

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

AB-9018

File: 41-391147 Reg: 08068714

ARTHUR BARRY ESKOWITZ, dba Manhattan Pizzeria
133 Manhattan Beach Boulevard, Manhattan Beach, CA 90266,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 6, 2010
Los Angeles, CA

ISSUED JULY 23, 2010

Arthur Barry Eskowitz, doing business as Manhattan Pizzeria (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for five days for his clerk, Albert Campo-Isias (hereinafter, "Campos"), having served a Bud Light beer to Victoria Hitt, a 19-year-old police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a) (hereafter, section 25658(a)).

Appearances on appeal include appellant Arthur Barry Eskowitz, appearing through his counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated March 20, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on September 23, 2002. On May 19, 2008, the Department instituted an accusation against appellant charging that one of his employees sold or furnished an alcoholic beverage to a minor.

An administrative hearing was held on February 3, 2009, at which time documentary evidence was received and testimony concerning the violation charged was presented. The evidence established that one of appellant's clerks, Jennifer Gallardo, asked for the decoy's identification. Gallardo examined the decoy's California driver's license, which displayed the decoy's true date of birth and a red stripe with white letters stating "AGE 21 in 2009," then had a second clerk, Campos, pour beer for the decoy. Gallardo accepted payment, and Campos placed the beer on the counter near the decoy, but did not ask for identification. The decoy took the beer, and took a seat next to a counter located next to the wall. The police cited Campos, but did not cite Gallardo.

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

Appellant filed a timely notice of appeal in which he contends that the findings fail to identify what Campos supposedly did in violation of the statute, and that Rule 141(a) was violated by the police use of a decoy only three weeks younger than 20 years of age.

The Department argues that, under the undisputed facts of the case, the Board need only review the evidence, and if the evidence supports any of the alternatives

described under section 25658(a), selling, furnishing, or giving, there was a violation.

DISCUSSION

I

Appellant contends that the findings are deficient in that they fail to define in what manner Campos violated section 25658(a). Appellant argues the statute can be violated in any one of six ways (the selling, furnishing, giving, causing to be sold, causing to be furnished, or causing to be given of an alcoholic beverage to a minor), while the findings do not indicate which of the six different ways was found to have been performed by Campos. Thus, argues appellant, the failure to specify which of the six violated Government Code section 11425.50, subdivision (b), which provides:

The statement of the factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision.

Finding of Fact II A. states, in part:

Gallardo then had a male clerk pour a beer from beer tap labeled "Bud Light". This male clerk who was later identified as Albert Campos-Isias (hereinafter, "the clerk") then placed the beer on the counter near the decoy without asking the decoy for identification or any questions regarding her age. After paying Gallardo for the beer and receiving change, the decoy took the beer and took a seat at a counter located next to the wall.

Under these facts, it could be said that Gallardo sold an alcoholic beverage to a minor, Campos furnished an alcoholic beverage to a minor, or the two, in combination, sold and furnished an alcoholic beverage to a minor.

Appellant focuses on a statement by the decoy that Campos "placed beer 'towards'" her (App. Br., p. 8), but ignores her testimony (at RT 27) that: "he handed it to me"; "he handed it over the counter to me, yes"; "he kind of put it on the counter, like,

towards me, like, he handed it towards me." Read as a whole, it is undisputable that the decoy was explaining the delivery process from Campos.² There is no evidence that anyone attempted to prevent the decoy from accepting the beer tendered to her, and that is enough to support a finding, as the import of Finding of Fact II of the decision reflects, that Campos furnished beer to the decoy.

We have reviewed the case authorities cited by appellant, and find them not on point.

II

Department Rule 141(b)(1) provides that at the time of a decoy operation, the decoy shall be less than 20 years of age. Appellant contends that the Department's use of a decoy three weeks short of 20 years of age "violates the spirit, letter and intent" of Rule 141. As authority for his assertion, appellant cites *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], a case in which the court held that language of the rule regarding the process of identifying the seller of alcoholic beverages must be complied with strictly.

We believe appellant's argument misconceives what Rule 141(b)(1) says. The rule requires that a decoy must be **under** 20 years of age at the time of the decoy operation.

It is plain that the Department has complied strictly with the "letter" of the law, as well as its intent and spirit. The decoy was not 20 years of age, and there is no contention that she lacked the appearance required by Rule 141(b)(2), i.e., "that which

² Manhattan Beach Police Officer Gina Luttenegger testified that she observed the transaction from an outside vantage point, and saw Campos place the beer on the counter "maybe six inches" from the decoy.

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.”

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.