

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

AB-8627

File: 47-182053 Reg: 06062627

ACAPULCO RESTAURANTS, INC. dba Acapulco
1020 West San Marcos Boulevard, #50, San Marcos, CA 92078,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 1, 2007
Los Angeles, CA

ISSUED JANUARY 17, 2008

Acapulco Restaurants, Inc., doing business as Acapulco (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for its waiter, Procopio Cervantes, having sold a bottle of Coors light beer to Casey Burns, a 19-year-old police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Acapulco Restaurants, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated September 28, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on March 3, 1986. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on February 16, 2006.

An administrative hearing was held on July 18, 2006, at which time oral and documentary evidence was received. The evidence established that the decoy entered the premises and sat at a table. When approached by a waiter, she requested a Coors Light beer in a bottle. The waiter went to the bar area, and returned with the beer. He did not ask her age or for identification. He placed the beer on the table along with a receipt, and left the area. A sheriff's deputy entered the premises, asked the decoy to point to the person who sold her the beer. She did so from a distance of 15 to 20 feet, and again identified him as the seller, this time from a distance of about three feet, while he was at the cash register.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and which rejected appellant's claim that the decoy's appearance did not comply with Rule 141(b)(2).

Appellant has filed a timely notice of appeal, and raises the following issues: (1) the Department communicated with its decision maker on an ex parte basis, in violation of the APA; and (2) there was no compliance with Rule 141(b)(2).

DISCUSSION

I

The contention that the Department communicated with its decision maker on an ex parte basis, in violation of the APA, has been made many times before and has been adjudicated by the California Supreme Court in *Department of Alcoholic Beverage*

Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*). This Board has followed *Quintanar* in numerous appeals, remanding the matters to the Department for evidentiary hearings to resolve the factual issues regarding ex parte communications raised in these cases. (E.g., *Dakramanji* (2007) AB-8572; *BP West Coast Products, LLC* (2007) AB-8549; *Hong* (2007) AB-8492; *Chevron Stations, Inc.* (2007) AB-8488; *Circle K Stores, Inc.* (2006) AB-8404.) The ex parte communication contention in the present appeal is virtually identical to those made in the earlier appeals, and we decide this issue in the present appeal as we did the same issue in the earlier appeals just cited.

II

Appellant contends that the decoy did not display the appearance required by Rule 141(b)(2).² It asserts that the decoy appeared older at the time of the investigation, i.e., the sale transaction, than she did at the time of the administrative hearing. It argues that the administrative law judge (ALJ) relied on facts outside the record in his analysis of the decoy's appearance as depicted in a photograph of the decoy taken at the time of the decoy operation (Exhibit 3), and a two foot by four foot enlargement of that exhibit (Exhibit A). Appellant further contends that the ALJ misconstrued a statement by its counsel as a concession that the decoy appeared younger in person than she did in the photograph, when what he said and intended was the opposite.

The ALJ addressed the appearance of the decoy at some length in section II.C

² Rule 141(b)(2) requires that a decoy "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."

of his Findings of Fact:

C. The decoy's overall appearance including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty one years of age and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation.

1. The decoy is five feet ten inches in height and she weighs one hundred forty-five pounds. On the night of the sale, the decoy was wearing blue jeans, a white T-shirt, a tan jacket and tennis shoes. She was wearing some make-up on that night and it consisted of foundation powder, mascara and eyeliner. However, she was not wearing any lipstick or any jewelry. Her appearance on the day of the sale was as shown in Exhibit 2 which was taken at the premises. Exhibits 3 and 4 were taken at the Sheriff's station before going out on the decoy operation. Although the decoy is wearing a necklace and carrying a purse in Exhibits 3 and 4, the decoy took the necklace off before entering the premises and she did not take the purse into the premises.

