

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

AB-9715

File: 47-386883; Reg: 17086120

CANAL CLUB, INC.,
dba Canal Club
2025 Pacific Avenue, Venice, CA 90291,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Doris Huebel

Appeals Board Hearing: January 10, 2019
Ontario, CA

ISSUED JANUARY 31, 2019

Appearances: *Appellant:* Ralph Barat Saltsman and Brian Washburn, of Solomon, Saltsman & Jamieson, as counsel for Canal Club, Inc.,

Respondent: John P. Newton, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Canal Club, Inc., doing business as Canal Club, appeals from a decision of the Department of Alcoholic Beverage Control¹ suspending its license for 10 days because its bartender sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated June 1, 2018, is set forth in the appendix.

Appellant's on-sale general eating place license was issued on July 29, 2002, and there is no record of prior departmental discipline against the license.

On November 16, 2017, the Department filed a single-count accusation against the license, charging that appellant's bartender, Tomas McGibb Mason (the bartender), sold an alcoholic beverage to 18-year-old Jonathan Andrew Rodriguez on March 9, 2017. Although not noted in the accusation, Rodriguez was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on March 6, 2018, documentary evidence was received, and testimony concerning the sale was presented by Rodriguez (the decoy) and by LAPD Sergeant Craig Nollner.

Appellant presented no witnesses at the hearing because the corporate officer they planned to have testify had a medical emergency that rendered him physically unable to attend, just a few days prior to the hearing. Appellant requested a continuance or bifurcation of the hearing, and presented a note from the witness' doctor stating that his medical condition prevented him from testifying, but the request was denied by the administrative law judge (ALJ).

Testimony established that on March 9, 2017, the decoy entered the licensed premises, accompanied by a second female decoy who did not actually participate in this decoy operation except as a companion. They sat at the bar and the bartender took the male decoy's order for a Bud Light beer. The bartender asked for his identification and the decoy handed him his United States Government Passport — which showed his correct date of birth, showing him to be 18 years of age. The bartender looked at the passport for approximately five seconds, then handed it back to

the decoy. The bartender left to retrieve the beer, then returned to say the Bud Light beer keg was out. The decoy ordered a Corona beer instead, which the bartender obtained and placed on the counter. Sergeant Nollner observed the transaction through the front window of the premises.

Sergeant Nollner entered the premises with three other LAPD officers and asked the decoy to identify the person who sold him the beer. The decoy pointed at the bartender who was standing behind the counter. The decoy and bartender were about two feet apart at the time of the identification. Sergeant Nollner identified himself and explained the violation to the bartender. A photo of the decoy and bartender was taken (exh. 3) and the bartender was issued a citation. The bartender did not testify at the administrative hearing, and the facts surrounding the decoy operation are not at issue in this matter.

On March 23, 2018, the ALJ issued her proposed decision, sustaining the accusation and recommending a 10-day suspension of the license. The Department adopted the proposed decision in its entirety on May 7, 2018, and a Certificate of Decision was issued on June 1, 2018.

Appellant then filed a timely appeal contending the ALJ abused her discretion and Government Code section 11524 was violated when appellant's request for a continuance or bifurcation of the administrative hearing was denied.

DISCUSSION

Appellant contends the ALJ erred when she refused appellant's request for a continuance or bifurcation of the administrative hearing to allow a corporate officer to testify at a later date. Appellant maintains it showed good cause to justify a

continuance or bifurcation, and that the denial prevented it from presenting evidence of additional mitigating factors. (AOB at pp. 2-6.)

The weekend before the hearing, one of appellant's corporate officers, Daniel Samakow, who planned to testify at the administrative hearing, sustained an injury. He was told to visit his doctor on Monday morning, which he did, and the doctor told him he was not physically able to attend the hearing — scheduled for the following day, on March 6, 2018.

