderance of the evidence presented

at the hearing established that the identification of the bartender complied with the Department's Rule 141.

In its brief, appellant very selectively quotes the decoy's testimony and relies on the discredited testimony of Mr. Logan. Appellant points out the decoy's testimony that the bartender was "grabbing money from another customer," but ignores the rest of the decoy's statement. The decoy's complete statement was: "I think I recall [the bartender] grabbing money from another customer, yes, after. After I had pointed him out, he had taken money from another customer." [RT 33.] When asked specifically where the attention of the bartender was directed when she pointed at him and identified him, the decoy said "Towards us. . . . Me and the officer." [RT 33.]

The ALJ's finding was supported by the evidence and not unreasonable.

II

Appellant contends that this decoy operation was not conducted in a fashion that promotes fairness, as required by rule 141(a). Its contention is based on the rule 141(b) violations it alleged, and on the alleged failure of the decoy to take possession of the beer. Appellant relies on the testimony of the Logans, Skiff, and officer Meritt for the latter assertion.

The ALJ rejected the story told by appellant's witnesses that the decoy neither had possession of the beer nor paid for it. Appellant quotes officer Meritt as saying that he did not know if the decoy ever "actually took possession" of the beer. Once again, appellant fails to quote the testimony following the language relied on. Meritt was asked if the decoy had possession of the beer at the time the officer approached her, and Meritt asked counsel to define "possession" for him. Counsel then asked, "Did she have control of that Corona [beer] within her hand or something of that nature?" The

officer answered, "From my view of it, yes. The beer was right in front of her. It was clearly – no one else is to either side." [RT 48.]

The alleged violations of rule 141(b) have already been discussed and rejected. We find no reason to conclude that the decoy operation was conducted unfairly.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.