

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

AB-8232

File: 20-361485 Reg: 03055496

MARC BENJAMIN STRAUCH, dba Lake Forest AM/PM
13401 Folsom Boulevard, Folsom, CA 95630,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ann Sarli

Appeals Board Hearing: October 7, 2004
San Francisco, CA

ISSUED DECEMBER 29, 2004

Marc Benjamin Strauch, doing business as Lake Forest AM/PM (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his off-sale beer and wine license for 25 days for his clerk selling an alcoholic beverage to a police minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Marc B. Strauch, appearing through his representatives, Charles Benninghoff and Nancy Benninghoff, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on September 20, 2000. On July 29, 2003, the Department instituted an accusation against appellant charging that, on March 26, 2003, appellant's clerk, Sekou Scott (the clerk), sold an alcoholic beverage to 19-year-

¹The decision of the Department, dated December 31, 2003, is set forth in the appendix.

old Teresa Monge. Although not noted in the accusation, Monge was working as a minor decoy for the Folsom Police Department at the time.

An administrative hearing was held on October 30, 2003, at which time documentary evidence was received, and testimony concerning the sale was presented by Teresa Monge (the decoy), by Folsom police officer Carl Siegler, by the clerk, and by the store manager, Harvey Johnson.

Following the hearing, the Department issued its decision that determined the violation charged had been proven, and no defense had been established. Appellant has filed an appeal contending: (1) The findings are not supported by substantial evidence; (2) rule 141(b)(3)² was violated; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that the findings are not supported by substantial evidence, although his argument is that the defense of Business and Professions Code section 25660³ should be available to him.

²References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

³Section 25660 provides:

Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license or an identification card issued to a member of the Armed Forces, which contains the name, date of birth, description, and picture of the person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

When the decoy took a 24-ounce can of Bud Light beer from the cooler in the premises and brought it to the counter, the clerk asked for her identification. She gave him her California driver's license that shows her date of birth as 06-03-83 and bears a red stripe with "AGE 21 IN 2004" in bold letters.

The clerk swiped the driver's license through a scanner, called a "legal age terminal" by appellant, that is designed to read the date of birth on an identification card and to indicate to the clerk whether the holder of the card is old enough to legally purchase alcoholic beverages. The legal age terminal would not read the decoy's driver's license. The clerk manually entered data into the terminal and completed the sale to the decoy.

Later, the clerk told the officer that the terminal had approved the sale of the alcoholic beverage to the decoy. The officer had the clerk swipe the card through the scanner again. The terminal indicated it could not read the card and directed that the date of birth should be manually entered. When this was done, the terminal screen displayed "Denied for Sale of Alcoholic Beverages." At the hearing, the clerk testified that the driver's license given him initially by the decoy, which he said was approved by the legal age terminal, was different from the one the officer gave him to scan later that caused the terminal to deny an alcoholic beverage sale.

Appellant asserts that the clerk "may have made what amounts to a small clerical error," but he made a good faith effort to verify that the decoy was old enough before he sold her the beer, and he believed that the driver's license presented to him by the decoy verified her majority. Appellant argues that this violation resulted from the clerk's "reliance on bona fide evidence of the majority and identity of the person" and thus the clerk's good faith effort should qualify for the section 25660 defense.

The evidence is clear that appellant's employee sold an alcoholic beverage to the police decoy. Appellant does not so much deny the substantiality of the evidence as the legal conclusion that flows from it. In essence, appellant is urging this Board to excuse this violation because it may have been due to a mistaken data entry on the part of the clerk.

We first point out that there is no evidence that the clerk made a mistake when entering the birth date. The clerk testified that he did *not* make a mistake entering the birth date, but that a driver's license different from the decoy's genuine driver's license was presented to him.

Even if the clerk did make a mistake, the violation is not excused. Section 25658, subdivision (a), provides that "every person who sells, furnishes, gives, or causes to be sold, furnished or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." The statute does not provide exceptions for mistake or inadvertence. Indeed, we are inclined to believe (or at least hopeful) that many of the illegal sales made to minors are the result of mistake, such as miscalculation of age. The mistake here, if that was the cause of the violation, does not excuse the violation.

Nor does the purported mistake, albeit in good faith, entitle appellant to the defense afforded by section 25660. The defense is available only if the seller reasonably relied on "bona fide evidence of *majority* and identity of the person." The driver's license presented by the decoy showed that she had *not* reached the age of 21. The driver's license was not evidence of majority, so the defense is not available to appellant.

II

Rule 141(b)(3) requires that if a decoy carries identification during a decoy operation, it must be the decoy's own identification showing his or her correct date of birth. Appellant contends that the driver's license presented to the clerk by the decoy did not comply with this rule because the magnetic strip on the back of the license was not functional, making the decoy's date of birth unable to be read by the legal age terminal. Had the magnetic strip been functional, appellant asserts, the clerk would not have sold to the decoy. Appellant argues that it was unfair, and in violation of rule 141, for the Folsom Police Department to use a decoy whose identification was not readable by the legal age terminal, preventing appellant from using a valuable compliance tool.

We need not decide the question of whether appellant is correct in asserting that a nonfunctional magnetic strip would violate rule 141. The short answer to appellant's contention is that there is no evidence that the magnetic strip on the decoy's driver's license was nonfunctional. There could be other reasons the legal age terminal indicated it could not read the magnetic strip; the terminal itself could have malfunctioned or been improperly programmed.

Even if the magnetic strip were nonfunctional, the clerk had several other means of complying with the law. The license on its face showed the decoy's date of birth and the statement that she would not be 21 until 2004. Appellant was not prevented from complying with the law by any action of the decoy or the Folsom police.

III

Appellant contends that the discipline imposed is too harsh based on his allegations that the Folsom police did not comply with Rule 141 and that he was entitled to the defense provided by section 25660.

Our rejection of appellant's arguments on the two issues discussed previously makes this argument moot.

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.