Appellant's counsel received an email later that day, at approximately 1:00 p.m. on Monday, March 5, 2018, containing a doctor's note dated the same day from Vincent A. Punturere, D.C., stating:

Mr. Samakow come [sic] into our office today for evaluation and treatment. It is my opinion that he has suffered significant injury to the lower back and scalar iliac joints. His condition is greatly exacerbated by prolong [sic] sitting. He also has been given strong pain relievers which impair his cognition. Both of these conditions make driving for any distance a source of aggravation to his lower back pain. It is my recommendation that he should avoid driving any significant distance especially in traffic.

(Exh. 1.1.)

At the hearing on the following day, appellant's counsel requested that the hearing be continued or bifurcated, to give Mr. Samakov an opportunity to present evidence of mitigation once he recovered from his injury. (RT at p. 8.) Department counsel objected on the grounds that three other corporate officers are listed on the license, and that one of them could have come to the hearing to present the evidence, instead of Mr. Samakov. (*Id.* at p. 9.) Department counsel also argued that it would be difficult to reschedule the appearances of the Department's witnesses — an LAPD officer and two decoys. (*Ibid.*)

Appellant maintains that Mr. Samakow is the corporate officer who actually runs the business, deals with the day-to-day operations, and trains the employees — making his testimony essential. (*Id.* at p. 14.) However, the Department was not notified in advance that Mr. Samakow would be a witness (*Id.* at p. 19) or, for that matter, that any corporate officer or licensee would be called as a witness. (*Id.* at p. 25.)

The ALJ denied the request for bifurcation (*Ibid*), finding that it would prejudice the Department in regards to the requirement of having the minor decoy present again, as well as the Department's other witnesses, and that no corporate officers or licensees had been listed as witnesses prior to the hearing.

Pursuant to Government Code section 11524, subdivision (b), the ALJ has the right to grant a request for continuance for good cause. The party seeking the continuance must make the request within 10 working days from the time the party discovers (or reasonably should have discovered) the event which establishes good cause for the continuance.

There is no absolute right to a continuance; one is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198]; *Givens v. Dept. of Alcoholic Bev. Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)

The Government Code does not specify what will constitute "good cause," but guidance is provided by provisions in the Code of Civil Procedure dealing with continuances. Section 595.4 of the Code of Civil Procedure provides that a request for

continuance "on the ground of the absence of evidence" must show "the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it." A party requesting a continuance in order to obtain evidence must show what it expects the evidence to prove. (*Johnson v. Fassett* (1955) 132 Cal.App.2d 871, 873 [283 P.2d 281].) A belief that evidence favorable to one's position might be discovered does not automatically justify granting a continuance; that is up to the discretion of the ALJ. (*Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 628 [157 Cal.Rptr. 248]; *Johnston v. Johnston* (1941) 48 Cal.App.2d 23, 26 [119 P.2d 158].)

The ALJ excercised her discretion in this case and found that good cause was not shown. She found that a continuance or bifurcation in this case would prejudice the Department — in part, because of the necessity of having the minor decoy and other witnesses present at a second hearing. This is entirely reasonable and a proper use of the ALJ's discretion.

Secondly, and more importantly, the ALJ denied the request, in part, because she did not believe appellant's counsel was reasonably diligent in informing the Department that this witness, or any witness, would testify. Appellant's failure to inform the Department during discovery that it planned to call any corporate officer as a witness, countmands the "essentialness" of Mr. Samakow's testimony and further underscores the fact that the request for a continuance or bifurcation was properly denied.

Finally, the ALJ denied the request, in part, because she did not believe appellant's counsel was reasonably diligent in attempting to ascertain whether one of the three other corporate officers could have presented this testimony instead. If Mr.

Samakow had been the sole officer of this corporation this might have had a different outcome, but here there are three other individuals listed as corporate officers — notwithstanding appellant's assertion that Mr. Samakow is the only one who could testify about the day-to-day operations at the premises and the training of the employees that appellant wished to present as mitigating factors.

