

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

AB-9528

File: 47-472478 Reg: 14081245

MAC ACQUISITION, LLC,
dba Romanos Macaroni Grill
26641 Aliso Creek Road, Aliso Viejo, CA 92656,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 3, 2016
Los Angeles, CA

ISSUED APRIL 19, 2016

Appearances: *Appellant:* Melissa H. Gelbart, of Solomon Saltsman & Jamieson, as counsel for appellants Mac Acquisition, LLC, doing business as Romanos Macaroni Grill.
Respondent: Kerry K. Winters as counsel for the Department of Alcoholic Beverage Control.

OPINION

Mac Acquisition, LLC, doing business as Romanos Macaroni Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 10 days because its employee sold an alcoholic beverage to a Department minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated July 22, 2015, is set forth in the appendix.

Appellant's on-sale general license was issued on August 17, 2009. On September 22, 2014, the Department filed an accusation charging that appellant's employee, Raven Gilbert (Gilbert), sold an alcoholic beverage to 18-year-old Gilbert Centeno on August 9, 2014. Although not noted in the accusation, Centeno was working as a minor decoy for the Department at the time.

At the administrative hearing held on April 29, 2015, documentary evidence was received, and testimony concerning the sale was presented by Centeno (the decoy), and by Vic Duong, an agent for the Department. Appellant presented the testimony of Gilbert and of Angela Ahrens-Marenco, the general manager of the licensed premises.

Testimony established that on the date of the alleged violation, the decoy entered the licensed premises and took a seat at the bar counter. Agent Duong also entered but remained in an open area near the hostess station. Gilbert, who was working as bartender at the time, asked the decoy what he would like to drink. The decoy ordered a Bud Light beer, and Gilbert asked him how he wanted it — bottle or draft. The decoy requested a bottle and Gilbert asked to see his ID.

According to the decoy, he then handed his California identification card to Gilbert. Both the decoy and Agent Duong testified that Gilbert took the ID over to the cash register, where she put on her eyeglasses and looked at it. She then returned the ID to the decoy. The decoy also testified that, as Gilbert approached the register, she said something to him. According to the decoy, he did not hear what Gilbert said, so he asked her to repeat it. He did not hear anything else so he was not sure whether Gilbert repeated what she previously said or not.

Gilbert's version of the story varied substantially from that of the decoy and Agent

Duong. Gilbert testified that the decoy handed her a driver's license as opposed to a California ID. (See, e.g., RT at p. 49.) Gilbert claims she held the license up as she stood directly in front of the decoy, looked at the date of birth, and misread it as saying 1993. According to Gilbert, she then turned to the decoy and said, "You just turned 21, right" or "You're 21 right?" According to Gilbert, the decoy nodded his head "yes." Gilbert also testified that the decoy was wearing a ball cap and a jacket. Gilbert served the decoy a bottle of Budweiser beer because the licensed premises only had Bud Light on tap.

After the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. The administrative law judge (ALJ) proposed — and the Department adopted — a penalty of 10 days' suspension.

Appellant filed an appeal contending: (1) the Department misapplied rule 141(b)(4)²; (2) the Department failed to apply rule 141(a); and (3) the ALJ abused his discretion by inappropriately casting the present matter as a credibility dispute and rejecting Gilbert's testimony based on irrelevant and immaterial factors.

DISCUSSION

I

Appellant contends the Department misapplied rule 141(b)(4). Appellant claims the ALJ misapplied this Board's previous decisions regarding a decoy's obligation to truthfully respond to questions concerning his or her age. (App.Br. at p. 6.) More

²References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

specifically, appellant claims that the decoy's failure to respond to Gilbert's questions, one way or the other, constitutes a violation of rule 141(b)(4) or, alternatively, a violation of rule 141(a). At oral argument, appellant further insisted that *even if the decoy did not hear Gilbert's question*, his silence violated the rule.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (Cal. Const., art. XX, §§ 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

Rule 141(a) provides:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a *fashion that promotes fairness*.

