

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

AB-9474

File: 47-6660 Reg: 14080262

ABBJOHN, INC.,
dba Pancho's Mexican Restaurant
3615 Highland Avenue, Manhattan Beach, CA 90266,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 7, 2015
Los Angeles, CA

ISSUED MAY 19, 2015

Abbjohn, Inc., doing business as Pancho's Mexican Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 5 days because its clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellant Abbjohn, Inc., through its counsel, Ralph Barat Saltsman and Margaret Warner Rose of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on July 1, 1977. On April 4, 2014, the Department filed an accusation charging that appellant's server, Elba

¹The decision of the Department, dated October 2, 2014, is set forth in the appendix.

Lopez (the clerk), sold an alcoholic beverage to 18-year-old Katlyn Randolph on February 28, 2014. Although not noted in the accusation, Randolph, along with a second minor, was working as a decoy for the Manhattan Beach Police Department at the time.

At the administrative hearing held on August 6, 2014, documentary evidence was received, and testimony concerning the sale was presented by Randolph (the decoy); by Bailey Ambriz, a second decoy involved in the operation; by Michael Allard, a Manhattan Beach Police detective; by Elba Lopez, the selling server; and by Emetiro Aleman, appellant's manager.

Testimony established that on the date of the operation, the decoy and Ambriz entered the licensed premises and sat at a table near the stage. Lopez, who was working as a server, approached and asked if they wanted anything to drink. After a brief discussion about the types of beer available, the decoy ordered a Corona Light. Ambriz ordered a glass of water. Lopez went to the bar counter and obtained a Corona Light, which she served to the decoy, then left to get the glass of water for Ambriz.

After the sale, Detective Allard entered the premises and contacted Lopez about the violation. A face-to-face identification took place, a photo was taken of the decoy and Lopez together, and Lopez was cited.

Lopez testified that she believed the decoy appeared to be roughly the same age as her oldest daughter — 23 — but that Ambriz appeared to be young. She stated her opinion was reinforced when the decoy ordered a beer, but Ambriz only ordered water.

Aleman did not witness the transaction, but approached the officers when they entered the premises. They advised him that they were investigating a sale to a minor. Aleman testified that when he saw the decoy, he believed she appeared to be over the

age of 21.

After the hearing, the Department issued its decision, which determined that the violation charged was proved and no defense was established. In light of appellant's disciplinary history, the Department assigned a mitigated penalty of five days' suspension.

Appellant filed an appeal contending: (1) the appearance of the second decoy unfairly influenced the operation, and (2) the Board must view the decoys in person.

DISCUSSION

I

Appellant contends that the decoy's apparent age must be determined with reference to the apparent age of Ambriz, the second decoy, because Ambriz actively participated in the transaction and was therefore part of the circumstances presented to the seller. Appellant argues that Ambriz's presence and participation "increased the apparent age of the participating decoy." (App.Br. at p. 6.) Moreover, appellant insists that Lopez, the selling server, had "sixteen years' experience assessing the age of minors related to alcohol" as well as "personal experience living with a 23-year-old daughter." (*Id.* at p. 8.) According to Lopez, Ambriz's "young physical appearance and shy demeanor contrasted sharply with [the decoy's] physical and emotional maturity," combined with the fact that Ambriz only ordered water, merely confirmed for Lopez that the decoy was over 21. (*Ibid.*) At a minimum, claims appellant, the operation "caused confusion" and "mised the seller." (*Ibid.*)

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we

must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; see also *Kirby v. Alcoholic Bev. Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged."].)

Rule 141, subdivision (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." The rule provides an affirmative defense, and the burden of proof lies with the appellant. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

There is nothing in rule 141 that requires a decoy to purchase the alcoholic beverage alone. In *7-Eleven, Inc./Janizeh Corp.* (2002) AB-7790, however, the Board explained that "the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law." (*Id.* at p. 4 [no testimony from clerk, so no evidence that clerk was distracted].) Subsequent cases consistently follow this rule. (See, e.g., *Dave & Busters of Cal., Inc.* (2015) AB-9464, at pp. 8-9 [uncontroverted evidence supported finding that second decoy's presence was irrelevant].)

In *Hurtado* (2000) AB-7246, the decoy was accompanied into a nightclub by a 27-year-old officer, who sat with him at the table. (*Id.* at p. 2.) The decoy and the officer each ordered their own beer from the server. (*Ibid.*) The licensee argued that the presence of the officer “was part of the circumstances presented to the seller, and would have had an impact on the assessment of the decoy’s age.” (*Id.* at p. 3.) The Department held that the presence of the officer did not render the operation unfair. (*Id.* at p. 3.) This Board reversed, holding that the officer actively participated in the transaction, and that “consideration of the effect of another person is essential for disposition.” (*Id.* at p. 4.)

