

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

AB-7706

File: 47-292395 Reg: 00048894

FARSHID TAHVILDARI dba Tumbleweed's Saloon
21094 & 21108 Beach Boulevard, Huntington Beach, CA 92648,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: August 16, 2001
Los Angeles, CA

ISSUED OCTOBER 16, 2001

Farshid Tahvildari, doing business as Tumbleweed's Saloon (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 15 days for selling an alcoholic beverage to a person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Farshid Tahvildari, appearing through his counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Kim.

¹The decision of the Department, dated September 14, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on March 31, 1994. Thereafter, the Department instituted an accusation against appellant charging him with the illegal sale of an alcoholic beverage (beer) to an 18-year-old minor, Heidi Bentz. Bentz was working as a decoy for the Huntington Beach Police Department (HBPD) at the time of the sale.

An administrative hearing was held on August 9, 2000, at which time documentary evidence was received and testimony was presented by Bentz ("the decoy"), by Huntington Beach police officer James Muller, and by appellant.

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

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(4) was violated; and (3) Rule 141's requirement that decoy operations be conducted "in a fashion that promotes fairness" was violated.

DISCUSSION

I

Appellant contends that the decoy's appearance did not meet the standard of Rule 141(b)(2), and the ALJ's conclusion that it did is not supported by the facts stated in the Findings.

Appellant's argument appears to be based primarily on the belief of the licensee when he served the beer to the decoy that she was over the age of 21. Appellant also

contends that several of the findings made by the ALJ about the decoy's appearance and demeanor preclude the conclusion that she presented the appearance which could generally be expected of a person under the age of 21, under the circumstances presented to the seller at the time of the sale.

The ALJ, while not necessarily disputing the sincerity of the licensee's belief that the decoy was over the age of 21, found it "difficult to justify that belief having seen the decoy in person." (Det. of Issues II.) The licensee's belief, in any case, is not controlling. As this Board has said before, Rule 141(b)(2)

"through its use of the phrase 'could generally be expected' implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk [or licensee, as in the present case] mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age."

(7-Eleven, Inc. & Grewal (4/18/01) AB-7602.)

The ALJ made extensive findings regarding the decoy's appearance, evaluating her physical appearance, both at the hearing and in photographs taken on the day of the sale, and her demeanor, concluding (Finding VII.C.):

"The court has observed the decoy's overall appearance, considering her physical appearance, her dress, poise, demeanor, maturity and mannerisms as shown at the hearing. The court has considered the photographs, Exhibits 3 and 4, and the other evidence concerning Bentz's overall appearance and conduct at [appellant's] business on September 9, 1999. In the court's informed judgment, decoy Bentz gave the appearance at the hearing and before [appellant's] clerk^[2] which could generally be expected of a person under the age of 21 years."

² The ALJ mis-spoke here; it was appellant himself, not an employee, who sold the alcoholic beverage to the decoy.

Appellant seeks to have this issue retried by the Appeals Board. The Appeals Board is not in a position to second-guess the trier of fact, who has had the opportunity, which the Board has not, of observing the overall appearance of the decoy in person as she testified at the hearing. The ALJ has obviously made a careful evaluation of the decoy's appearance and has gone into considerable detail in articulating his evaluation. Under the circumstances, we will defer to his judgment in this regard.

Appellant takes issue with the ALJ's evaluation, saying it consists of "conclusionary terms that are self-contradictory." Appellant appears to assert that the following findings preclude a conclusion that the decoy appeared to be under 21: Finding VII – The decoy is 5'7" tall, but the sandals she wore at the time of the sale made her 5'8" or 5'9"; the decoy testified in a straightforward, courteous and competent manner; the decoy had been a paid police cadet for about five months at the time of the sale; Finding VIII – appellant believed the decoy was old enough to work as a cocktail waitress and he asked her if she would be interested in working for him.

Appellant does not explain why he believes these findings do not support the conclusion that the decoy's appearance was that of a person under 21. Her height was the same at the time of the sale and at the hearing, because she wore sandals at the hearing that added the same amount of height as those she wore at the time of the sale. In any case, it appears the decoy was sitting down when she ordered and was served the beer by appellant. [RT 12, 28.] The decoy's "straightforward, courteous, competent manner" of testifying is a trait that is not limited to persons over 21.

The decoy's work experience with the HBPD does not disqualify her as a decoy. This Board has addressed this argument before, stating:

"Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older."

(Azzam (2001) AB-7631.)

As discussed above, the licensee's erroneous belief that the decoy was over 21 does not preclude a finding by the ALJ that the decoy's appearance was that of a person under the age of 21.