(Emphasis added.) Pursuant to that requirement, rule 141(b)(4) states "[a] decoy shall answer truthfully any questions about his or her age[.]" Importantly, rule 141 provides

an affirmative defense, and the burden of proof lies with the party asserting it.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

The heart of this issue lies with the various witnesses' testimony concerning the decoy's interaction with Gilbert while in the licensed premises. The decoy testified as follows on direct examination:

[BY MS. WINTERS:]

Q. What happened when [Gilbert] walked off to the register?

[THE DECOY:]

A. She asked me a question.

Q. What did she ask you?

A. I'm not sure. I don't know.

Q. So when she asked you the question what did you say or do?

A. I asked her to repeat it again.

Q. What happened next?

A. I'm not sure she repeated it. I couldn't hear.

Q. What did you observe next?

A. I observed her put her glasses on and look at my ID.

(RT at pp. 19-20.) On cross examination, the decoy's testimony proceeded thus:

[BY MS. ROSE, COUNSEL FOR APPELLANT:]

Q. And then you testified that she asked a question but you couldn't hear it?

[THE DECOY:]

A. Yes.

Q. And then you asked her to repeat that question?

A. Yes.

Q. The Department attorney just a few minutes ago asked you if the bartender, she asked you, did she ask you your age, and you replied no.

A. I replied no.

Q. Isn't it true that she asked you a question — the bartender did ask you a question but you couldn't hear?

A. Yes.

(RT at p. 26.) The decoy also testified that he wore a gray t-shirt, blue jeans, and white and blue tennis shoes on the date of the operation (RT at p. 15), and his testimony was consistent with the pictures of the decoy taken on August 9, 2014. (See Exhibits 2, 3.) Finally, the decoy stated that, when asked, he handed Gilbert his California identification card. (RT at pp. 18-19.)

Gilbert, on the other hand, remembered the events differently:

[BY MS. ROSE:]

Q. So after you looked at [the decoy's] ID did you do — what else did you do? Anything else to verify his age?

[GILBERT:]

A. I did.

Q. What did you do?

A. My policy is — I'll tell you what I said to him exactly. My exact words were, "Looks like you just turned 21; right? You need to get another license. You're going to motor vehicles soon; right?" And he nodded yes.

Q. Did you ask him his age?

A. I said, "You're 21; right?" I didn't ask for his exact age.

Q. And were you holding his identification when you asked him this?

A. I was handing it back to him when I was asking him that.

Q. Could you — did you speak clearly when you said this to him?

A. Yes, I did.

Q. Were you looking at him?

A. Yes.

Q. Did he do anything after you asked him this that made you think he heard you?

A. He nodded yes to my question.

[¶ . . . ¶]

Q. And what did you understand that motion to mean?

A. I understood that to mean he was answering my question with a yes.

(RT at pp. 51-52.) Gilbert also recalled that the decoy was wearing a pulled-down ball cap, a jacket, and jeans during the operation. (RT at p. 48.)

In considering appellant's rule 141(b)(4) arguments, the ALJ sorted through the conflicting testimony and found as follows:

6. The Respondent's rule 141(b)(4) is more complicated, since testimony of the witnesses do [*sic*] not agree. The Respondent emphasizes Gilbert's testimony that she asked [the decoy] if he was 21 and that he responded by nodding his head. The Respondent further argues that, even if [the decoy] did not nod his head, he was obligated to answer the question and, therefore, his silence violated the rule. The Department, on the other hand, emphasizes [the decoy's] testimony that he could not hear what Gilbert was saying, so asked her to repeat it, but she did not.

Using the factors set forth in evidence code section 780, [the decoy] was the more credible witness. His testimony was not only internally consistent, but consistent with the other evidence. Gilbert's testimony, on the other hand, was not (e.g., [the decoy] was not wearing a cap, [the decoy] was not wearing a jacket, and [the decoy] showed an identification card, not a driver license). Accordingly [the decoy's] testimony (Finding of Fact ¶ 7) is specifically relied upon and Gilbert's testimony (Finding of Fact ¶ 8) is rejected.

Accordingly, the Respondent's rule 141(b)(4) argument is rejected. It is

not enough for a seller to simply ask an age-related question; rather, the decoy's response must be something other than truthful in order for a violation to exist. In the present case, [the decoy] did not hear the question, so he asked Gilbert to repeat it. She did not (at least, not in any meaningful way). [The decoy] was trying to answer the question, but he needed to hear it before he could. The seller, after all, is the one in control of the sale. It was incumbent upon Gilbert to wait for a response before selling an alcoholic beverage. Where, as here, the decoy is expressly asking the seller to repeat the question so that he could answer it, it is the seller's obligation to repeat the question. Gilbert's failure to repeat the question and wait for an answer is the problem — "I didn't hear you" is not the same thing as "Yes, I'm 21." Rule 141(b)(4) has not been violated in such a case.

