

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

AB-9172

File: 20-405688 Reg: 10073979

NEW LITE MARKET, INC., dba New Lite Market
1416 Haight Street, San Francisco CA 94117,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 12, 2012
Sacramento, CA

ISSUED AUGUST 10, 2012

New Lite Market, Inc., doing business as New Lite Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 12 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 New Lite Market, Inc., appearing through its counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control (ABC), appearing through its counsel, Sean Klein.

¹

The decision of the Department, dated May 4, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 23, 2003.

On December 17, 2010, the Department filed an accusation against appellant charging that, on February 3, 2010, appellant's clerk, Sam Kazzouh (the clerk), sold an alcoholic beverage to 18-year-old Megan Torres. Although not noted in the accusation, Torres was working as a minor decoy for the San Francisco Police Department and ABC at the time.

At the administrative hearing held on March 17, 2011, documentary evidence was received, and testimony concerning the sale was presented by Torres (the decoy) and by Joseph Fong, a San Francisco Police inspector.

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

Appellant has filed an appeal making the following contentions: (1) there was no compliance with rule 141(b)(5), and (2) there was no compliance with rule 141(b)(2).

DISCUSSION

Subsection (b) of rule 141 sets forth minimum standards with which a law enforcement agency must comply in actions filed pursuant to Business and Professions Code section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage. Subdivision (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 to make a face to face identification of the alleged seller of alcoholic beverages.

Subdivision (c) of the rule provides that a failure to comply with the rule shall be a defense to any action brought pursuant to section 25658.

Summarizing the decoy's testimony, appellant contends there was no face-to face identification meeting the requirement of the rule:

[T]here were only two witnesses to testify...: the first, the minor decoy, testified that she wasn't looking at the clerk to know what the clerk was doing at the time of the face-to-face; the second witness, the police officer accompanying the minor decoy on this operation, testified that he could not remember a face-to-face identification ever occurring.

(App. Br., p.6.)

This distorts and misstates the substance of the decoy's testimony. Viewed in its entirety, there is no doubt that the face-to-face identification required by the rule took place [RT 22-23]:

Q. So you entered the store the second time when Inspector Fong was with you?

A. Yes.

Q. And did you go back up to the counter?

A. Yes.

Q. Was the same employee who had sold you the item behind the counter still?

A. Yes.

Q. When you went back up and approached the employee, what happened next?

A. I just said, "This is the person who sold to me."

Q. And did the officer ask you who had sold the alcohol to you?

A. Yes.

Q. And so it was subsequent or after he had asked you that you stated that this was the person that had sold the alcohol to you?

A. Correct.

Q. And where exactly was the employee or the clerk standing at that point?

A. Behind the counter.

Q. About how far away were you from him?

A. It would be an estimate, but I'm on the other side of the counter, so it would be a couple feet.

...

Q. When you were doing the face-to-face identification, were you making eye contact with the clerk?

A. Yes.

Q. You paused a little.

A. Well, initially I make eye contact so that they see that I'm speaking to them, but just – I look away after the initial eye contact.

Q. So while you're saying that this is the person that sold you the alcohol, you're looking toward the police officer?

A. No.

Q. Where were you looking?

A. As I was speaking, I made eye contact with the clerk and then I looked down. A nervous habit. I don't like –

...

Q. So since you're looking away and not at the clerk, you don't know what the clerk is doing: is that correct?

JUDGE LO: Wait. Is that correct?

A. No.

Q. Is that correct that you do not know what the clerk is doing while you are speaking?

A. Yes.

Ms. Renshaw: Is that understandable, Your Honor?

JUDGE LO: I do understand.

Q. After you made the face-to-face identification, what happened next?

A. I left the store.

The very least which can be drawn from the decoy's testimony is that she began speaking to the clerk while making eye contact, this after having been asked by the police inspector who it was who sold the alcoholic beverage to her. This took place while the decoy and the clerk were across the counter from each other. It is not unreasonable to believe that the clerk was on notice that she was being accused by the decoy, whether she was looking at the decoy the whole time, or whether the decoy broke eye contact in the middle of her answer to the question of the police inspector. (See, e.g., *Chun* (1999) AB-7287.)

II

Appellant contends that the decoy lacked the appearance required by rule 141(b)(2), i.e., that she “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.” Appellant argues that the administrative law judge (ALJ) failed to provide any insight into his determination that the decoy's appearance complied with rule 141(b)(2), leaving “an analytic chasm to puzzle over.”

Appellant's assertion that the Board has held that an ALJ must provide enough findings to demonstrate that he or she considered the totality of the decoy's physical

and non-physical appearance is perhaps too broad. The material from *Circle K Stores, Inc.* (2010) AB-8919 quoted by appellant is not so sweeping:

While it is true that the burden of establishing a defense under Rule 141(b)(2) is on appellant, it is also true that the Board has made it clear that the decision should contain enough of a description of the decoy's overall appearance to assure the Board that the administrative law judge (ALJ) has considered the decoy's overall appearance and has not focused

only on a single facet of that appearance and ignored others that might support the appellant's burden of proof.

In that case, the ALJ's decision stated no facts regarding the decoy's appearance other than her age and the number of decoy operations in which she had participated in support of his conclusion that she did not appear to be older than 21 to him or to anyone else.

Here, to the contrary, the ALJ, who, of course heard and watched the decoy as she testified, considered her physical size (her height and weight), the fact that she wore no makeup or jewelry, and that, although not nervous, was uncomfortable while purchasing the wine at appellant's store. The ALJ rejected appellant's argument that, based on her size and her experience as a decoy, the decoy appeared at least 21 years of age, stating (Det. Of Issues III):

Respondent did not show how the decoy's size made the eighteen-year old decoy appear twenty-one years old. Probably the "most important piece of evidence" regarding the decoy's appearance on the day of the decoy operation is the photograph of the decoy taken that day. See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (The Southland Corporation Real Party in Interest)* (2002) 103 Cal.App.4th 1084, 1094, 127 Cal.Rptr.2d 652. That photograph (State's Exhibit 5) clearly shows a young woman who appears under twenty-one years old.

It was unnecessary for the ALJ to remind the reader of his decision that he had

listened to the decoy testify, or that his impression of the decoy's apparent age is made up of many intangible and, perhaps, even unidentifiable, considerations that contributed to his decisional process. It is enough that we can see from the decision that how he got where he did was a reasoned process and not simply an arbitrary leap.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, 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.