There is no absolute right to a continuance. Under the circumstances and facts presented here, we believe the ALJ properly exercised her discretion in denying appellant's request for a continuance or bifurcation. Appellant has not established that the denial constitutes an abuse of discretion.

ORDER

The decision of the Department is affirmed.²

MEGAN McGUINNESS, ACTING CHAIR
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

CANAL CLUB, INC.
CANAL CLUB
2025 PACIFIC AVENUE
VENICE, CA 90291

ON-SALE GENERAL EATING PLACE - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

CERRITOS DISTRICT OFFICE

File: 47-386883

Reg: 17086120

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on May 7, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after July 12, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: June 1, 2018



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

| | | |
|---|---|--|
| Canal Club, Inc. | } | File: 47-386883 |
| Dba: Canal Club | } | Reg.: 17086120 |
| 2025 Pacific Avenue | } | License Type: 47 |
| Venice, California 90291 | } | Word Count: 11,285 |
| Respondent | } | Reporter: Pamela Williamson California Reporting |
| <u>On-Sale General Eating Place License</u> | } | <u>PROPOSED DECISION</u> |

Administrative Law Judge D. Huebel, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on March 6, 2018.

John Newton, Attorney, represented the Department of Alcoholic Beverage Control (the Department).

Donna Hooper, Attorney, represented Respondent, Canal Club, Inc.

The Department seeks to discipline the Respondent's license on the grounds that, on or about March 9, 2017, the Respondent, through their agent or employee, at said premises, sold, furnished, gave or caused to be sold, furnished or given, an alcoholic beverage, to-wit: beer, to Jonathan Andrew Rodriguez, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on March 6, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on November 16, 2017.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

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2. The Department issued a type 47, on-sale general eating place license to the Respondent for the above-described location on July 29, 2002 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondent's license.
4. Jonathan Andrew Rodriguez was born on July 18, 1998. On March 9, 2017, he was 18 years old. On that date he served as a minor decoy in an operation conducted by the Los Angeles Police Department (LAPD).
5. Decoy Rodriguez appeared and testified at the hearing. On March 9, 2017, he was 5'9" tall and weighed 160 pounds. He wore a blue t-shirt, khaki cargo shorts and gray tennis shoes. (Exhibits 2 and 3.) His appearance at the hearing was similar, except he weighed 152 pounds, wore a white t-shirt, blue jeans and gray Jordan tennis shoes.
6. On March 9, 2017, at approximately 5:00 p.m., decoy Rodriguez and a second female decoy named Jackie entered the Licensed Premises, which they found empty besides a single bartender behind the bar and one other employee, a manager. The two decoys walked to the bar and sat on barstools. Soon thereafter, bartender Thomas McGibb Mason took decoy Rodriguez' order. Decoy Rodriguez ordered a Bud Light beer. Bartender Mason asked decoy Rodriguez for his identification (ID). Decoy Rodriguez handed to bartender Mason his valid United States Government Passport, which showed his correct date of birth. Bartender Mason retrieved the passport, looked at the passport page with the decoy's date of birth thereon for approximately five seconds, and handed it back to the decoy. Bartender Mason left to retrieve the Bud Light beer. Bartender Mason returned and advised decoy Rodriguez that the Bud Light beer keg was out. Decoy Rodriguez ordered a Corona beer instead. Corona beer is an alcoholic beverage. Bartender Mason retrieved a Corona beer can and placed it on the counter to the side of decoy Rodriguez. Decoy Jackie did not interact with bartender Mason at all. The decoys then waited for the LAPD officers to enter the Licensed Premises.
7. While the decoys were inside the Licensed Premises LAPD Sergeant Craig Nollner stood outside the front window, with a clear, unobstructed view of the decoys and bartender Mason. Sergeant Nollner witnessed the events as described above.
8. Once Sergeant Nollner witnessed bartender Mason place the Corona beer on the counter for decoy Rodriguez he entered the Licensed Premises with three other LAPD officers. Sergeant Nollner approached the decoys, who were still seated at the bar. Sergeant Nollner asked decoy Rodriguez to identify the person who sold him the alcohol. Decoy Rodriguez pointed at bartender Mason, who was standing behind the bar counter in front of decoy Rodriguez, just to his right. Decoy Rodriguez and bartender Mason were standing approximately two feet apart at the time of this identification. Sergeant