(Conclusions of Law, ¶ 6.)

Appellant argues that the ALJ's holding is contrary to this Board's precedent interpreting rule 141(b)(4). In *Garfield Beach CVS, LLC* (2015) AB-9434, for instance, the Board reversed the decision of the Department where the clerk had said to the decoy upon inspection of his identification something to the effect of, "I would never have guessed it. You must get asked a lot." (*Id.* at p. 2.) Similarly, in *Lucky Stores, Inc.* (1999) AB-7227, the Board reversed a decision of the Department where the decoy made no response when the clerk said, "1978. You are just 21" (per the decoy) or "1978. You are 21" (per the clerk). (*Id.* at pp. 4-6.) Also, in *Equilon Enterprises, LLC* (2002) AB-7845, the Board reversed a decision of the Department where the decoy remained silent after the clerk examined the decoy's driver's license, which showed he would be 21 in 2003, and said, "Born in 1981. You check out okay." (*Id.* at pp. 2, 4-6.)

The Board explained why it thought the decision merited reversal:

Rule 141 requires that a decoy shall answer truthfully questions about his or her age. There is nothing in the rule that requires a decoy to volunteer information about his or her age, or to clear up what may be a misconception about age where a seller is silent and simply goes ahead with the sale either without having requested proof of age or, upon

request, having been provided identification. Since a decoy is engaged in a law enforcement process to determine the extent to which sellers are complying with the law regarding sales of alcoholic beverages to minors, it would seem unreasonable to expect that process to function if the decoy was obligated to clear up what might be a mistake or misconception on the part of the seller.

For example, many transactions involve a seller who requested identification, was furnished identification which showed the decoy to be a minor, yet proceeded with the sale. It could reasonably be assumed the seller was careless, or unable to interpret the information provided. It might also be assumed the seller did not really care, although this is undoubtedly much less frequent.

However, where there has been a verbalization of the seller's thought processes such as that in this case a decoy may be expected to respond. Rule 141 says that a decoy is required to respond to a question. As this Board has said in an earlier case, there may be a thin line between what is a statement and what is a question. And when that line blurs, and the verbalization borders on the ambiguous, it may well be that a response is required.

(*Id.* at p. 5.) Finally, in *Circle K Stores, Inc.* (2007) AB-8567, the Board observed that it “considers an appropriate response to a statement or question by a clerk one which is free of ambiguity, and unlikely to cause confusion or distraction. A response which leads a clerk to guess at what the decoy intended to say is not in the spirit of the rule and will not suffice.” (*Id.* at p. 6.)

What appellant fails to note is the critical — indeed, fatal — factual distinction between each of the cited decisions and the current case: there was no dispute in any of those cases that the decoy *actually heard* the questions or statements at issue. In this case, by contrast, the decoy testified that, while he believed that Gilbert had asked

him a question, he did not hear it. (See RT at pp. 19-20, 26.) He asked Gilbert to repeat her question and, as far as the decoy knew, she did not. (*Id.* at pp. 19-20.) Though Gilbert testified that the decoy nodded “yes” in answer to her question regarding his age, the ALJ discredited her testimony because of the various flaws it contained — including her inaccurate recollection of the decoy's clothing and of the type of identification he produced.³ (See Conclusions of Law, ¶ 6; see also Part III, *infra.*) Thus, the decoy's version of events was found to be true — and, according to the decoy, he did not hear the question asked. A defense under rule 141(b)(4) loses all its force if the decoy does not perceive — audibly or otherwise — the age-related question or statement made by the seller of alcoholic beverages. Indeed, an unheard verbalization of the seller's thought process — if indeed one did occur in this case — is as good as no verbalization at all, if the aim is to elicit a truthful response. (See rule 141(b)(4) [the “decoy shall answer *truthfully*. . .”].) Because he did not hear Gilbert's comments, it would be “unreasonable to expect [the] process to function if the decoy was obligated to clear up what *might be* a mistake or misconception on the part of the seller.” (See *Equilon Enterprises, supra*, at p. 5, emphasis added.)

³At oral argument, the Department pointed out further inconsistencies in Gilbert's testimony surrounding her examination of the decoy's identification. For example, although Gilbert claimed she was dyslexic and told the officer she “read the wrong line” when checking the decoy's identification (RT at p. 37), she later testified that she was not color blind (RT at p. 59), suggesting she ought to have noticed the bright red line reading “AGE 21 IN 2017.”

