

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

AB-8230

File: 47-350965 Reg: 03054813

INLAND PACIFIC INVESTMENTS, LLC, dba Carlos O'Brien's
440 West Court Street, San Bernardino, CA 92401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 2, 2004
Los Angeles, CA

ISSUED FEBRUARY 7, 2005

Inland Pacific Investments, LLC, doing business as Carlos O'Brien's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days² for appellant's bartender selling alcoholic beverages to two police minor decoys, violations of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Inland Pacific Investments, LLC, appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated December 24, 2003, is set forth in the appendix.

²Two 15-day suspensions were imposed, one for each of the two counts, but were ordered to run concurrently.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on November 20, 2000. On April 10, 2003, the Department filed an accusation charging that, on November 9, 2002, appellant's bartender, Manuel Victor Garcia (the bartender), sold alcoholic beverages to Tracey Torres and Jennifer Haro, both of whom were 18 years of age. Although not noted in the accusation, Torres and Haro were working as minor decoys for the San Bernardino Police Department at the time.

At the administrative hearing held on October 22, 2003, documentary evidence was received, and testimony concerning the sale was presented by decoys Torres and Haro and by Ruben Cordoba, a San Bernardino police officer.

On the night of the decoy operation, Cordoba and another officer received wristbands from the doorman at the entrance of the licensed premises, indicating they were over the age of 21. Torres and Haro, after presenting their ID's, were not given wristbands because they were both under the age of 21.

Haro approached the bar counter and stood with her hands on the counter and her wrists plainly visible. She ordered a Coors Light from the bartender, which he obtained and placed on the counter in front of her. The bartender did not ask Haro for her age, her identification, or a wristband. After Haro returned to the officers and Torres with her beer, Torres went to the bar counter and ordered and obtained a Coors Light. The bartender did not ask Torres for her age, her identification, or a wristband.

Before leaving the premises, Haro and Torres pointed out the bartender to the arresting officers. Then they waited outside the premises until the officers escorted the bartender outside. There they both identified the bartender while standing in close proximity to him.

Subsequent to the hearing, the Department issued its decision which determined that the violations charged had been proven, and no defense had been established.

Appellant has filed an appeal making the following contentions: (1) The decoys did not make proper face-to-face identifications of the bartender, violating rule 141(b)(5)³; (2) the decoy operation was not conducted in a fashion that promotes fairness, violating rule 141(a); and (3) the Department failed to produce substantial evidence that what the bartender sold to the decoys were alcoholic beverages.

DISCUSSION

I

Rule 141(b)(5) provides that, following a sale of an alcoholic beverage to a minor decoy, "the peace officer directing the decoy shall . . . have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages."

Appellant contends that the identifications of the bartender in this case violated the rule because they took place outside the premises and because they were not "face to face."

In paragraphs 1 through 4 of Finding of Fact II-C, the ALJ discussed the evidence supporting his finding that the bartender had been identified in a face-to-face identification that complied with rule 141(b)(5):

1. Police officers who were part of the arresting team escorted Manuel Victor Garcia, the bartender who served Torres and Haro a Coors Light beer, out of the premises after they were advised that a violation had taken place and after the bartender had been pointed out to them by Torres and Haro.
2. While outside the premises, one of the officers asked Haro to point out the person who had sold her the beer and she pointed to Garcia. When this identification took place, Garcia and Haro [were] standing in close

³References 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.

proximity. The photograph depicted in Exhibit 2-A was taken shortly thereafter. This photograph depicts Haro holding a bottle of Coors Light beer and pointing to Garcia, the bartender that served a beer to her.

3. While Torres was outside the premises, one of the officers also asked Torres to identify the bartender who had served her a beer and Torres pointed to Garcia. The photograph depicted in Exhibit 2-D shows her holding a bottle of Coors Light beer and pointing to Garcia, the bartender that served her a beer. When this identification took place, the decoy and [Garcia] were standing in close proximity.

