

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

AB-9474a

File: 47-6660 Reg: 14080262

ABBJOHN, INC.,
dba Pancho's Mexican Restaurant
3615 Highland Avenue, Manhattan Beach, CA 90266,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 5, 2016
Los Angeles, CA

ISSUED June 6, 2016

Appearances: *Appellant:* Michelangelo Tatone, of Solomon Saltsman & Jamieson, as counsel for appellant Abbjohn, Inc., doing business as Pancho's Mexican Restaurant.
Respondent: Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

Abbjohn, Inc., doing business as Pancho's Mexican Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for five days because its clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on July 1, 1977. On April 4, 2014, the Department filed an accusation charging that appellant's clerk, Elba Lopez (the clerk), sold an alcoholic beverage to 18-year-old Katlyn Randolph on

1. The revised decision of the Department, dated October 21, 2015, is set forth in the appendix.

February 28, 2014. Although not noted in the accusation, Randolph was working as a minor decoy for the Manhattan Beach Police Department at the time.

At the administrative hearing held on August 6, 2014, documentary evidence was received and testimony concerning the sale was presented by Randolph (the decoy); by Bailey Ambriz, a second decoy involved in the operation; by Michael Allard, a Manhattan Beach Police detective; by Elba Lopez, the selling server; and by Emetiro Aleman, appellant's manager.

Testimony established that on the date of the operation, the decoy and Ambriz entered the licensed premises and sat at a table together. Lopez, who was working as a server, approached and asked if they wanted anything to drink. After a brief discussion about the types of beer available, the decoy ordered a Corona Light. Ambriz then ordered a glass of water. Lopez went to the bar counter and obtained a Corona Light, which she served to the decoy, then left to get the glass of water for Ambriz.

After the sale, Detective Allard entered the premises and contacted Lopez about the violation. A face-to-face identification took place, a photo was taken of the decoy and Lopez together, and Lopez was cited.

Lopez testified that she believed the decoy appeared to be roughly the same age as her oldest daughter — 23 — but that Ambriz appeared to be young. She stated her opinion was reinforced when the decoy ordered a beer, but Ambriz only ordered water.

Aleman did not witness the transaction, but approached the officers when they entered the premises. They advised him that they were investigating a sale to a minor. Aleman testified that when he saw the decoy, he believed she appeared to be over the age of 21.

After the hearing, the Department issued its decision, which determined that the violation charged was proved and no defense was established. In light of appellant's disciplinary history, the Department assigned a mitigated penalty of five days' suspension.

Appellant then filed a timely appeal of the Department's decision before this Board. In its original appeal, appellant contended (1) the appearance of the second decoy unfairly influenced the operation, and (2) the Board must view the decoys in person.

The Board issued its decision on the appeal on May 9, 2015. It rejected appellant's second contention that the Board must view the decoys in person, but held:

The decision of the Department is remanded for additional factual findings as to whether Ambriz actively participated in the transaction, and, if so, whether Ambriz's participation was intended to or had the effect of distracting or impairing Lopez's ability to comply with the law.

(*Abbjohn, Inc.* (2015) AB-9474, at p. 8.)

On October 21, 2015, the Department issued a revised decision. The decision contained additional factual findings addressing the interactions between Ambriz, Randolph, and Lopez during the course of the transaction (see Findings of Fact, ¶¶ 6-7) as well as Ambriz's appearance (Findings of Fact, ¶ 11). He then reached additional conclusions of law regarding Ambriz's participation in the transaction and Ambriz's apparent age. (Conclusions of Law, ¶¶ 6-7.)

Appellant then filed a timely appeal of the Department's October 21, 2015 decision contending (1) the ALJ applied in the incorrect legal standard when he focused on the second decoy's participation in the *transaction*, rather than in the operation as a

whole, and (2) the ALJ failed to determine whether the operation was conducted in fashion that promotes fairness, as required by rule 141(a).

DISCUSSION

I

Appellant contends the ALJ improperly focused on the effect the second decoy had on the *transaction*, rather than on the whole of the decoy operation. Appellant cites this Board's decision in *7-Eleven, Inc./Lee* (2015) AB-9502, in which we said:

It follows that while the active participation standard may be a subjective one, in order for it to have any real significance in light [of] rule 141(a)'s fairness requirement, the totality of the factual circumstances confronting the seller of alcoholic beverages throughout the operation — and not just those immediately preceding the sales transaction — should be considered.