II

Appellant contends the decoy violated Rule 141(b)(4), which requires that "A decoy shall answer truthfully any questions about his or her age." This contention is based on the events described in Finding VIII:

"After [appellant] served the Corona beer to decoy Bentz that night, he asked her what she did. She told him she was a student and he asked if she would like to work as a cocktail waitress at his business. The conversation made Bentz uncomfortable, she averted her eyes downward toward the beer, she kind of laughed and said, 'no, thank you.'

"[Appellant] believed that the decoy was old enough to work as a cocktail waitress and he had some interest in employing her in that capacity. Decoy Bentz did not advise [appellant] that she worked with Huntington Beach Police Department as a cadet or in any other capacity."

Appellant argues that his question to the decoy about what she did was one having "an impact . . . directly on the issue of age," and the decoy should have given a "fully truthful answer," that she was a student *and* employed by the HBPD. "When she

only provided a partial truth, she was not truthful within the definition provided by Rule 141(b)(4)."

Appellant's contention must be rejected. First, Rule 141(b)(4) only requires a truthful answer to a question about a decoy's age, and, as the ALJ points out in Determination I, appellant did not ask the decoy about her *age*, he asked *what she did*. We fail to see how that question could in any way be construed to have anything to do with the decoy's age. This is made more apparent when one considers that even if the decoy gave the "truthful" answer appellant contends she should have, that she was both a student and employed by the police department, appellant still would not have any information about the decoy's age. Clearly, the question asked was not about the decoy's age, and did not require a truthful answer for purposes of Rule 141(b)(4). Secondly, even if the question could somehow be construed to fall under Rule 141(b)(4), the decoy's answer was not untruthful. The decoy answered that she was a student, which was true. The fact that she also works for a police department does not make her response untrue.³

Appellant compares the present case with this Board's opinion in Mauri Restaurant Group (1999) AB-7276, in which the male decoy, who was 6'1" tall and weighed 190 pounds, went into a licensed premises, an expensive Italian restaurant,

³We note that appellant asked the decoy what she did *after* he had served her the beer. While the rule does not specify that a violation only occurs if the question is answered untruthfully *before* the alcoholic beverage is sold to the minor, it seems logical that an untruthful answer about the decoy's age could be an unfair inducement to sell alcoholic beverages only before the sale. If so, this would be another reason to reject appellant's contention. However, neither party raised this point, and we need not decide the question in this case.

walked past the bar stools in the bar, and was asked by the maitre d', "One for dinner?", to which the decoy responded affirmatively. When he was seated, he told the waiter he was expecting two more people to join him and said he was staying at the nearby, and expensive, Hyatt Hotel. None of these things the decoy told the maitre d' and the waiter were true. The decoy ordered a beer, which was served to him by the waiter. The Department imposed a 25-day suspension with 5 days stayed for a one-year probationary period. The Appeals Board reversed, agreeing with the licensee that the decoy's misrepresentations, made in order to induce a sale of alcohol, "[could] fairly be equated with a misrepresentation as to his age, a violation of Rule 141(b)(4)." The Board also made clear that it had taken into account the decoy's relatively large size in reaching this result.⁴

Mauri Restaurant Group is distinguishable from the present case. There the decoy volunteered comments which were designed to give the impression that the decoy was old enough to stay in an expensive hotel and to patronize an expensive restaurant. This conduct, the Board stated, "crossed the line between fairness and unfairness." The Board said:

"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."

⁴After finding that the decoy's appearance was that which could generally be expected of a person under the age of 21, as required by Rule 141(b)(2), the Board said: "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."

The Board clearly differentiated between not volunteering information and volunteering false information. In the present appeal, the decoy did not volunteer false information designed give the impression that she was old enough to purchase and consume alcoholic beverages, as did the decoy in Mauri Restaurant Group; she simply did not volunteer information. The decoy's conduct in the present case can not "fairly be equated with a misrepresentation as to [her] age"; therefore, there was no violation of Rule 141(b)(4).

III

Appellant urges that the decoy operation was not conducted in a fashion that promoted fairness, contrary to the requirement of Rule 141(a), because the decoy "circumvented the identification-checking door host, by sneaking in through a passage not intended to be an entry [and then] went directly to a restroom and waited inside for approximately two minutes before going to the bar."

Finding IV states:

"[Appellant's] licensed premises is entered through a single set of double doors. Having entered through the double doors, one is in a vestibule. Inside the vestibule, there are two doorways, one on the left without any door and one on the right with another set of double doors. [Appellant] intends for patrons to enter the premises through the interior left doorway. On the night in question he had a security person posted there whose job was to 'check the door' and check identification of entering patrons who appear to him to be under the age of 25 years.