The ALJ, however, made no findings regarding Gilbert's alleged dyslexia, or any testimonial inconsistencies related to it.

Regardless, the inconsistencies cited in Conclusions of Law, paragraph 6, are sufficient to support the ALJ's determination that Gilbert was a less credible witness than the decoy. (See also Part III, *infra.*)

We concur with the ALJ's statement that Gilbert was the person in charge of the transaction. (See Conclusions of Law, ¶ 6.) If there was any confusion regarding whether the decoy in fact heard her comment, the burden was on Gilbert to resolve it. Having failed to do so, appellant, through its employee, violated section 25658(a) by furnishing the decoy with a beer, and the affirmative defense to the charge under rule 141(b)(4) is unavailing.

II

Appellant contends that the Department failed to apply rule 141(a) in the manner required by law. Appellant argues,

the Department seeks to curtail an honest, impartial, and uniform administration and enforcement of the liquor laws by determining that Rule 141(b)(4) was not violated because "it is not enough for a seller to simply ask an age-related question" and that "it was incumbent upon Gilbert to wait for a response before selling an alcoholic beverage" even where the seller testified that she believed she received an answer in the affirmative to her question directed to the decoy asking if he just turned 21.

(App.Br. at p. 7.)

Appellant has simply recast its rule 141(b)(4) argument (see Part I, *supra*) as a rule 141(a) argument. Accordingly, we decline to expend additional effort dispensing with this issue. Regardless of the rule relied upon, the argument fails.

III

Appellant contends the ALJ erred in rejecting Gilbert's version of events. Appellant claims that Gilbert's testimony was consistent with the decoy's regarding whether she asked the decoy a question on August 9, 2014, and thus there is no credibility dispute. (App.Br. at p. 8.) Appellant further claims the ALJ improperly relied

on trivial aspects of Gilbert's testimony, including the fact that she could not remember what the decoy was wearing, or whether he handed her a driver's license or an identification card, in making his credibility determination. (*Id.* at p. 9.) Also, appellant claims that Gilbert's testimony regarding the decoy's affirmative response to her age-related question was consistent with what she told the Department investigator on August 9, 2014, thereby suggesting that it is true. (*Ibid.*) At oral argument, appellant repeated that there was no actual credibility dispute, and argued that the ALJ simply created one in order to disregard Gilbert's testimony.

Appellant is essentially asking this Board to overrule the ALJ's determination that the decoy was a more credible witness than Gilbert. What appellant misses is the oft-repeated notion that "it is a fundamental precept of appellate review that it is the province of the administrative law judge, as trier of fact, to make determinations as to witness credibility and to resolve any conflicts in the testimony." (*7-Eleven, Inc./Singh* (2015) AB-9485, at p. 5, citing *Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640].)

While the ALJ did not call out specific indicia of credibility in his proposed decision, he did reference section 780 of the Evidence Code. (See Conclusions of Law, ¶ 6.) Section 780 provides that a fact-finder may consider the following factors, among others, when assigning witness credibility: the extent of the witness's capacity to recollect any matter about which she or he testifies; her or his character for honesty or veracity or their opposites; and the existence or nonexistence of any fact testified to by her or him.

Considering these factors, Gilbert's incorrect testimony concerning the decoy's

apparel during the operation and the type of identification he provided to her (see RT at pp. 48, 49, 58-59, 60) — which was refuted by testimonial *and* documentary evidence in the record (see RT at pp. 18-19, 33; Exhibits 3-4) — was sufficient for the ALJ to discredit her version of events altogether. While appellant rebuts the ALJ's determination by referencing Gilbert's prior consistent statement⁴ to the investigators on the night of the operation that the decoy told her he was 21 (see App.Br. at p. 9), that fact alone is not sufficient for the Board to reverse the credibility determination of the ALJ. The ALJ was in the best position to observe the witnesses as they testified, to consider the various factors outlined in Evidence Code section 780, and to make a informed credibility determination. As such, we find no abuse of discretion in this case.

⁴A statement previously made by a witness that is consistent with her testimony at the hearing is yet another factor that can be considered by a trier of fact when assessing credibility. (Evid. Code, § 780, subd. (g).)

ORDER

The decision of the Department is affirmed.⁵

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

⁵This 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.