(*Id.* at p. 8.)

As we observed in the original appeal, this Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; see also *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence

rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged.”].)

In its original appeal brief, appellant emphasized only that Ambriz's presence and appearance had to "meet the regulatory requirement[s] *under the circumstances presented to Ms. Lopez.*" (App.Br. at p. 7, *Abjohn, Inc.* (2015) AB-9474, emphasis in original.) Appellant's argument then focused on the effect Ambriz's appearance had on Lopez's interpretation of Randolph's apparent age. It wrote:

While not required that Ms. Randolph enter Appellant's restaurant alone, Ms. Ambriz's presence played a significant role in the circumstances presented to Ms. Lopez; Ms. Ambriz's own youthful appearance reinforced Ms. Lopez's belief that Ms. Randolph was old enough to buy alcohol and therefore caused confusion at the time of the sale and misled the seller. There is "a mandate that the decoy operation be conducted fairly and *anything that interferes with fairness is prohibited.*" . . . The ALJ nonetheless determined that the operation complied with Rule 141. The Department's certification of that determination reflects a failure to consider Rule 141(b)(2)'s standard that apparent age is determined under the *circumstances presented to the seller at the time of the sale.*

(*Id.* at pp. 8-9, second emphasis added.) Throughout its initial appeal, appellant focused on the effect Ambriz's appearance had on Randolph's apparent age at the time of the sale, when Lopez interacted with Randolph. It is only on this appeal that appellant changes course and demands an assessment of both decoys' conduct *throughout the entire operation*, and not simply the transaction itself.

Based on the facts and arguments at the original appeal, this Board found a troubling omission of analysis as to Ambriz's involvement in the *transaction* — not, as appellant now contends, in the entirety of the operation. We wrote:

The ALJ's conclusions of law offer only a summary comment on Ambriz's presence:

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that [the decoy's] weight, confidence, and demeanor made her appear to be over the age of 21, particularly when compared to Bailey Ambriz, who was sitting next to her. This argument is rejected. [The decoy's] appearance was consistent with that of an 18 or 19 year old; as such, she had the appearance generally expected of a person under the age of 21.

(Conclusions of Law ¶ 5.)

We find this summary treatment troubling. First, Ambriz' involvement in the transaction rises nearly to the level of the police officer in *Hurtado, supra*. While Ambriz admittedly did not order an alcoholic beverage, she did sit at the same table as the decoy, and she did order a water at the same time the decoy ordered a beer. The facts strongly suggest that Ambriz actively participated in the transaction — and yet, the decision below offers no finding or conclusion on this point.

[¶ . . . ¶]

The appellant offered testimony to the effect that Ambriz's physical appearance and act of ordering water — as opposed to the decoy's beer — caused Lopez to misjudge the decoy's age. This is not a case based on mere speculation. In light of the evidence presented, a remand is appropriate for findings on two additional points: whether Ambriz actively participated in the transaction, and if so, whether her participation was intended to or had the effect of distracting or impairing Lopez's ability to comply with the law.

(*Abjohn, supra*, at pp. 5-7.) Accordingly we remanded "for additional factual findings as to whether Ambriz actively participated *in the transaction*, and, if so, whether Ambriz's participation was intended to or had the effect of distracting or impairing Lopez's ability to comply with the law." (*Id.* at p. 8.)

On remand, the ALJ made the following additional or enhanced findings of fact:

6. On February 28, 2014, Randolph entered the Licensed Premises with another decoy, Bailey Ambriz. They sat down at a table near the stage. They were talking to each other as they waited for someone to approach them. They stopped talking to each other when the waitress, Elba Lopez, approached.^[fn.]

7. Lopez asked Randolph and Ambriz if they wanted anything to drink. After a brief discussion about the types of beer available, Randolph ordered a Corona Light. After Randolph finished ordering, Ambriz ordered a glass of water. Lopez went to the bar counter and obtained a Corona Light, which she served to Randolph, then left to get the glass of water for Ambriz.

[¶ . . . ¶]

11. Ambriz was born on January 15, 1995. On February 28, 2014 she was 19 years old. She was dressed in jeans, a dark gray sweatshirt, and white tennis shoes while inside the Licensed Premises. Her hair was long and parted near the top of her head. She appeared her age.

