

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

AB-8272

File: 21-372965 Reg: 03056079

FOSTER LIQUOR STORE, INC. dba Foster Liquor Store
13260 Woodruff Avenue, Downey, CA 90242,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: February 3, 2005
Rehearing June 2, 2005
Los Angeles, CA

ISSUED OCTOBER 13, 2005

Foster Liquor Store, Inc., doing business as Foster Liquor Store (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for its clerk, Nagy Ibrahim, having sold a six-pack of beer to Skyler Bryant, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Foster Liquor Store, Inc., appearing through its counsel, Jeffrey Weiss, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 23, 2001. Thereafter, on October 22, 2003, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on May 15, 2003. An

¹The decision of the Department, dated April 8, 2004, is set forth in the appendix.

administrative hearing was held on February 18, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and appellant had failed to establish any affirmative defense under Rule 141.

Appellant has filed a timely notice of appeal. In its appeal, appellant contends that Administrative Law Judge (ALJ) Lo did not properly explain why he was satisfied the decoy presented the appearance required by Rule 141(b)(2).²

DISCUSSION

Appellant contends that the ALJ did not “completely” discuss or describe all of the reasons for his finding that the decoy displayed the appearance required by Rule 141(b)(2). It argues that Judge Lo put most of his emphasis on a photograph of the decoy and paid “very little” attention to any other factor. Appellant also argues that the fact that 10 of 23 establishments visited by the decoy sold him alcoholic beverages supports its contention that there was no compliance with the rule.

Appellant cites the Board’s decision in *McCabe* (2000) AB-7363, a case decided early in the Board’s and the Department’s experience with Rule 141(b)(2). The Board reversed the Department’s decision in that case because the ALJ limited his consideration of the decoy to her physical appearance, ignoring all other indicia of age. Citing several of its earlier decisions, the Board wrote:

² Rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2)) provides:

"The decoy shall 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."

Rule 141(c) provides that a failure to comply with Rule 141(b)(2) creates a defense to any action under Business and Professions Code section 25658.

This Board has repeatedly told the Department that, in its consideration of a Rule 141(b)(2) defense asserted by a licensee, the administrative law judge must explain why he is satisfied that the decoy presents the appearance which could generally be expected of a person under the age of 21 years. *We made it clear that we did not expect an exhaustive discussion of every possible consideration, but simply enough to satisfy this Board that the correct legal standard had been applied and that sufficient indicia of age ... in addition to physical characteristics were considered in order to show that, in reaching a conclusion as to the decoy's appearance, the whole person has been considered.* We cited such obvious considerations as poise, demeanor, maturity and mannerisms, but made it clear there were other aspects of appearance that could be relevant as well. (Emphasis added).

Our examination of what Judge Lo said about the decoy in this case persuades us that he was aware of and applied the correct legal standard. He devoted a substantial number of his findings and conclusions to this issue, which, when viewed as a whole, show that his consideration of the issue was much more complete than appellant contends. Judge Lo wrote:

The decoy was 5' 8" tall and weighed 220 pounds on May 15, 2003. Two photographs were taken of him that day before the decoy operation began. (Finding of Fact IV).

The decoy was 5' 8" tall and weighed approximately 208 pounds on the day of the hearing. He was polite when he testified, sitting with his hands folded on his lap. He spoke clearly and confidently. Except for the decrease in weight, the decoy's physical appearance at the hearing was similar to his appearance in the photographs. The Administrative Law Judge observed the decoy's appearance, including his poise, demeanor, and mannerism. (Finding of Fact V).

The decoy was "successful" at ten of the twenty-three licensed premises which he visited on May 15. Neither Ibrahim, nor any of the other nine persons who sold alcoholic beverages to the decoy, asked to see his identification. (Finding of Fact VI).

Respondent argued that the decoy operation violated the Department's Rule 141 because it was not done in a manner that promoted fairness, and because the decoy did not display the appearance which could generally be expected of a person under twenty-one years old. In support of its argument, Respondent noted the large size of the decoy, his "precise" vocabulary while testifying, and the fact that nine other licensed premises sold alcoholic beverages to him without checking his identification. Respondent also cited the case of Southland / Chawla and Kaur (2001) Alcoholic Beverage Control Appeals Board Case

Number AB-7603, as legal authority supporting its argument.

Respondent's argument is rejected. (Determination of Issues II).

The Southland / Chawla and Kaur case is distinguishable from the present case, as the decoy in that case was 6' 4" tall and weighed 250 pounds, whereas the decoy in the present case was 5' 8" tall and weighed 220 pounds.

A case closer on point is 7 Eleven / Francisco (2003) Alcoholic Beverage Control Appeals Board Case Number AB-8050, which involved a decoy who was six feet tall and weighed 195 pounds. The Appeals Board said about that decoy's size: "By itself, this means little, since many high school juniors and seniors are probably that size. Physical size is only one of a number of characteristics which must be considered under the rule." At page 4, Footnote 2. (Determination of Issues III).

The Appeals Board has also held that a decoy's high "success" rate is not necessarily evidence that the decoy did not appear under twenty-one years old.

In 7 Eleven / Williams (2001) Alcoholic Beverage Control Appeals Board Case Number AB-7591, the Administrative Law Judge found that the decoy in that case appeared under twenty-one years old on the day of the decoy operation, even though the decoy was "successful" in a high percentage of the premises visited. In affirming that Administrative Law Judge's finding on that issue, the Alcoholic Beverage Control Appeals Board made the following comment: "We do not ignore the evidence ... that the decoy was able to purchase alcoholic beverages in more than half - seven of thirteen - 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." At page 5. (Determination of Issues IV).

The fact that the decoy testified "precisely" at the hearing is given little weight. The ability to do so is not evidence that a person appears at least twenty-one years old, or any other age. Moreover, there is no evidence that the decoy said anything to Ibrahim which would manifest this ability. (Determination of Issues V).

Finally, the photographs of the decoy taken shortly before the decoy operation began are "arguably the most important piece(s) of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age." Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (The Southland Corporation Real Party in Interest) (2002) 103 Cal.App. 4th 1084, 127 Cal.Rptr.2d 652, 659. (In Southland, the Court was describing a photograph taken shortly after the sale.) While those photographs show the decoy to be larger than many other persons his age, they also show that he has a youthful, boyish face. (Determination of Issues VI).

After taking into consideration 1) the photographs of the decoy taken on May 15, 2003, 2) the testimonies about his appearance on that day, and 3) his appearance (including his poise, demeanor, and mannerism) at the hearing, the Administrative Law Judge finds that the decoy did display the appearance which could generally be expected of a person under twenty-one years old when he purchased the beer from Ibrahim. (Determination of Issues VII).

We have set out Judge Lo's comments at length to show that he was thoroughly, and carefully, addressing the considerations the Board has said an ALJ should look at in making the evaluation required by Rule 141(b)(2). We do not think it impairs his decision that he did not include greater detail when referring to the decoy's poise, demeanor and mannerisms. ("He was polite when he testified, sitting with his hands folded on his lap. He spoke clearly and confidently." (Finding of Fact V).) Much of an ALJ's analysis of the issue regarding the decoy's appearance is necessarily mental, a process that does not easily translate into the written word.

Suffice it to say, this is another of the many cases where a licensee's counsel disagrees with the ALJ's determination regarding a decoy's appearance. We find nothing that persuades us that his conclusions are such that intervention by this Board would be justified.

ORDER

The decision of the Department is affirmed.³

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, 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.