

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

AB-9061

File: 20-418814 Reg: 08069623

G4 CONSORTIUM, LLC, dba Moorpark Petroleum/Alliance
50 West Los Angeles Avenue, Moorpark, CA 93021,
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 AUGUST 5, 2010

G4 Consortium, LLC, doing business as Moorpark Petroleum/Alliance (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 20 days for its clerk having sold an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant G4 Consortium, LLC, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 6, 2005.

Thereafter, the Department instituted an accusation against appellant charging that

¹The decision of the Department, dated July 27, 2009, made under the authority of Government Code section 11517, subdivision (c), together with the proposed decision of the administrative law judge, is set forth in the appendix.

appellant's clerk, Rubi G. Martin, sold a 16-ounce can of Sparks Premium Malt Beverage, an alcoholic beverage, to John Michael Koman. Although not set forth in the accusation, Koman was acting as a decoy for the Ventura County Sheriff's Office and the Department.

An administrative hearing was held on February 25, 2009, at which time documentary evidence was received and testimony concerning the violation charged was presented by Koman ("the decoy") and Chris Love, a Ventura County deputy sheriff. Charanjit Gill, a member of G4 Consortium, LLC, testified about employee training and remedial measures taken by appellant.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and no affirmative defense had been established under Department Rule 141 (4 Cal. Code Regs., §141).

Appellant filed a timely notice of appeal in which it raises a single issue; it contends there was no compliance with Rule 141(b)(5). Rule 141(b)(5) states:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the premises and have the minor decoy who purchased alcoholic beverages to make a face to face identification of the alleged seller of the alcoholic beverages.

Rule 141(c) provides that a failure to comply with the rule shall be a defense to any action brought pursuant to section 25658.

DISCUSSION

Appellant contends that the finding that there was an identification by the decoy of the clerk who sold him the alcoholic beverage was not supported by substantial evidence. Finding C-1, the challenged finding, states:

After the sale of the malt beverage had taken place, the decoy reentered the

premises with one or two of the deputies and with the Department investigator and they all proceeded to the sales counter. Once the officers had identified themselves to the clerk, Deputy Love asked the decoy to identify the person who had sold him the malt beverage. The decoy then pointed to the clerk and identified her as the clerk who had sold him the malt beverage. Exhibit 5 is a photograph that was taken after this identification had taken place. In this photograph, the decoy is holding the can of Sparks Malt Beverage that was sold to him at the premises and the decoy is standing next to the clerk who sold him the can of Sparks.

Appellant argues that "[t]he clear testimony" in the case demonstrates that the identification was photographed, and the factual finding made by the administrative law judge (ALJ) that the identification preceded the photograph is unsupported by any testimony. Thus, appellant contends, the photograph shows that the decoy and the clerk were standing next to each other, not facing each other, so the identification was not "face-to-face" as required by the rule.

Appellant relies principally on *Chun* (1999) AB-7287. In that case, the Board stated:

The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

The Department does not read the *Chun* decision as requiring the decoy and the seller must physically face each other. Citing *Greer* (2000) AB-7403, the Department states that it was not necessary that the clerk actually be aware the identification was taking place: "The only acknowledgment requirement was achieved by 'the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.'"

Strict adherence to the requirements of Rule 141(b)(5) must take into account the realities of the identification process. The photograph (Exhibit 5) which depicts the

decoy pointing to the clerk from a distance of about three feet and the clerk looking in the direction of the camera represents no more than a moment in time - the click of a camera shutter. It does not show the clerk being advised she has just sold an alcoholic beverage to a person under the age of 21, it does not show what the clerk did as the decoy moved to the counter and pointed to her, and it does not show where the clerk's face and eyes were directed in the moments before the camera shutter opened and closed. The dynamics of the identification process are such that only part of that process is seen in the photograph.

The Board's discussion of the identification process in *7-Eleven/Kim* (2004) AB-8198, a case where similar claims of non-compliance with the rule were asserted, is instructive:

The clerk did not testify, so we do not know if he was aware. However, in this case, it is unrealistic to assert that the clerk was not aware that the decoy was identifying him as the seller. The photograph shows the two standing with only the width of the counter separating them; the six-pack of Coors Light beer that the decoy purchased minutes before is on the counter, still partly in the bag, in front of the clerk; and the decoy, her arm outstretched, is pointing at the clerk, while holding her California driver's license in her other hand. We find it difficult to believe that the clerk might not be aware of what the decoy, standing only a few feet away, was doing or saying. Nor does it follow that, because the clerk may have been looking elsewhere at the moment when this photograph was being taken, he was unaware of the identification process.

At the very least, the clerk reasonably ought to have been aware that the decoy was identifying him, and that is all that is required. We are satisfied that there was compliance with Rule 141(b)(5).

Strict adherence to Rule 141(b)(5) does not require, as appellant seems to suggest, an "eyeball to eyeball" confrontation. We do not find it surprising that a seller may avert his or her eyes away from a person pointing to her moments after being apprised she has made an illegal sale. By no means does that suggest any unawareness of what is happening and why.

The comment by the ALJ that the identification preceded the taking of the photograph - "Exhibit 5 is a photograph that was taken after this identification had taken place" - is, if not literally accurate, fairly reflective of the identification process as the Department's witnesses explained it. Any perceived error is inconsequential.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.