(Findings of Fact, ¶¶ 6-7, 11.) Based on these findings, the ALJ reached the following additional conclusions of law:

6. There is nothing unusual about two people entering a restaurant and sitting together. The simple fact that Randolph and Ambriz were together while inside the Licensed Premises, in and of itself, did not affect or impair Lopez's ability to comply with [the] law. Once Lopez was at the table, conversation between the two girls ceased. Randolph and Lopez had a conversation about the types of beer available, after which Randolph ordered a beer. Only after Randolph had ordered did Ambriz order a water. In short, Ambriz did not interject herself into Randolph and Lopez's conversation, nor did she distract Lopez at any time. (Findings of Fact ¶¶ 6-7.)

7. Randolph's appearance was consistent with that of an 18 or 19 year old. Ambriz's appearance was consistent with her actual age, 19. When they were inside the Licensed Premises, they had the appearance of two teenagers sitting together. The Respondent's argument that Randolph appeared older by comparison to Ambriz is rejected — Randolph had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 11-12.)

(Conclusions of Law, ¶¶ 6-7.)

As required by this Board's order of remand, the ALJ made additional findings as to whether Ambriz actively participated in the transaction and whether her presence was intended to or had the effect of distracting or impairing Lopez's ability to comply with applicable laws. Appellant now insists that this is insufficient, and that additional findings addressing the whole of the operation are required. Such findings are beyond the scope of the argument appellant presented in its original appeal and, as a result, beyond the scope of this Board's order of remand. We find no error in their omission.

II

Appellant contends the ALJ failed to determine whether the presence of the second decoy violated the fairness mandate of rule 141(a). Appellant argues the ALJ improperly focused on rule 141(b)(2) and failed to determine whether the presence of the second decoy violated rule 141(a).

Rule 141(a) provides:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors . . . and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

(Cal. Code Regs., tit. 4, § 141(a).) Rule 141 provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Appellant's defense under rule 141(a), however, is inseparable from its defense under rule 141(b)(2). Indeed, in its original appeal brief, appellant lumped the two arguments together. (See App.Br. at pp. 6-9, *Abbjohn, Inc., supra.*) Even now, as it attempts to separate the defenses, the arguments are indistinguishable; both depend on

Lopez's alleged misinterpretation of Randolph's age due to Ambriz's presence and demeanor. Appellant writes:

The circumstances presented to Ms. Lopez *at the time of the sale* were Ms. Ambriz and Ms. Randolph *together*. While Ms. Lopez testified that Ms. Randolph already looked old enough to buy alcohol, the circumstances presented to Ms. Lopez were also that Ms. Ambriz's young physical appearance and shy demeanor contrasted sharply with Ms. Randolph's physical and emotional maturity, confirming for Ms. Lopez that Ms. Randolph was indeed of legal drinking age. (RT 73:3-10.) Naturally, it made perfect sense to Ms. Lopez when Ms. Randolph ordered a beer and Ms. Ambriz a water. (*Ibid.*) Ms. Lopez testified at the hearing that *these* were the circumstances presented to her at the time of the sale. Ms. Lopez's testimony was uncontroverted and further corroborated by Mr. Aleman's testimony that he believed Ms. Randolph to be over 21 years of age when he saw her just minutes after the sale. Based on this evidence, the operation was not conducted in a fashion that promotes fairness.

(App.Br. at pp. 11-12, emphasis in original.) Appellant attempts to cast this as a rule 141(a) defense, separate and apart from its rule 141(b)(2) defense, in order to manufacture error. Appellant bears the burden of proof on any affirmative defense; if it intended to launch two defenses, rather than one, it was incumbent upon appellant to argue and support each defense separately from the outset.

Appellant's *only* defense, however, focuses on Randolph's apparent age as presented to Lopez at the time of the sale, with Ambriz's appearance, demeanor, and participation in the transaction — or, as the ALJ found, lack thereof — representing factors that appellant alleges influenced Randolph's apparent age. This is a pure rule 141(b)(2) defense, and one the ALJ addressed to this Board's satisfaction when he concluded:

Randolph's appearance was consistent with that of an 18 or 19 year old. Ambriz's appearance was consistent with her actual age, 19. When they were inside the Licensed Premises, they had the appearance of two teenagers sitting together. The Respondent's argument that Randolph

appeared older by comparison to Ambriz is rejected — Randolph had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶¶ 11-12.)

(Conclusions of Law, ¶ 7.) Appellant's single affirmative defense was clearly addressed and rejected, regardless of the label appellant assigns it. There is no error here.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

2. This 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.