

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

AB-8332

File: 20-347892 Reg: 04056989

MJS ENGEL NO. 2, INC. dba MJS Engel, Inc. #2
13511 Euclid Street, Garden Grove, CA 92843,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 4, 2005
Los Angeles, CA

ISSUED SEPTEMBER 29, 2005

MJS Engel No. 2, Inc., doing business as MJS Engel, Inc. #2 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk, Alejandro Diaz, having sold a six-pack of Coors Light beer to Tony Vo, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant MJS Engel No. 2, Inc., appearing through its vice-president, Jamal Ghannam, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 30, 1998. On March 29, 2004, the Department instituted an accusation against appellant charging the unlawful sale by Alejandro Diaz ("Diaz") of an alcoholic beverage to Tony Vo ("Vo")

¹The decision of the Department, dated August 12, 2004, is set forth in the appendix.

or “the decoy”), on December 12, 2003.

An administrative hearing was held on July 2, 2004, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Ed Leiva, a Garden Grove police officer, by Vo, the decoy, and by Jamal Ghannam, appellant’s vice-president. The testimony of the police officer and the decoy established that Diaz asked the decoy for identification, and was shown the decoy’s California driver’s license, which contained a blue stripe with the legend “provisional until age 18 in 2002,” and a red stripe with the legend “age 21 in 2005.” The clerk examined the license, returned it to the decoy, and went forward with the sale. Ghannam testified that Diaz was a new employee, not a regular cashier, and had been instructed to ask for identification from all customers, regardless of their age.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and no defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the decoy’s appearance at the hearing was different than when at appellant’s store; his shaven head made him appear younger than 21; and (2) the Department failed to respond to appellant’s request for materials relating to the case.

DISCUSSION

Appellant contends that the decoy’s appearance was changed between the time of the sale and the time of the hearing, such that he appeared younger at the hearing than he did at the time of the sale.

The administrative law judge (ALJ) made a factual determination that the decoy possessed the requisite appearance under Rule 141(b)(2), i.e., that he displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances of the sale. He wrote (Finding of Fact II-D):

The decoy is a slender young man with a very youthful looking face. His overall appearance including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty one years and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that his hair was a little longer on the day of the sale.

1. On the day of the sale, the decoy was wearing blue jeans and a black T-shirt and he was clean shaven. The photograph depicted in Exhibit 2 was taken at the premises and it depicts what the decoy looked like and what he was wearing at the premises on the day of the sale.
2. The decoy gave straightforward answers at the hearing and there was nothing remarkable about his nonphysical appearance.
3. The decoy testified that he had participated in one prior decoy operation.
4. After considering Exhibit 2, the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the alleged offense.

Appellant contends that the decoy shaved his head after the event and, as a result, presented a more youthful appearance to the ALJ. According to appellant, the clerk, who did not testify, thought the decoy to be older than 21 – “way over 21.” [RT 43, 51].

The ALJ commented on the fact that the decoy was wearing his hair shorter than at the time of the sale, but obviously placed much greater weight on the decoy's “very youthful looking face.”

The Appeals Board has many times said it was unwilling, in the absence of extraordinary circumstances, to substitute its judgment for that of an ALJ with respect to the apparent age of a decoy. We find no extraordinary circumstance in this case.

Appellant also contends that “the discovery package was not received prior to court appearance,” despite several attempts to obtain it, and that no witness list was provided.

There is nothing in the hearing transcript to indicate that the concerns expressed by appellant about the discovery package or the witness list were raised at the administrative hearing. The subject appears to have been discussed prior to the commencement of the hearing, but not on the record, and appellant was apparently provided information at that time. The transcript does, however, reveal two later instances [RT 50, 54] where the ALJ invited appellant to raise anything it did not feel had been covered, an invitation appellant declined.

It is not uncommon for minor problems or disputes to arise during the discovery phase of a case. We are unable to tell from the record we have been given whether that was the case here. Unless such matters are brought to the attention of the ALJ, and the ALJ acts on them on the record, there is nothing for this Board to review.

At the hearing, appellant was unable to explain what he expected to get in the way of discovery that might have affected the outcome of the case, and we are not permitted to speculate. Without an adequate record, we are unable to afford any relief.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.

