

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

MAURI RESTAURANT GROUP	)	AB-7276
dba Pasquale Italian Cuisine	)	
8980 University Center Lane	)	File: 47-326130
San Diego, CA 92122,	)	Reg: 98042757
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	November 5, 1999
	)	Los Angeles, CA

Mauri Restaurant Group, doing business as Pasquale Italian Cuisine (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days, with five days of the suspension stayed conditionally for a one-year period of discipline-free operation, for its waiter, Cosimo Guido, having served an alcoholic beverage (a bottle of Budweiser beer) to Darren Haugum, a minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a

¹The decision of the Department, dated November 5, 1998, is set forth in the appendix.

violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Mauri Restaurant Group, appearing through its counsel, Michael Duckor and Gregory P. Olson, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on January 25, 1984. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on September 15, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented in support of the accusation by Kerry Mensor, a San Diego police detective, and Darren Haugum, the decoy. Pasquale Angelotti, appellant's maitre'd and part owner, and Cosimo Guido, the waiter who sold the beer to the decoy, testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged and that no defenses had been established. A 25-day suspension was ordered, with five days thereof stayed for a one-year probationary period.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the decision must be reversed for the following reasons: (1) the decision fails to address uncontradicted evidence demonstrating three material misrepresentations made by the minor decoy to a waiter and host; (2) it fails to consider

material misrepresentations in a police report; (3) it ignores uncontradicted evidence that police did not follow published decoy guidelines; (4) it fails to recognize violations of Rule 141; (5) it fails to consider an entrapment defense supported by the evidence; and (6) it ignores the Department's failure to comply with a discovery request for the address of the minor decoy. Some of these issues overlap, so may not be addressed independently.

DISCUSSION

I

Appellant contends that the decoy lied in order to induce a sale of alcohol. Appellant's maitre d', Pasquale Angelotti, testified that the decoy upon entering the restaurant, was asked "One for dinner?," and responded affirmatively, even though he had no intention of having dinner.² Angelotti also testified that the decoy told him he was being joined by two others, and that he was staying at the nearby Hyatt hotel. Appellant claims these misrepresentations were intended to convey to Angelotti a false message as to the decoy being old enough to stay in an expensive hotel and able to afford to patronize what is, according to the evidence, an expensive restaurant. Appellant characterizes the alleged misrepresentations as the functional equivalent of a misrepresentation by the decoy about his age, which would be violative of Rule 141(b)(4).

The Administrative Law Judge (ALJ) did not address this issue in his proposed

² Angelotti's testimony was that either he or the decoy uttered the word "one," which Angelotti then interpreted to mean "one for dinner," in part because the decoy had walked past all the bar stools [See RT 179-181].

decision. The record suggests the decoy may well have made such representations.³

We are inclined to agree with appellant that, viewed as a whole, the decoy's conduct can fairly be equated with a misrepresentation as to his age, a violation of Rule 141(b)(4).

What was the effect of the decoy's misrepresentation? It resulted in his being seated at a table in the dining room, where the decoy then told the waiter he was waiting for other people [RT 196], which was also untrue, and was calculated to mislead the waiter into thinking the decoy was a bona fide patron.

We are not prepared to lend our approval to what occurred. The overall objective of Rule 141 is to prevent a program capable of abuse from realizing that capability, and to ensure fairness in decoy operations.

It is one thing for a decoy to not volunteer information that might alert a seller to the fact that the decoy is not of legal age. It is quite another for a decoy to volunteer false information to induce exactly the opposite, as the events in this case illustrate.

The decoy's conduct, we think, crossed the line between fairness and unfairness. We trust that, in future cases, the police and the Department will take heed of this decision, and discourage conduct by a decoy which may be misleading or deceptive, and especially do so if it bears on the subject of age.⁴

³ When asked, the decoy testified he did not recall whether he had said he was staying at the next-door Hyatt, waiting to be joined by others or that he was intending to have dinner [RT 136-137, 139-141], but admitted he could have made such statements [RT 141-142].

⁴ Appellant argues that the misrepresentations give rise to a defense of entrapment. Although disapproving of them, we do not believe that what occurred meets the classic test for entrapment that is spelled out in People v. Barraza (1979) 23 Cal.3d 675, 689-690 [153 Cal.Rptr. 459].

II

Appellant contends that Rule 141(b)(2) was violated by the use of a decoy six foot one inch in height, weighing 190 pounds. Appellant contends further that the breach of the rule was compounded by statements of the decoy to the effect he was a guest in an expensive hotel, and expecting to be joined by others.

The Administrative Law Judge concluded that the decoy's appearance passed muster under Rule 141(b)(2), stating;

“Although Darren Haugum (hereinafter “the minor”) was six foot one inch in height and weighed 190 pounds as of December 17, 1997, he has a youthful looking face and his appearance is such as to reasonably be considered under twenty-one years of age and it would be reasonable to ask him for identification to verify that he could legally purchase alcoholic beverages. The minor's appearance at the time of his testimony was substantially the same as his appearance at the time of the sale The photograph in Exhibit 4 depicts the minor's appearance and what he was wearing on the night in question.”