"The interior doors to the right lead into a smoking room which in turn leads into the remainder of the premises. There is a sign indicating that it is a smoker's break room. Those doors were unlocked and the one security guard was supposedly in charge of both interior doorways.

"At the time decoy Bentz first entered the premises, after entering through exterior doors which were held open for her by an unknown person, there was a crowd of people standing around the doorway to the left and talking. She took the path of least resistance and entered the premises through the interior doors

on the right. It was not established whether decoy Bentz saw the sign which indicated a smoker's break room. It was not established that anyone made any attempt to stop the decoy from entering the establishment through the right-hand doors. Decoy Bentz may have noticed that the security guard was requesting identification, but she made no effort to intentionally evade or avoid having her identification checked."

In the second paragraph of Determination of Issues I, the ALJ said:

"A preponderance of the credible evidence established that the decoy operation was conducted fairly. Decoy Bentz entered the licensed premises through open doorways available to any patron. She did not intentionally avoid having her identification checked. Instead she used an available path of least resistance. Respondent, himself, testified that the security guard is supposed to ensure that all patrons enter the establishment through the left-hand doorway. The security guard missed decoy Bentz. One way of ensuring so-called 'proper' entry into the club would be to lock the right-hand doors. Another would be to station a different person at that doorway. Neither apparently was done here. The decoy operation was not made unfair simply because the decoy chose and was permitted to enter through an unguarded door."

Preliminarily, this Board feels strongly that, if a violation of Rule 141 occurred, it makes no difference that the decoy did not intend to evade the doorman and avoid having her identification checked. The lack of intention to violate Rule 141 does not excuse law enforcement or the Department from conforming to the requirements of the rule, if a violation actually occurs. Indeed, we doubt that this Board has had a case before it involving Rule 141 where the rule was intentionally violated.

That said, the question remains whether the decoy's entrance through the right-hand doors, without having her identification checked, violated the rule's mandate that decoy operations be conducted in a fashion that promotes fairness. The ALJ determined that there was no unfairness, largely because he attributed to appellant the decoy's opportunity to avoid the doorman. He noted that appellant's controls were apparently lax enough to allow the decoy, and presumably anyone else, to avoid the ID

check at the left-hand door.⁵ He noted that the right-hand doors were unlocked and there was only one security guard to monitor both the left and right-hand doors, circumstances that he felt appellant could easily have remedied.⁶ "The decoy operation was not made unfair simply because the decoy chose and was permitted to enter through an unguarded door," concluded the ALJ.

To appellant, unfairness is obvious: the decoy knew ID's were being checked at the open, left-hand door [RT 11, 24], yet she made no effort to go around or through the group of people near that door or to wait her turn if the people there were waiting to have their ID's checked; instead, she chose to go through the closed, right-hand door.

Appellant testified that no one under 21 was allowed in the premises unless accompanied by someone over 21, minors were not allowed to enter at all after 9 p.m., and all minors had to leave the premises by 10 p.m. [RT 62, 63]. Since the decoy was unaccompanied, if her identification had been checked, presumably she would not have been allowed to enter. If the decoy was in the premises after 10 p.m., when only patrons over 21 were to be in the premises, the assumption by any server would presumably be that she was at least 21. Unfortunately, no one established the time the

⁵The record leaves unanswered a number of questions that might have aided in resolving this issue. We do not know the size of the vestibule with the two doors for one doorman to watch. Appellant testified there was a sign on the right-hand door that said "smoker's break room only" [RT 55], but the decoy was not asked if she saw the sign, and we do not know whether the sign was so noticeable that she should have seen it. The decoy testified that, although she had never been to this premises before, she knew beforehand that both doors led to the same place, but it was not established how she knew this. [RT 33-34.]

⁶Appellant testified, however, that the Fire Department prohibits locking the right-hand door [RT 55]. Therefore, the failure of the licensee to lock the door is unfairly criticized by the ALJ, and the remedy appears not to be as simple as the ALJ suggests.

decoy entered the premises, although the ALJ, in Finding II, said that it was "in the evening."

We find the decoy's failure to submit to the ID checking that she knew was going on at the left-hand door to be unfair. Whether intentional or not, the decoy evaded appellant's control measures that she knew to exist. Rule 141 demands that a decoy operation be conducted in a fashion that promotes fairness, and knowingly avoiding security measures cannot be considered an action that promotes fairness. Violation of subdivision (a) of Rule 141 provides a defense to this action (4 Cal. Code Regs. §141, subd. (c)), and the Department's decision in this matter must be reversed on that basis.

ORDER

The decision of the Department is reversed.⁷

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁷This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.