4. A citation was issued to Garcia after the two decoys had identified him as the bartender who had served them a beer.

Appellant's contention that rule 141(b)(5) is violated by having the identification take place outside the premises, rather than inside, was rejected in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Keller)* (2003) 109 Cal.App.4th 1687, 1695-1698 [1 Cal.Rptr.3d 339]. The court explained that rule 141(b)(5) "does not address the location or manner of such identification. ¶ We conclude [rule 141(b)(5)] only requires the peace officer to enter or remain on the premises *to arrange* a face-to-face identification. The literal terms of the section leave the location of the identification to the discretion of the peace officer. Given the variety of circumstances surrounding the sale of alcohol, such discretion is necessary."

Both decoys and the police officer testified that, after the decoys had purchased the beers, both decoys pointed out the bartender to the officers. At that time, they were standing approximately 20 feet from the bar counter behind which the bartender worked. The decoys then went outside, and some of the officers brought the bartender out to them, where the decoys again identified the bartender as the person who sold the beer to them. Appellant complains that Haro and Torres were standing too far away when they identified the bartender outside and that the bartender's attention was not directed toward the decoys because he was not looking at them.

We reject these contentions regarding alleged deficiencies in the required face-to-face identification, as did the ALJ. As found by the ALJ, both were in "close proximity" to the bartender while making the identifications outside the premises – Torres said she was less than five feet away from the bartender, and Haro said she was "right next to" him. Torres said the bartender was looking down, not at her, and Haro said they were both looking straight ahead, but given the circumstances, it is reasonable to infer that the bartender knew the decoys were identifying him.

The bartender did not testify, so we do not know if he was aware. However, we find it difficult to believe he might not be aware of what the two decoys, standing only a few feet away, were doing or saying. Nor does it follow that, because the bartender may have been looking elsewhere at that moment, he was unaware of the identification process. At the very least, the bartender reasonably ought to have been aware that the decoys were identifying him, and that is all that is required. We are satisfied that there was compliance with Rule 141(b)(5).

II

Appellant contends that the decoy operation violated the requirement of rule 141(a) that decoy operations be conducted in a fashion that promotes fairness. This contention is based on the allegation that the decoys did not "obviously and clearly disclos[e] their wrists so that a reasonable bartender in the same or similar circumstances would find it readily apparent that they [wore] no wristband[s] and thus should not be served." (App. br. at p. 11.)

Appellant's allegation is sheer fabrication. Haro and Torres both testified that their hands were on the bar counter when they made their purchases, and their wrists were visible. Cordova testified that he watched both purchases, and the decoys' arms

were visible. The decoys did not attempt to hide the fact that they had no wristbands. The bartender simply failed to look or did not care. There was no violation of rule 141(a).

III

Appellant contends that the Department failed to prove that what the decoys purchased were actually alcoholic beverages, because the officers poured out the liquid in the bottles at the scene and the bottles were not produced at the hearing.

While it is true that neither the bottles nor the liquid they contained were produced at the hearing, the uncontroverted testimony clearly showed that the bottles contained beer, an alcoholic beverage.

Both decoys testified that they ordered "Coors Light," which is a commonly known brand of beer. It is presumed that when an alcoholic beverage is ordered, an alcoholic beverage is served (*Mercurio v. Department of Alcoholic Beverage Control* (1956) 144 Cal. App. 2d 626, 634-635 [301 P.2d 474]; *Griswold v. Dept. of Alcoholic Beverage Control* (1956) 141 Cal.App.2d 807, 811 [297 P.2d 762]), and appellant presented no evidence to controvert that presumption. The bottles the decoys received were labeled as Coors Light beer, as shown in Exhibit 2B, which is a photograph of the bottles the decoys purchased. Officer Cordova testified that, although he did not taste the liquid in the bottles, the bottles were cold, full, unsealed, and smelled like beer.

Substantial evidence was produced that the beverages sold to the decoys were alcoholic beverages.

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.