In this case, the ALJ made the following factual findings regarding Ambriz’s presence:

6. On February 28, 2014, [the decoy] entered the Licensed Premises with another decoy, Bailey Ambriz. They sat down at a table near the stage. The waitress, Elba Lopez, approached and asked if they wanted anything to drink. After a brief discussion about the types of beer available, [the decoy] ordered a Corona Light and Ambriz ordered a glass of water. Lopez went to the bar counter and obtained a Corona Light, which she served to [the decoy], then left to get the glass of water for Ambriz.

¶ . . . ¶

8. Aleman did not see the transaction at issue. He approached the officers when he saw them. They advised him that they were investigating a sale to a minor. When he saw [the decoy], he believed that she had appeared to be over the age of 21. Lopez testified that she believed that [the decoy] appeared to be roughly the same age as her oldest daughter, 23, but that Ambriz appeared to be young. This opinion was reinforced when [the decoy] ordered a beer, but Ambriz only ordered a glass of water.

(Findings of Fact ¶¶ 6, 8.) While the factual findings include a discussion of the decoy’s physical appearance, they make no reference to Ambriz’s appearance.

The ALJ’s conclusions of law offer only a summary comment on Ambriz’s

presence:

5. The Respondent argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)^[fn] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondent argued that [the decoy's] weight, confidence, and demeanor made her appear to be over the age of 21, particularly when compared to Bailey Ambriz, who was sitting next to her. This argument is rejected. [The decoy's] appearance was consistent with that of an 18 or 19 year old; as such, she had the appearance generally expected of a person under the age of 21.

(Conclusions of Law ¶ 5.)

We find this summary treatment troubling. First, Ambriz' involvement in the transaction rises nearly to the level of the police officer in *Hurtado, supra*. While Ambriz admittedly did not order an alcoholic beverage, she did sit at the same table as the decoy, and she did order a water at the same time the decoy ordered a beer. The facts strongly suggest that Ambriz actively participated in the transaction — and yet, the decision below offers no finding or conclusion on this point.

Moreover, the question of whether Ambriz actively participated in the transaction is deeply relevant to the outcome of this case. (Compare *Hurtado, supra*, with *Dave & Busters of Cal., Inc., supra*.) Where another person actively participates in a decoy operation, consideration of the effect of the second person is essential for disposition. (*Hurtado, supra*, at p. 4.) At a minimum, it must be determined “whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law.” (*7-Eleven, Inc./Janizeh Corp.* (2002) AB-7790, at p. 4.) Here, the Department's decision offers only a summary rejection of the argument in its entirety.

The appellant offered testimony to the effect that Ambriz's physical appearance and act of ordering water — as opposed to the decoy's beer — caused Lopez to

misjudge the decoy's age. This is not a case based on mere speculation. In light of the evidence presented, a remand is appropriate for findings on two additional points: whether Ambriz actively participated in the transaction, and if so, whether her participation was intended to or had the effect of distracting or impairing Lopez's ability to comply with the law.

II

Appellant contends that in order for the Board to correctly review the sufficiency of the ALJ's rule 141(b)(2) findings, the Board must view both decoys in person. (App.Br. at pp. 9-11.)

Appellant is simply raising the same decoy-as-evidence argument we addressed at length — and firmly rejected — in *Chevron Stations* (2015) AB-9415 and numerous subsequent cases. On or about February 9, 2015, counsel for appellant petitioned the Second District Court of Appeal for a writ of review of our decision in *Chevron* specifically as it pertained to this issue. On April 2, 2015, following a brief stay, the court entered a final order summarily denying the petition.

Since the Court's April 2, 2015 order, counsel for appellant has filed four additional petitions for writ of review on this issue — two in the Fourth District Court of Appeal, and two more in the Second District. Both petitions for writ in the Fourth District were summarily denied by the Court on April 30, 2015. One of the two petitions for writ in the Second District was summarily denied on May 12, 2015, and we are confident that the second will soon suffer the same fate. As such, we are convinced that this argument is without merit, and counsel for appellant's repeated insistence on raising it on appeal is nothing more than a frivolous delay tactic and an all-out assault on already strained public resources. We therefore strongly urge counsel for appellant to cease

this fruitless and wasteful venture.

ORDER

The decision of the Department is remanded for additional factual findings as to whether Ambriz actively participated in the transaction, and, if so, whether Ambriz's participation was intended to or had the effect of distracting or impairing Lopez's ability to comply with the law.²

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.