Nollner made contact with bartender Mason, identified himself as an officer and explained the violation to him. A photo of bartender Mason and decoy Rodriguez was taken after the face-to-face identification, with decoy Rodriguez holding the Corona beer and his passport while standing next to bartender Mason. (Exhibit 3). The two decoys then exited the Licensed Premises.

9. Bartender Mason was issued a citation. Bartender Mason did not appear and did not testify at the hearing.

10. Decoy Rodriguez appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of bartender Mason at the Licensed Premises on March 9, 2017, decoy Rodriguez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk. Decoy Rodriguez looks youthful in person; his overall appearance was consistent with that of a teenager, actually appearing younger than his age.

11. On March 9, 2017, decoy Rodriguez visited a total of five locations, two of which served alcohol to decoy Rodriguez, including the Licensed Premises. Decoy Rodriguez was asked for his ID at all five locations, and he showed his valid U.S. passport at each location.

12. Prior to March 9, 2017, decoy Rodriguez participated in 11 decoy operations. He was nervous at his first decoy operation and he became less nervous in his role as a decoy as he gained experience. He learned about the decoy program through his service with the LAPD Cadet Program, as a volunteer cadet for two years (as of the date of the said operation). As a recruit cadet he went through an 18-week basic training course, in which he learned the basics of the LAPD. His rank is a C3 Corporal. He is responsible for directing approximately 20 cadets; teaching them to take care of one another and learn the aspects of the LAPD. He believes his experience with law enforcement has given him a sense of maturity, self-confidence and has positively affected him in the manner in which he presents himself to the world.

13. Sergeant Nollner spoke to the one other employee in the bar during the operation, who was the manager. When bartender Mason served the Corona beer to decoy Rodriguez, the manager was approximately 15 feet off to the left, behind the bar in a little nook off to the side of the bar. The manager was not called over by bartender Mason to view the decoy's passport ID during the transaction. There is no evidence the manager witnessed the said service of alcoholic beverage to the decoy. The manager did not look at decoy Rodriguez' passport.

14. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.
2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondent's license exists under Article XX, section 22 of the California State Constitution and sections 24200(a) and (b) on the basis that on March 9, 2017, the Respondent's bartender, Thomas McGibb Mason, inside the Licensed Premises, furnished an alcoholic beverage, to-wit: beer, to Jonathan Andrew Rodriguez, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-10.)
5. The Respondent argued the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2) and 141(b)(5), and therefore, the accusation should be dismissed pursuant to rule 141(c).
6. With respect to rule 141(b)(2), Respondent argued decoy Rodriguez did not have the appearance of someone under 21 because of several factors which made him appear to be older than 21. Those factors include decoy Rodriguez' acknowledged gained confidence and maturity from his training and participation with law enforcement as a cadet, and his acknowledgment that as he gained experience he became less nervous in his role as a decoy. Further, Respondent's counsel opined the decoy "is a mature looking man." This rule 141(b)(2) argument is rejected. Respondent presented no evidence as to why bartender Mason allegedly believed decoy Rodriguez to be 21 years old. Bartender Mason never testified. Respondent's counsel's unsupported assertions are nothing but supposition and conjecture. There was nothing about decoy Rodriguez' training, experience with law enforcement as a cadet or demeanor which made him appear older than his actual age. Decoy Rodriguez has a youthful appearance as evidenced by the photographs taken of him on the day of the operation. (Exhibits 2 and 3.) In fact, when

viewing decoy Rodriguez, in-person at the hearing, his appearance is consistent with that of a teenager, and actually appears younger than his age. In other words, decoy Rodriguez had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

