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

**AB-8182**
File: 21-371217 Reg: 03054811

LAWRENCE ASKAR and ELIAS MBARKEH dba Louies Liquor
16461 Vanowen Street, Van Nuys, CA 91406,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: April 8, 2004
Los Angeles, CA

**ISSUED MAY 25, 2004**

Lawrence Askar and Elias Mbarkeh, doing business as Louies Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk having sold beer to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Lawrence Askar and Elias Mbarkeh, appearing through their counsel, Jeffrey S. Weiss, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on December 18, 2000. Thereafter, the Department instituted an accusation against appellants on April 10, 2003, charging that appellants' employee, Abd Haydari, sold beer to San Deep Singh, a

[1]The decision of the Department, dated August 14, 2003, is set forth in the appendix.

person then 19 years of age. Not stated in the accusation, Singh was acting as a decoy for the Los Angeles Police Department.

An administrative hearing was held on July 16, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Singh, and by Los Angeles police officer Deseray Ehrlich. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and that appellants had failed to establish any affirmative defense.

Appellants thereafter filed a timely appeal in which they contend that they established a defense under Rule 141(b)(2), and that the Department is bound by the doctrine of collateral estoppel.

DISCUSSION

I

Business and Professions Code section 25658, subdivision (a) provides that any person who sells an alcoholic beverage to a minor is guilty of a misdemeanor. Subdivision (f) of that same section authorizes persons under the age of 21 to be used by peace officers in the enforcement of section 25658. Subdivision (f) also provides for the adoption by the Department of regulatory guidelines with respect to the use of such persons, and authorized the continuation of decoy programs in operation prior to the adoption of such guidelines, "so long as the minor decoy displays to the seller of alcoholic beverages the appearance of a person under the age of 21 years." It is this language, slightly modified by the addition of the words "which could generally be expected," which underlies the issues in this case.

Department Rule 141 (4 Cal. Code Regs. §141) provides that a law enforcement

agency may only use decoys "in a manner which promotes fairness." The rule sets out "minimum standards" applicable to actions alleging that a minor decoy has purchased an alcoholic beverage, and provides that non-compliance with those standards shall be a defense to any action brought under section 25658, subdivision (a).

Section 141(b)(2) of the rule is one of those minimum standards. When that defense is asserted, the administrative law judge, as part of his or her proposed decision, must make a determination whether the decoy displayed the appearance of a person under 21 years of age under the actual circumstances presented to the seller of alcoholic beverages.

It is obvious from a mere reading of the rule that the task assigned to the ALJ's is not an easy one. Beginning at a disadvantage, since the transaction in question will have taken place months earlier, without their presence, they must make that determination based upon what they see and hear at the administrative hearing. Initially, they did so based only on the physical appearance of the decoy. Physical appearance remains a major consideration, but not the only one. In *Circle K Stores, Inc.* (1999) AB-7080, the Appeals Board concluded that not enough consideration was being given to other indica of age:

> [W]hile an argument might be made that when the ALJ uses the term "physical appearance," he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what he did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.
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> It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions

> we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.

Since that decision, the cases coming to the Appeals Board have, by and large, respected the Board's teachings, and the ALJ's in those cases have explained in more detail what led them to conclude that the decoy displayed the appearance required by the rule. The Board, in turn, has, with very few exceptions, deferred to the judgment of the ALJ, because the ALJ has the opportunity to see the decoy as he or she testifies, an opportunity the Board does not have.

This case reveals the difficulties this procedure can engender. Appellant has attached to its brief five proposed decisions, written by administrative law judge (ALJ) Ronald M. Gruen and adopted by the Department, in which Judge Gruen determined that the decoy in those cases did not display the appearance which could generally be expected of a person under 21 years of age at the time of the sale. The decoy is the same person who was the decoy in this case. Both Judge Gruen and Judge McCarthy observed this decoy when he testified, carefully noted his physical and non-physical characteristics, and reached opposite results.

Since we are not in a position to say that Judge McCarthy was mistaken, we have little choice but to defer to his judgment that Mr. Singh did display the appearance which could generally be expected of a person under the age of 21. By the same token, this is not to say that Judge Gruen was wrong when he found that Mr. Singh did not.[2] As the Board said in *7-Eleven, Inc./Dianne* (2002) AB-7835, "[t]he phrase 'could

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[2] Judge Gruen wrote, after seeing this decoy in at least four cases:

(continued...)

generally be expected" clearly implies, as this Board has said, that *not everyone* will necessarily believe that a particular decoy appears to be under 21."

We see this as a situation where two different fact finders heard the same evidence concerning an issue about which reasonable persons might disagree, and they did, in fact, disagree. Under such circumstances, there is no basis to say either was wrong.

