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

AB-8127
File: 47-297760 Reg: 02053985

THE LOST ISLE PARTNERS, LP dba Lost Isle
11050 West Acker Island, Stockton, CA 95209,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: January 8, 2004
San Francisco, CA

ISSUED APRIL 14, 2004

The Lost Isle Partners, LP, doing business as Lost Isle (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for its bartender, Phillip Champion,[2] having sold beer to Carmen Romero, a 19-year old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant The Lost Isle Partners, LP, appearing through its counsel, Marvin B. Ellenberg, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated March 20, 2003, is set forth in the appendix.

[2] The accusation identifies the bartender as Phillip Champion. The decision refers to him at times as Phillip Champion and at other times as Phillip Cameron. Since no issue is raised regarding the identity of the bartender, the discrepancy is immaterial.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on April 12, 1995. On October 8, 2002, the Department instituted an accusation against appellant charging an unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on February 11, 2003, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Carmen Romero, the minor decoy, and Mike Press, a San Joaquin County sheriff's deputy. Allen Strege and James Ryan testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proven, and appellant had failed to establish an affirmative defense under Rule 141.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) The use of four decoys violated the fairness requirement of Rule 141; (2) the decoy lied to gain entry to the premises; and (3) there was no evidence of compliance with the notice requirement of Business and Professions Code section 25658, subdivision (f).

DISCUSSION

I

According to the testimony of San Joaquin County sheriff's deputy Mike Press, as many as four decoys were transported to the island where the premises are located. Press and a second deputy were in charge of decoy Romero and a second decoy, identified by Press as Elizabeth Lopez. The four traveled to the island together. Press witnessed a sale of beer to Romero, identified himself as a deputy sheriff, and escorted Champion from the premises to the area of the dock where the sheriff's patrol boat

docks. Romero joined them, and identified Champion as the person who sold the beer to her.

Romero testified that she thought Lopez had attempted unsuccessfully to purchase an alcoholic beverage at the premises. She was not asked how she knew this. Romero did not remember who made the first attempt. Press, on the other hand, did not recall whether he had known of an attempt by Lopez.

James Ryan testified that he was working as a bartender at a second bar in the premises on the afternoon in question. He heard by word of mouth that Champion had sold beer to a minor, and then saw him leave the bar. According to Ryan [RT 58], he had been approached 15 to 30 minutes earlier by a person whom he believed to be a decoy:

> She had approached the bar and waited very patiently, which is pretty uncharacteristic and I had – I kept glancing over to her and she wasn't very adamant about making a purchase. And then I had glanced over to her to make – tie in specific to her and ask if I could help her and she requested a beverage that was [an] alcoholic beverage and her arms were down below my visible range. So then I asked her if she had a wristband on and she said no. And then I asked her if she had I.D. and she said that she didn't have it and she started fumbling around and my attention was directed the other direction and when I looked back to her just a second or two later, she was gone through the crowd.

The ALJ summarized Ryan's testimony in this manner [Finding of fact IV-B]:

> James Ryan works as a bartender for Respondent. He was not working at the same bar as Champion on July 27, 2002. He believes he was approached that date by a minor decoy but after he asked for her identification she wandered away while he waited on other customers. Ryan formed his opinion that this customer was a decoy because she was more polite than others in the bar while waiting to purchase an alcoholic beverage.

The decision makes no findings one way or the other whether there was more than one attempt by a decoy to purchase an alcoholic beverage on the day in question.

We are confronted with a record which establishes that as many as four decoys

and a number of San Joaquin County Sheriff's Office personnel visited appellant's premises on a warm July afternoon, and, during that visit, one of those decoys succeeded in purchasing an alcoholic beverage, and another decoy may have attempted to do so, but unsuccessfully. On these facts, appellant contended at the hearing and now contends in this appeal that the decoy operation was unfair. The decision concluded that it "was not established that the decoy operation was conducted other than in accordance with the fairness requirement of Rule 141."

In *7-Eleven, Inc./Mousavi* (2002) AB-7833, the Appeals Board concluded that an unsuccessful attempt by a second decoy to purchase an alcoholic beverage, after another decoy had successfully done so, transgressed the requirement of Rule 141 that a decoy operation be conducted "in a manner which promotes fairness." The Board was influenced by two primary considerations: (1) the premises in that case was the only one of those visited during the decoy operation which was subjected to multiple purchase attempts; and (2) had both been successful, the clerk and the licensee could each have been charged with two violations, exposing the licensee to possible revocation in the event of a third violation. In reversing the decision of the Department which had found a violation of section 25658, subdivision (a), the Board concluded that "it is how the decoy operation is conducted, not its result, that must be judged in determining fairness."

