

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

AB-8259

File: 21-16659 Reg: 03055917

CIRCUS LIQUORS, dba Circus Liquor
5600 Vineland Avenue, North Hollywood, CA 91601,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: November 4, 2004
Los Angeles, CA

ISSUED JANUARY 10, 2005

Circus Liquors, doing business as Circus Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk 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 Circus Liquors, appearing through its counsel, Jeffrey S. Weiss, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 25, 1966. On September 24, 2003, the Department instituted an accusation against appellant charging that on July 25, 2003, appellant's clerk, Julio A. Mejia, sold an alcoholic

¹The decision of the Department, dated March 11, 2004, is set forth in the appendix.

beverage to 19-year-old Betzabeth Rivera. Although not noted in the accusation, Rivera was working as a minor decoy for the Los Angeles Police Department at the time.

An administrative hearing was held on January 6, 2004, at which time documentary evidence was received, and testimony concerning the sale was presented by Rivera (the decoy), by Los Angeles police officer Aaron Korth, and by Mejia (the clerk).

At the premises, the decoy selected and took to the counter a 24-ounce can of Bud Light beer. The clerk asked to see her identification and she showed him her California identification card. He looked at the card for a few seconds, looked at the decoy, handed back the card, and sold her the beer.

After leaving the store with the beer, the decoy re-entered with police officers and identified the clerk as the seller. A photograph was taken of the clerk and the decoy,² and the clerk was cited.

At the hearing, the clerk testified that he believed the decoy was over 21 based on her appearance and her lack of hesitation in providing her identification when it was requested. He looked at the picture on the identification card and looked for her birth date, but did not notice the red stripe with the words "age 21 in 2004."

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense had been established. Appellant appealed the Department's decision, contending rule 141(b)(2)³ was violated.

²This was admitted into evidence as Exhibit 2 at the hearing.

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.

DISCUSSION

Rule 141(b)(2) requires that the decoy display the appearance that could generally be expected of a person under the age of 21 under the actual circumstances presented to the seller of alcoholic beverages at the time of the sale. A violation of any of the provisions of rule 141 provides a licensee with a defense to a sale-to-minor charge. (Cal. Code Regs., § 141, subd. (c).) Appellant alleges that the decoy appeared to be over the age of 21 at the time of the sale, and that the administrative law judge (ALJ) erroneously judged the decoy's appearance based on how she looked at the hearing, rather than how she appeared to the clerk at the time of the sale.

The decoy's appearance was addressed in the Department's decision in Findings of Fact 7 and 8:

7. Minor Rivera had the overall appearance of a teenager. She was then 5' 7" tall and weighed 150 pounds. She was dressed in a "Rolling Stones" t-shirt[,] black pants and tennis shoes and had on no makeup or jewelry. Her hair was partially pulled back in a ponytail and partially falling over her shoulders. At the hearing her hair was also in a ponytail, which gave her a rather pronounced appearance of youthfulness.

There was nothing in the minor's appearance at the hearing, less than 6 months after the July 25, 2003 incident, including her poise, demeanor and maturity, to indicate an age beyond her actual 19 years.

8. It is found that the minor displayed the appearance that could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller at the time of the violation.

This Board will not, in the absence of extraordinary circumstances, attempt to second-guess an ALJ's determination as to the apparent age of the decoy. This determination is part of the ALJ's responsibility as finder of fact, and, in any case, the ALJ has the benefit of seeing the decoy in person, which this Board does not.

Appellant asserts, however, that the ALJ improperly based his determination about the decoy's appearance on how she appeared at the hearing, not how she appeared on the date of the sale. This is shown, appellant contends, by the statement in finding 7 that, "[a]t the hearing her hair was also in a ponytail, which gave her a rather pronounced appearance of youthfulness." This "pronounced appearance of youthfulness," caused by the ponytail the decoy wore at the hearing, appellant asserts, resulted in the ALJ's determination that the decoy appeared to be under the age of 21. It appears that appellant's reasoning is that, since the decoy wore her hair differently at the time of the sale, she would not have had the "pronounced appearance of youthfulness" at that time; therefore, the ALJ did not determine that she appeared under the age of 21 at the time of the sale, but as of the time of the hearing.

In his findings, the ALJ clearly noted the minor differences in the way the decoy wore her hair. The testimony indicates that the two hairstyles were nearly indistinguishable, at least from the front [RT 26]:

- Q. How was your hair styled at the time of the sale?
- A. It was halfway pulled back.
- Q. Okay. How does that compare to today?
- A. I have it completely pulled back today.
- Q. Okay. Could you describe for us the difference? It looks in the photograph like it's flat against your head like it is today. So what's the difference between halfway pulled back and completely pulled back?
- A. There's a – well, it's completely – not completely. It's halfway pulled back in the sense that I still have some of my hair down to my – halfway down my back.
- Q. Okay. So instead of the hair in the back being pulled up today, it was down, like, in a ponytail, or was it loose?
- A. Well half of it was pulled back in a ponytail and half of it was down.

It appears that the ALJ considered both the hairstyle worn by the decoy at the hearing and the hairstyle worn by her at the time of the sale to be ponytails ("[a]t the hearing her hair was *also* in a ponytail"). Given the similarity in the appearance of the hairstyles, we cannot disagree with the ALJ's conclusion that they were essentially the same. Therefore, we read his statement that the ponytail gave the decoy "a rather pronounced appearance of youthfulness," to refer to both times – at the hearing and at the time of the sale.

We conclude that the ALJ properly determined the decoy's appearance as of the time of the sale to her of the alcoholic beverage.

In support of its contention that the decoy appeared to be over 21 at the time of the sale, appellant observes that at that time, the decoy was 5' 7" tall, weighed 150 pounds, and wore her hair partially pulled back in a ponytail. In addition, appellant notes, the clerk thought the decoy appeared to be over 21.

We see nothing about the decoy's height, weight, or hairstyle at the time of the sale that would inevitably make her appear to be old enough to legally purchase beer. As for the clerk's belief about the decoy's age, the Board has addressed this issue a number of times and consistently held that a defense is not established simply because a selling clerk says he or she believed the decoy to be at least 21 years old. For example, in *7-Eleven, Inc. & Grewal* (2001) AB-7602, the Board said:

[I]t is not the belief of the clerk that is controlling, it is the ALJ's reasonable determination of the decoy's apparent age based upon the evidence and his observation of the decoy at the hearing. (*7-Eleven, Inc. / Paul* (2002) AB-7791.) As this Board has said before, Rule 141(b)(2),

"through its use of the phrase 'could generally be expected' implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older

than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of a person under 21 years of age."

The Board expressed the same idea in *Prestige Stations, Inc.* (2000) AB-7248 (ftnt. 2):

The decoy must only present an appearance which could generally be expected of a person under the age of 21 years. If the clerk, observing a decoy who presents such appearance generally, perceives the decoy to be older than 21, he does so at his peril. A licensee cannot escape liability by employing clerks unable to make a reasonable judgment as to a buyer's age.

The Board reaffirmed these statements in *7-Eleven, Inc. & Ryberg* (2002) AB-7847.

Appellant bears the burden of proving that it is entitled to the affirmative defense provided by Rule 141. Appellant has presented nothing more than its assertion that the decoy's appearance violated the rule. We find no reason to question the ALJ's determination that the decoy's appearance complied with rule 141(b)(2).

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
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.