

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

AB-8024

File: 41-318920 Reg: 02052877

LOURDES LUNA dba Marisco's Ensenada
1127 West Main Street, Suites C and D, Santa Maria, CA 93458,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Samuel D. Reyes

Appeals Board Hearing: July 3, 2003
Los Angeles, CA

ISSUED AUGUST 28, 2003

Lourdes Luna, doing business as Marisco's Ensenada (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended her license for 25 days for her waitress having furnished a bottle of Budweiser beer to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Lourdes Luna, appearing through her counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine eating place license was issued on April 24, 1996. On May 3, 2002, the Department instituted an accusation against appellant

¹The decision of the Department, dated September 19, 2002, is set forth in the appendix.

charging that her employee, agent or servant, Evangelina Plata, made an unlawful sale of an alcoholic beverage to Matthew Stromberg, a minor.

An administrative hearing was held on July 30, 2002, at which time oral and documentary evidence was received. At that hearing, Daniel Begg, a Santa Maria police officer, testified that he had entered appellant's restaurant in the course of a decoy operation. While there, he observed the waitress, Plata, furnish a bottle of Budweiser beer to Stromberg, an 18-year-old police decoy. Before doing so, Plata had asked Stromberg for identification, and had reviewed his driver's license (Exhibit 5). The license disclosed Stromberg's true date of birth, August 7, 1983. The license carried the red stripe found on licenses issued to minors, stating "Age 21 in 2004," as well as an additional, blue, stripe stating "Provisional until age 18 in 2001." Begg confronted Plata after she had placed the beer on the table where Stromberg was seated, and identified himself as a police officer.

Stromberg testified that he was asked for identification after ordering a Budweiser. He produced his driver's license. After the waitress examined it, she brought him an open bottle of Budweiser. Stromberg placed a pre-marked \$5 bill on the table, got up and walked out the door. Although the record is not clear, it appears that the bill may have remained on the table for a period of time after Stromberg left the restaurant.

Subsequent to the hearing, the Department issued its decision which determined that Plata *furnished* an alcoholic beverage to a minor, and that appellant had failed to establish any affirmative defense. The decision rejected appellant's argument that Rule 141(b)(5) required a completed sale, stating that such a reading of the rule would make the rule inconsistent with section 25658, subdivision (a).

Appellant thereafter filed a timely notice of appeal. In her appeal, appellant contends that the Department erred in concluding that Rule 141(b)(5) does not require a completed sale prior to imposition of liability under section 25658, subdivision (a).

DISCUSSION

Rule 141(b)(5) provides: “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 licensed premises and have the minor decoy who purchased alcoholic beverages to make a face to face identification of the alleged seller of alcoholic beverages.”

Appellant does not contend that the decoy did not identify the seller. Instead, appellant focuses on the phrase “completed sale,” arguing that the price of the beer was not established, the money simply left on the table. Says appellant, “[t]he waitress did not receive money and returned no change;”² thus, there was no completed sale.³

Appellant argues that the decision in *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control App. Bd.* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], requires that the rule be read to require a completed sale, citing the language of the court that “If the rules are inadequate, the Department has the right and the ability to seek changes. It does not have the right to ignore a duly adopted rule.”

The administrative law judge (ALJ) reasoned that a completed sale was not required by the rule. He read the rule as requiring a face to face identification *if* there

² App. Br., p.3.

³ Since the Department did not argue the issue, we do not address the interesting question whether, when the alcoholic beverage has been delivered to the minor and money sufficient to cover the price of the beverage has been left on the table, a completed sale has taken place.

was a completed sale: “Further, respondent’s interpretation of the rule would make the rule as inconsistent with section 25658(a), which prohibits not only the selling, but also the furnishing or giving away of alcoholic beverages to anyone under the age of 21.”

(Legal Conclusion 5, paragraph 4.)

Rule 141 does not create liability. It is nothing more than an affirmative defense to a charge that Business and Professions Code section 25658, subdivision (a), has been violated in a decoy operation. Proof of a sale, furnishing or gift of an alcoholic beverage to a minor creates the liability under the statute; proof of non-compliance with Rule 141 gives rise to an affirmative defense.

Pursuing appellant’s argument to its logical conclusion, Rule 141’s claimed inapplicability would trump the statute by exempting any furnishing or gift of alcohol to a decoy, no matter whether, as here, the rule’s requirements had been rigidly met. This would result in an absurdity. It is as if appellant is saying, “since the rule does not apply, the statute was not violated.”

It makes eminently more sense to give Rule 141 the reasonable construction its relationship to section 25658, subdivision (a) invites, one that its wording permits and common sense requires. Since the statute extends its prohibition to any sale, furnishing or gift, it is reasonable to read the language “completed sale” in the rule as encompassing any of the three alternatives of liability. A licensee has little of which to complain of under such an interpretation, since it preserves the chances of establishing an affirmative defense if, unlike this case, there is no compliance with the rule.

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ 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.