2. The Respondent's attorney had Exhibit 3 enlarged into a two foot by four foot poster and that poster size photograph was marked as Exhibit A. In the photographs of the decoy which were taken on the day of the sale, it appears that the decoy was wearing red lipstick. However, the decoy credibly testified that she was not wearing lipstick on the day of the sale and that she does not wear lipstick. In looking closely at Exhibit 3 and its enlargement (Exhibit A) it is evident that the decoy's eyes appear red and that the tips of the decoy's hair also appear reddish. An observation of the decoy's photographs reveals that they have been printed on regular paper rather than on photographic paper. The fact that the photographs were not printed on photographic paper may help to explain why the photographs have a reddish tint to them.

3. The decoy appears younger in person than in the photographs and the Respondent's attorney conceded this fact.

4. The decoy had not participated in any prior decoy operations and she volunteered to be a decoy.

5. As of the day of the sale, the decoy had two jobs. She worked part time as a community services officer which she described as being similar to the work of a security guard. She also worked as a receptionist.

6. The decoy visited about ten locations on February 16, 2006 and she was able to purchase an alcoholic beverage at three or four locations. The subject premises was one of the last locations she visited and she was comfortable being a decoy when she entered the premises.

7. The Administrative Law Judge observed the decoy's maturity, her

mannerisms, her poise and her demeanor when she testified. The decoy has a young looking face, she was soft spoken, she provided straightforward answers and she appeared somewhat nervous while testifying. The Administrative Law Judge called the decoy back into the hearing room prior to closing the record to observe the decoy one more time and to compare her to her photographs. After considering all the photographs (Exhibits 2,3, 4 and A), the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellant's claim that the ALJ relied on evidence outside the record in his appraisal of the photographic exhibits is not persuasive. We agree with Department counsel that it would have been obvious that the photographs were not reproduced on photographic paper, and the photographs themselves support the ALJ's observations regarding the "reddish tint." It is important to note that the ALJ reached his ultimate conclusion regarding the appearance of the decoy after consideration of a number of aspects of the decoy's appearance, both in person and in the photographs.

We find guidance in the court of appeal decision in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd./The Southland Corporation* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr. 2d 652] addressing the question whether there was substantial evidence to support the ALJ's determination that the decoy in that case displayed the appearance required by Rule 141(b)(2). The court stated, in relevant part:

We have reviewed the evidence and have concluded that ALJ Lo's finding is supported by substantial evidence. Among other things, we have reviewed the photograph of the decoy taken immediately after the sale, which is arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age. *While one could look at the photograph and reasonably conclude that the decoy appeared to be older than 21 years of age, we cannot say that, as a matter of law, a trier of fact could not reasonably have concluded otherwise.* (Emphasis supplied.)

Similarly, we cannot say that, as a matter of law, ALJ Echeverria could not reasonably have concluded that there was compliance with the rule.

As long ago as 2001, the Appeals Board said:

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he or she possessed 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.

The Board is not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy did not have the appearance required by the rule, and an equally partisan response that she did.

(Idress (2001) AB-7611.)

Lastly, we address the contention that the ALJ misconstrued counsel's statement into a concession and agreement that would justify a determination of compliance with Rule 141(b)(2). Department counsel argued that "really the photograph makes her look older than she does in person; that in person – and this event only happened in February of this year – Ms. Burns still has a very youthful appearance." [RT 47]. Appellant's counsel responded: "I'll go with Mr. Sakamoto to some extent here. I think she looks younger today than she did in February." [RT 49.]

The thrust of the ALJ's finding -- "The decoy appears younger in person than in the photographs ...". -- does not appear to this Board to be premised on any concession by appellant's counsel. The remainder of the ALJ's finding -- "and the Respondent's attorney conceded this fact" -- simply recites that the appellant agreed that the decoy appears older in the photographs. Whether that observation was correct or not is immaterial.

We are unwilling to agree with appellant's contention that the ALJ used the

disputed concession as a device to justify his otherwise extensive factual determinations.

ORDER

The decision of the Department is affirmed as to the issue involving the appearance of the decoy, and the case is remanded to the Department for an evidentiary hearing on the issue involving the claimed ex parte communication.³

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

³ This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.