7. With respect to Respondent's rule 141(b)(5) argument, Respondent argued there was no evidence that bartender Mason "was aware he was being identified at the time he was identified by the decoy," because, "we don't know where [bartender Mason] was looking," the decoy did not know what bartender Mason was doing at the time and therefore the face-to-face was a violation of the strict compliance under *Acapulco*.²

Respondent's argument has no merit and is rejected. As pointed out by Department's counsel there is a recent case on point in this regard. *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2017) 18 Cal.App.5th 541 (226 Cal.Rptr.3d 527) provides that there is strict compliance with Rule 141 (b)(5) based on the totality of the circumstances, which shows the clerk "certainly knew or reasonably ought to have known that she was being identified." In that case, CVS argued that the defect was "the fact the decoy made the identification to the officer, not to the clerk, and therefore [the clerk] was not aware she was being identified at the exact time the decoy identified her." The Court of Appeal addressed CVS's insistence to "divorce the precise moment of the identification from the entire identification procedure, which included not only the moment when Christian pointed out the clerk to the police [with the clerk and the minor decoy within reasonable proximity of 10 feet], but the follow-up when he accompanied the police officer to the counter, the officer informed the clerk she had sold beer to the minor at his side, and the two of them were photographed together." (*Id.* at pp.547-548.)

The Respondent in the matter at hand makes the same argument and is also asking the undersigned, in essence, to "divorce the precise moment of the identification from the entire identification procedure." The unrebutted, sworn and direct testimony of both decoy Rodriguez and Sergeant Nollner establishes that a face-to-face identification was conducted as required by the rule. Decoy Rodriguez identified bartender Mason when the two were standing approximately two feet apart, with Decoy Rodriguez pointing at bartender Mason, who was standing behind the bar counter in front of decoy Rodriguez, just to his right. Sergeant Nollner made contact with bartender Mason, identified himself as an officer and explained the violation to him. A photo of bartender Mason and decoy Rodriguez was taken after the face-to-face identification, with decoy Rodriguez holding the Corona beer and his passport while standing next to bartender Mason. Based on the totality of these circumstances, bartender Mason "certainly knew or reasonably ought to have known that [he] was being identified."

² *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 579, 79 Cal.Rptr.2d 126 (*Acapulco*).

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PENALTY

The Department requested the Respondent's license be suspended for a period of 15 days. The Department argued that the Respondent's discipline free history since 2002 is outweighed by bartender Mason having merely asked for ID but did not pay attention to the birth date, and failed to call over the on-duty manager to double-check a passport ID. The Respondent recommended a 10 day, all stayed, penalty in the event the accusation was sustained given the length of licensure without discipline.³ The penalty recommended herein complies with rule 144.

ORDER

The Respondent's on-sale general eating place license is hereby suspended for a period of 10 days.

Dated: March 23, 2018



D. Huebel
Administrative Law Judge

| |
|---|
| <input checked="" type="checkbox"/> Adopt |
| <input type="checkbox"/> Non-Adopt: _____ |
| By: <u>D. Huebel</u> |
| Date: <u>5/7/18</u> |

³ Respondent's counsel argued Respondent was prevented from presenting evidence of mitigation when denied a bifurcated trial the day of the hearing, so that one of four corporate officers, Daniel Samakow, who was advised by a chiropractor to avoid driving long distances due to lower back pain, could, at some unknown future date, testify as to the measures Respondent has taken to prevent sales to minors. Ms. Hooper's argument is without merit. Ms. Hooper was not prevented from preparing for her case. She admitted she failed to check with three of the other corporate officers, namely James Evans (vice president), Simone Scharff (director/general manager), and Werner Scharff (director/general manager), to see if they could testify as to mitigation because "Honestly, it did not occur to [her]" to do so. She further was not limited to only putting those witnesses' testimony in as evidence of mitigation.