

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

AB-8267

File: 47-265250 Reg: 03055605

NAGGY N. FALTAS dba St. Nick's Pub
8450 West Third Street, Los Angeles, CA 90048,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

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

ISSUED JANUARY 28, 2005

Naggy N. Faltas, doing business as St. Nick's Pub (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 10 days, all of which were conditionally stayed for one year, for his bartender, Marlon Chavarria, having sold a Tom Collins, an alcoholic beverage containing gin and other ingredients, to Betsy Hernandez, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Naggy N. Faltas, appearing through his counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julie Doi, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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

PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on November 27, 1991. On August 6, 2003, the Department instituted an accusation against appellant charging that, on February 20, 2003, appellant's bartender sold an alcoholic beverage to a minor.

An administrative hearing was held on January 29, 2004, at which time oral and documentary evidence was received. Testimony established that the decoy ordered and was served an alcoholic beverage, and was not asked her age or for identification. No one testified on behalf of appellant. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and no defense had been proven.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant contends that the administrative law judge (ALJ) failed to reconcile the bartender's belief that the minor was over the age of 21, and the bartender's expression of surprise upon learning she was a minor, with the ALJ's conclusion that the minor appeared to be under 21 years of age.²

DISCUSSION

As we understand appellant's argument, the ALJ was required to explain how he could reach the conclusion that the decoy appeared to be under 21 years of age even though there is testimony in the record that the bartender stated to the police officer that he believed the decoy to be 21 and appeared surprised when he learned that she was

² Although appellant does not cite the rule in his brief, the issue he raises implicates Rule 141(b)(2), which requires that a decoy display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller.

not.

The ALJ carefully considered a number of aspects of the decoy's appearance

(Finding of Fact V):

The decoy was 5' 4" tall and weighed between 135 and 140 pounds on February 20, 2003. She wore a white tank top, blue and white pants, no jewelry, and no make up. A photograph of the decoy with Chavarria (Exhibit 2) was taken that day. Perhaps because of the lighting, the photograph does not show that the decoy's hair had been highlighted blond.

In February 2003, the decoy had been employed as a part-time police / student worker for the Los Angeles Police Department for seven or eight months. She had also participated as a decoy in one prior occasion, visiting approximately eight premises on that occasion. There is no evidence that the decoy's employment, or experience as a decoy, made the decoy appear older, or younger, than her age.

The decoy was 5' 4" tall and weighed between 135 and 140 pounds on the day of the hearing. She wore make up at the hearing, but the make up was not obvious. Except for differences in the decoy's hair – in a bun on February 20, combed down on the day of the hearing – the decoy's appearance at the hearing was similar to her appearance in the photograph. She spoke softly, sometimes smiling, sometimes giggling, and did not appear nervous.

Respondent noted that the decoy's skin was "mature". Any mature skin on the decoy was not obvious to the Administrative Law Judge, nor is it obvious on the photograph of the decoy.

The Administrative Law Judge observed the decoy's demeanor, mannerism, maturity, and poise while the decoy testified. Taking into consideration that observation, the testimony about the decoy's appearance on February 20, 2003, and the photograph, the Administrative Law Judge finds that the decoy displayed the appearance which could generally be expected of a person under twenty-one years old when she purchased the Tom Collins at Respondent's pub.

The bartender did not testify, so we do not know what it was about the decoy's appearance that led him to believe the decoy was 21 or older, or to be surprised to learn she was not.

We do not find it surprising that the ALJ did not discuss the bartender's statement that he believed the decoy to be 21, or his surprise to learn she was not.

Appellant's counsel, although arguing that the decoy's appearance did not comply with Rule 141(b)(2), made no mention of the bartender's testimony. The ALJ did address certain of the decoy's features that appellant's counsel highlighted in his summation. We do not believe an ALJ should be required to single out for discussion every aspect of testimony in the record, even that which counsel deemed unworthy of mention in his summation, simply because it might weigh against the conclusion the ALJ has reached based on the record as a whole.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
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.