There have been a number of cases which have come to the Appeals Board in which the premises then in question had been visited by two decoys. *Mousavi* is only one such example. In those cases the Board sometimes found the situation to be

unfair, in others not. As noted in *Mousavi*, "[u]nfairness has generally been found where the presence of the second decoy was obviously distracting or created the impression that the purchasing decoy was old enough to purchase the alcoholic beverage. The presence of two decoys, by itself, has not been enough to find a decoy operation unfair."

If bartender Ryan's testimony is to be believed, a second decoy may have attempted to purchase an alcoholic beverage after a successful attempt by the first decoy. Other than his surmise, and Romero's uncorroborated belief that there was another attempt, however, there is no persuasive evidence that there was a second attempt. If there was, this case is still unlike *Moussavi*, because the second attempt would have been at a different bar in the premises and a different seller.

The evidence does not establish with any certainty that any decoy other than Romero sought to make a purchase.

Although this case could be said to have approached the border of unfairness, we do not believe it crossed that line.

II

Romero testified that when she arrived at the premises, she was asked for identification by a security guard. She showed him her California identification card, which, like a driver's license, contains a red stripe showing in white letters the year she would be 21 - "Age 21 in 2003." The security guard asked her who she was with, and she told him she was there to pick up a friend. This was untrue. She was permitted to enter, and the guard did not stamp her wrist or place a band on her wrist. She then got

in line at the counter, placed her hands on the top of the counter, and asked for a Bud Light. The bartender sold her the beer. She had placed her hands on the counter to show the bartender she had no wrist band or markings, which, had she possessed either, would have informed the bartender that she was 21 or older..

Appellant claims that her conduct violated the fairness requirement of Rule 141, citing two decisions of the Appeals Board which involved instances of police decoys giving untrue answers to questions that did not involve their age.

In *Tahvildari* (2001) AB-7706, the decoy was asked what she did, and replied that she was a student. The licensee then asked her if she would like to work as a cocktail waitress at his business. The decoy averted her eyes downward and said "No, thank you." The licensee claimed the decoy should have answered that she was a student and employed by the Hermosa Beach Police Department. The Appeals Board rejected the licensee's contentions on two grounds: the rule only requires a truthful answer when the question relates to her age; and, the answer, that she was a student, was true. Thus, the fact that she also worked for the police department did not render her response untrue.

In *Maui Restaurant Group* (1999) AB-7276, the Board reached a contrary result where the decoy had volunteered comments which were designed to give the impression that he was old enough to stay in an expensive hotel and to patronize an expensive restaurant. In its decision, the Board stated:

> It is one thing for a decoy to not volunteer information that might alert a seller to the fact that a decoy is not of legal age. It is quite another for a decoy to volunteer false information to induce exactly the opposite, as the events in this case illustrate.

In the present case, the decoy gave an answer which was untrue. It could be said that, had she truthfully disclosed who she was with - a group of deputies and police decoys - she may never have reached the bar counter. Instead, her answer that she was there to pick up a friend implied that she would be leaving with the friend.

Since the security guard's inquiry did not have anything to do with age, we do not think her failure to disclose her affiliation with law enforcement personnel prejudiced the decoy operation. The answer she gave did not in any way imply that she was of legal drinking age. Indeed, when she purchased the beer, she intentionally acted to put the bartender on notice that he should not sell to her.

The testimony of both deputy Press and bartender Ryan indicates that the wrist band was a prerequisite to the ability to buy an alcoholic beverage. Thus, when Romero intentionally placed her hands where the bartender could see that she did not have a wrist band, he should have known she was not of legal drinking age.

We find this case more like *Tahvildari*, *supra*, than *Maui Restaurant Group, supra.* Nothing the decoy did misrepresented her true age.

III

Appellant contends that the failure of the Sheriff's Department to furnish the notice required by Business and Professions Code section 25658, subdivision (f), requires that the decision be reversed.

The statute obligates the law enforcement agency "using the decoy" to notify licensees of the results of the decoy program within 72 hours after the completion of the program, and/or within 72 hours of the issuance of a citation as a result of the program.

Since the duty to furnish the notice is placed on the law enforcement agency, and not on the Department, the failure to provide such notice is no defense to a

Department proceeding.

ORDER

The decision of the Department is affirmed.[3]

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

[3] 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.