The essence of this finding is that “[the decoy] has a youthful looking face and his appearance is such as to reasonably be considered under twenty-one years of age.” Unlike other decisions of the Department with which the Board has found fault, this finding is in accord with the precise language of the Rule, and does not contain any qualifying words or phrases that would indicate the ALJ erroneously focused on a single criterion to the exclusion of others.

It would be more desirable - as the Board has so suggested to the Department and its administrative law judges in other decisions - and would be helpful to the Board if the ALJ would elaborate upon his findings to assure the Board that he was considering the “whole person” of the decoy in addressing the subject of appearance. However, we are unwilling to say that the decision is fatally flawed by the absence of such further particularization.

We hasten to add, however, that the combination of a decoy of large stature and evidence of misrepresentations that could have affected one's perception of apparent age, has materially influenced our thinking with respect to this particular decoy operation and the result we have reached.

III

Appellant claims that misrepresentations in the report prepared by detective Mensior, to the effect that he directly overheard the conversation between the decoy and appellant's maitre d', give rise to a Rule 141 defense. Appellant also complains that the report does not include reference to the misrepresentations made by the decoy. It is appellant's theory that since the report was inaccurate and misleading, the essential fairness required under Rule 141(a) was lacking.

We have a difficult time understanding how the detective's report, even assuming for purposes of discussion that it contains inaccuracies or omissions, creates unfairness under Rule 141. The Department's case was based upon the proof at the hearing, not the content of the report. The ALJ expressly disclaimed any intention of relying upon the report in reaching his decision.

It appears to be appellant's theory that, because the detective who prepared the report did not observe everything contained in the report, it necessarily misrepresented the extent of his knowledge.

However, as detective Mensior explained, the report is only a narrative of what occurred, based partly on his own personal knowledge, and partly on information furnished to him by others. The report, and its contents, are merely collateral to the decoy operation, and the validity and/or fairness of the decoy operation does not turn

on the accuracy of the police report, but, rather, on what the evidence reveals regarding the decoy operation itself.

IV

Appellant complains that the Department failed to comply with its discovery request for the home address of the minor decoy. Appellant claims that it is entitled to the address as a matter of law, citing Government Code §11507.6, which provides that a party is entitled to obtain the names and addresses of witnesses to the extent known to the other party.

The Department objected to furnishing the minor's home address, and instead advised appellant that any communication to the minor could be transmitted to him through the Department or the police. When appellant attempted to make contact in such manner, its attorneys were told the minor was unwilling to meet or talk with them. The minor, in his testimony, confirmed this [RT 152].

The Department defends its position on two grounds. First, it claims it satisfied the discovery request by providing the address of the police station where the decoy "worked." The second ground, and to us at least equally persuasive, is that it would jeopardize the safety of the minor, and expose him to danger or possible harassment, if his home address was disclosed.

Even though there is no suggestion that appellant or appellant's representatives might engage in such conduct in this case, there is a great deal of validity to the Department's argument that a rule requiring disclosure could create a "huge safety" issue for all decoys.

The Department draws an analogy to the practice followed with respect to police

officers, where, instead of their home address, the address of the police station is what is provided. We think this is a sound analogy. Government Code §11507.6 entitles a party to an address for a witness. The statute does not say it must be a residential address. Since the decoy, in his role as a decoy, is an agent of the police, we do not believe it was unreasonable, or a failure to provide discovery, for the Department to furnish only the address of the police for whom the decoy acted.

There has been no contention by appellant that Department counsel were less than forthright in their representations that the minor had been advised of appellant's wish to contact him, and of his unwillingness to be contacted.

We think any requirement that a decoy's home address be disclosed must be conditioned upon a showing that the address itself has a material connection to the issues, and not simply as a means of contacting the decoy. That showing has not been made here.

V

Appellant claims the police failed to follow guidelines suggested by the Department in three respects: (1) through the decoy's lying to induce a sale; (2) by using a decoy who had purchased alcohol previously; and (3) by failing to keep the decoy under constant surveillance.

The issue regarding the alleged misrepresentations by the decoy has already been addressed.

The contention regarding a prior purchase of alcohol borders on the frivolous. Appellant contends, in effect, that once a decoy is permitted to purchase an alcoholic beverage, he or she no longer qualifies as a decoy under a literal interpretation of the

guidelines.

Reading the guidelines in light of their purpose, the obvious intention is that a decoy not have purchased an alcoholic beverage outside a decoy operation.

The contention that the decoy was not under constant surveillance is contrary to the testimony of detective Mensior and the findings of the ALJ. Even if the evidence were otherwise, the guideline was not for appellant's benefit.

In any event, non-compliance with the Department's guidelines has not heretofore been accepted as a defense in a sale-to-minor-case, and there is no persuasive reason why it should in this case.

ORDER

The decision of the Department is reversed, it being our view that there was a violation of Rule 141(b)(4). The conduct of the decoy was such that it was the equivalent of a misrepresentation of his true age.⁵

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ 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.