Nor do we think the decoy's "success" rate - he made 10 purchases in the course of 23 visits - compels a different result. As the Board said in *7-Eleven/Williams* (2001) AB-7591:

> We do not ignore the evidence in this case that the decoy was able to purchase alcoholic beverages in more than half - 7 of 13 - of the establishments he visited. While this suggests that he presented a more mature appearance to some sellers than he did to others, we can only assume the ALJ took this into consideration in his deliberations.

Judge McCarthy did so in this case.

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[2](...continued)
The conduct of a minor decoy task force is a serious endeavor meant to protect the consuming public from errant licensees. In equal measure the use of minor decoys require [sic] police agencies to evaluate and give careful consideration to decoy candidates in a manner that promotes fairness and compliance with Rule 141(a) & (b)(2).

The call that the minor did not display the appearance which could generally be expected of a person under 21 years of age was not difficult to make in this case as well as other cases involving this very same minor. This raises concerns of the efficacy of the safeguards in place by the police department for the screening of potential minor decoy candidates to meet the standards of fairness set forth in Rule 141.

This issue deserves the attention of the Department in assisting police agencies to strengthen their practices in this area in the interest of justice.

*In the Matter of the Accusation Against Juan Mario Salazar*, Registration No. 03055118 (November 6, 2003).

II

Appellants argue that the Department is bound by the doctrine of collateral estoppel because of its certification of a decision by Judge Gruen which found that the same decoy in this case did not display the appearance required by Rule 141(b)(2).

The Board has addressed this issue in earlier decisions, and has declined to apply the doctrine. (See *O'Brien* (2001) AB-7751 and *7-Eleven, Inc./Amroli* (2002) AB-7784.)

Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue already determined in a prior proceeding. There are three basic requirements for application of the doctrine of collateral estoppel: "(1) the issue decided in the prior action is identical to the one presented in the action in which the defense is asserted; (2) a final judgment has been entered in the prior action on the merits; and (3) the party against whom the defense is asserted was a party to the prior adjudication." *(Takahashi v. Board of Education* (1988) 202 Cal.App.3d 1464, 1477 [249 Cal.Rptr.2d 578].) Appellants assert that all three requirements are met here and, therefore, the decision in the present matter must be reversed.

In *O'Brien, supra,* and *7-Eleven, Inc./Amroli*, *supra*, the Board concluded that the issues could not be said to be identical. It stated, in *O'Brien*:

> The consideration of a decoy's appearance independently in each case makes practical sense as well. Even if two violations involving the same decoy occur within a short time of each other, the physical situation will be different, the clerk will certainly be different, and the time of day may be different. The wide variety of factors that could differ in each sale and that could affect a clerk's perception of a decoy's apparent age require that an independent evaluation be made of the decoy's appearance for each sale.
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> Certainly an ALJ who has seen a particular decoy testify at a hearing previously,

> perhaps more than once, will have formed some general impression of that decoy's appearance. We must rely on the integrity of each ALJ to separate out any previous impression and judge the decoy's appearance solely in the context of the case then before the ALJ. We have said that we trust the ALJ to do the difficult task of judging how the decoy appeared on the day of the sale even though the ALJ sees the decoy in person months after the sale and may or may not have a photograph taken near the time of the sale to help make that judgment as to the decoy's physical appearance. We have also said that we are not in a position to second-guess the determination of an ALJ as to a decoy's appearance, since the ALJ will have had the opportunity to see the decoy in person, which we have not. Without some substantial indication that the ALJ has not done his or her job properly, the Board has neither power nor the inclination to overturn an ALJ's determination as to the apparent age of the decoy.
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> In one sense we are not at all disturbed that an ALJ at one hearing found that a decoy did not comply with Rule 141(b)(2), while another ALJ at another hearing regarding a different violation found that the decoy did comply with the rule. An ALJ's task to evaluate the appearance of a decoy is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's are reasonable and not arbitrary or capricious, we will uphold them.
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> In another sense, however, disparities in findings about a decoy's appearance concern us. We fear that such disparities may be due to the selection of decoys whose appearance is so close to what is, after all, a hazy line, that the decoys will often be perceived to be over that line.

We could add that we are dealing with a situation involving an affirmative defense, where the licensee has the burden of persuasion. The answer to the disparity may be nothing more than the adeptness of one of the attorneys for one of the licensees.

Thus, we do not think the doctrine of collateral estoppel can be applied to this situation. In every 141(b)(2) case, the ALJ is being asked, on the basis of his own life experience, whether, based upon the evidence he has seen and heard, he believes the decoy could generally be thought to have displayed the appearance of a person under 21 years of age. Every case is different, even when it is the same decoy in more than

one case. It is a subjective determination on the part of the ALJ, just as it is a subjective determination on the part of the seller of alcoholic beverages. They could both be wrong. But it is not the Board's function to substitute its view just because it disagrees with the ALJ. The ALJ has the better view of the evidence, much of which cannot be seen in the paper record that comes to the Board. That is why we must trust the integrity of the ALJ.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.