

ISSUED MARCH 22, 2000

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

RAFAEL B. and RICARDO HURTADO	)	AB-7246
dba El Maguey Nightclub)	
8813 E. Imperial Hwy.	)	File: 48-320630
Downey, CA 90242,	)	Reg: 98043044
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	February 3, 2000
	)	Los Angeles, CA

Rafael B. and Ricardo Hurtado, doing business as El Maguey Nightclub (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for appellants' employee selling an alcoholic beverage to a person under the age of 21 and for allowing a person under the age of 21 to enter and remain in the licensed premises, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §§25658, subdivision (a), and 25665.

¹The decision of the Department, dated October 8, 1998, is set forth in the appendix.

Appearances on appeal include appellants Rafael B. and Ricardo Hurtado, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public premises license was issued on November 6, 1996. Thereafter, the Department instituted an accusation against them charging that, on December 19, 1997, appellants' waitress, Alejandra Padilla ("the waitress") sold a beer to Luis Dominicus, a 19-year-old police decoy ("the decoy"), and that appellants allowed the decoy to enter and remain in the on-sale licensed premises.

An administrative hearing was held on August 27, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the sale by Downey police officer Paul Joseph Hernandez, by the decoy, and by the waitress.

Hernandez and the decoy entered the premises together at about 9:20 p.m. and sat down together at a small table [RT 8-9, 27-28]. Hernandez and the decoy both testified that they each ordered their own beers from the waitress [RT 10, 28]. The waitress testified that the older man at the table ordered both beers [RT 43]. The decoy paid for the beers when the waitress brought them to the table [RT 11, 28-29, 43]. The waitress did not ask either of the two men for identification or about their age [RT 10-11, 28-29, 45].

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as charged in the accusation, that no defense had been established and that the older police officer sitting with the decoy did not make the decoy operation unfair.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the decoy operation violated Rule 141 (4 Cal. Code Regs. §141), and (2) the findings are inadequate to support the decision.

DISCUSSION

Appellants contend this decoy operation was not “conducted in a fashion that promotes fairness” because of the presence of the 27-year-old police officer at the table with the decoy. Rule 141(b)(2) requires that the 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* of alcoholic beverages at the time of the alleged offense; . . .” (Emphasis added.) The officer’s presence, appellants argue, was part of the circumstances presented to the seller, and would have had an impact on the assessment of the decoy’s age. Appellants contend that having the officer and the decoy sitting together “made it more likely that the younger man was closer in age to the older.” (App. Opening Br. at 9.)

The ALJ responded to this argument in Determination of Issues IV. After quoting subdivision (a) of Rule 141 (requiring that decoys may be used only “in a fashion that promotes fairness”) he stated:

“B. [Appellants] argue that the decoy operation in this case was unfair because the decoy was constantly with a 27-year old man.

“C. While it is unusual for a decoy to be with someone when he purchases alcoholic beverages, there is no requirement that decoy must do so alone. And, although the record does not indicate why the police officer chose to accompany the decoy into [appellants’] premises, one can certainly appreciate a police officer not wanting to send a 19-year old person into a bar by himself.

“D. Finally, it simply does not follow that a person sitting with someone older than he will somehow automatically appear older. There was nothing unfair about the police officer accompanying the decoy into [appellants’] premises and sitting with him at a table.”

We agree with appellants that the presence of the police officer made this decoy operation unfair.

The ALJ’s speculation about why the officer accompanied the minor is not only gratuitous and not supported by the record, but also illogical. While it may be true that the officer did not want to have the 19-year-old decoy go into the bar by himself, there is not evidence that such was the case in the present matter. In addition, most of the decoy operations reviewed by this board show that the decoy does not enter a premises alone, but the officer goes in separately and merely observes rather than participating in the attempt to purchase.

It is true that “there is no requirement that a decoy must [purchase alcoholic beverages] alone.” There is, however, a mandate that the decoy operation be conducted fairly and anything that interferes with fairness is prohibited.

In the appeal of Southland Corporation and R.A.N., Inc. (1998) AB-6967, the 19-year-old female decoy was accompanied into the premises by an 18-year-old female who stood beside the decoy during the sale. In a footnote, we said:

“We do not need to consider the use of this ‘unknown’ female as the disposition of the case renders such consideration non-essential. However, such an apparent loose practice may cause confusion at the time of the sale, which may be contrary to the Rule’s demands for ‘fairness.’”

Here consideration of the effect of another person is essential for disposition. Certainly, if the officer ordered the beers, that would completely taint the decoy operation. Even if he did not order the beer for the minor, we find the officer's active participation in the decoy operation to be highly likely to affect how the decoy appeared and to mislead the seller. We conclude that the officer accompanying the decoy as a companion was unfair and violated Rule 141.

In light of our disposition of this matter, we need not address appellants' other contention.

ORDER

The decision of the Department is reversed.²

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.