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

AB-8305
File: 21-178969 Reg: 03056441

A M FOOD & LIQUOR CORPORATION, dba Ray's Skyway
5944 Skyway, Paradise, CA 95969,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: January 6, 2005
San Francisco, CA

ISSUED FEBRUARY 11, 2005

A M Food & Liquor Corporation, doing business as Ray's Skyway (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for appellant's clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant A M Food & Liquor Corporation, appearing through its counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

---

[1]The decision of the Department, dated June 24, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 20, 1989. On December 21, 2003, the Department filed an accusation against appellant charging that, on September 24, 2003, appellant's clerk, Larry Bradford (the clerk), sold an alcoholic beverage to 18-year-old Jared Tomlinson. Although not noted in the accusation, Tomlinson was working as a minor decoy for the Paradise Police Department at the time.

At the administrative hearing held on May 27, 2004, documentary evidence was received, and testimony concerning the sale was presented by Tomlinson (the decoy) and by Robert Pickering, a Paradise police officer.

The testimony established that the clerk asked for and examined the decoy's California driver's license and then sold a can of beer to him. After the decoy left the store with the beer, a police officer took him back inside, where, from a distance of about three or four feet, the decoy identified the clerk as the one who sold the beer to him. The same clerk also sold beer to the same decoy three and one-half months previously.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and appellant had not established a defense to the charge. Appellant then filed the present appeal, contending that the Department failed to establish that a face-to-face identification occurred as required by rule 141(b)(5).

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 make a face to face identification of the alleged seller of the alcoholic beverages.

Appellant contends that the Department did not show that the decoy complied with rule 141(b)(5), because no evidence was introduced establishing that the clerk saw the decoy making the identification.

The ALJ found, with respect to the face-to-face identification:

> After decoy Tomlinson left Respondent's premises on September 24, 2003, he was met by [Paradise] Police Officer Robert Pickering who took possession of the beer. Pickering then entered the premises with the decoy and asked him to identify the person who sold the beer to him. From a distance of about 3 to 4 feet from the clerk the decoy pointed to sales clerk Bradford and said "He sold me the beer" or words to that effect.

(Finding of Fact VIII.)

The ALJ addressed appellant's contention that a face-to-face identification was not established, in Determination of Issues II.B.:

> In accordance with Findings of Fact No. VIII, there was compliance with Rule 141(b)(5). Although Respondent contends the Department failed to establish that the "face to face identification" required by Rule 141(b)(5) was an act known to the clerk, the evidence established that the decoy pointed at the clerk and identified him as the seller of the beer. This took place from a distance of three to four feet.
>
> Based on the clerk's failure to examine the decoy's identification properly, and the fact that this was the second time he sold beer to the same 18 year old decoy in just over three months, it is possible that he was unaware of being identified by the decoy as a seller of beer to him, but the facts clearly establish that he should have been aware of it. Respondent has failed to establish any violation of Rule 141(b)(5).

Appellant's argument is based on language in the appeal of *Chun* (1999) AB-7287, where the Board said that "face-to-face" means that:

> the decoy and the seller, in some reasonable proximity to each other, acknowledge each other’s presence, by the decoy’s identification, and the seller’s presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Appellants stretch *Chun* farther than its language warrants. In *Chun*, the Board said that the seller is, *or reasonably ought to be*, knowledgeable that he or she is being accused. And, as the Board said later in *Greer* (2000) AB-7403, it is not necessary that the clerk *actually* be aware that the identification is taking place.

The clerk did not testify, so we do not know if he was aware. However, in this case, it is unrealistic to assert that the clerk was not aware that the decoy was identifying him as the seller. We find it difficult to believe the clerk might not be aware of what the decoy, standing only a few feet away, was doing or saying.

Appellant quibbles with the language from the second paragraph of Determination of Issues II.B., *ante*, that, "[b]ased on the clerk's failure to examine the decoy's identification properly, and the fact that this was the second time he sold beer to the same 18-year-old decoy in just over three months, it is possible that he was unaware of being identified by the decoy as a seller of beer to him, but the facts clearly establish that he should have been aware of it." According to appellant, this sentence means that the Department thinks that, because the clerk sold to the same decoy previously, he should have been aware of the identification being conducted.

We disagree. The point of the first part of the sentence is that this clerk appears to be particularly unobservant, since he failed to properly examine the decoy's identification and this was his second sale to the same decoy in just over three months' time, and therefore, it is possible that he was equally inattentive when the decoy was identifying him. The second part of the sentence concludes that, even if the clerk was actually unaware of the identification, the facts were sufficient to make the inference that someone in his position should have been aware of the identification by the decoy.

At the very least, the clerk reasonably ought to have been aware that the decoy was identifying him, and that is all that is required. We are satisfied that there was compliance with Rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[2]

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

[2]This 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.