

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

AB-7795

File: 47-106132 Reg: 00049858

EL TORITO RESTAURANTS, INC. dba El Torito
2693 Vista Way, Oceanside, CA 92054,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 7, 2002
Los Angeles, CA

ISSUED APRIL 18, 2002

El Torito Restaurants, Inc., doing business as El Torito (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for appellant's bartender selling an alcoholic beverage to a minor decoy, 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 El Torito Restaurants, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on April 1, 1982. Thereafter, the Department instituted an accusation against appellant charging that, on

¹The decision of the Department, dated March 29, 2001, is set forth in the appendix.

June 17, 2000, appellant's bartender, Norman Burke ("the bartender") sold an alcoholic beverage to eighteen-year-old Jacob McGovney. At the time of the sale, McGovney was acting as a minor decoy for the Oceanside Police Department (OPD).

An administrative hearing was held on February 16, 2001, at which time documentary evidence was received and testimony was presented for the Department by McGovney ("the decoy") and Oceanside police officer Julian Hutzler, and for appellant by Teresa Perez and Robin Corey.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged in the accusation and that no defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the decoy operation violated the fairness requirement of Rule 141(a).

DISCUSSION

Appellant contends the fairness requirement of Rule 141(a) was violated in this decoy operation because the decoy displayed an appearance different from that described in police training as indicative of a minor. The bartender who sold to the decoy attended the police training approximately 10 days before the violation occurred, and appellant argues that it was unfair for the police to teach sellers to look for one set of characteristics and then to use a decoy who displayed none of those characteristics.

Robin Corey, one of appellant's bartenders and its head certified trainer, testified that training regarding sales to minors was given by the OPD on June 7, 2000, and that both she and Burke (the bartender who sold to the decoy) attended that training.

Exhibit C, submitted by appellant, is a page from the material provided at the training. It

is headed, "Ways to tell when a customer is Underage (Warning Signs):" followed by 12 bulleted items: "Looks under 30, looks young; Wears trendy clothes; Seems nervous; Has shifty eyes; Orders sweet drinks; Appears inexperienced; Doesn't know what to drink; Stays away from the bar; Heads into the restroom right away; Acts like your best friend; Already has a glass; Your 'gut level' instinct tells you so." Appellant argued that, save for looking under 30, which it dismissed in closing argument as "a given," the decoy here did not display any of the characteristics on the list provided by the OPD.

It is unfair under Rule 141(a), appellant argues on appeal, to teach the bartender to look for a certain set of characteristics and then use a decoy who does not display those characteristics. It cites this Board's decision in Southland and R.A.N. (1998) AB-6967, saying that, in that appeal, "[t]he Board decided that it was unfair, in a general context, for the Department to train licensees as to one set of criteria and then allow a police department to present a decoy that fit none of that [sic] criteria." (App. Br. at 8.) Appellant contends that the present situation is even more egregiously unfair because Detective Hutzler, who was directing the decoy when this violation occurred, was also the officer who presented the sale-to-minor training, and the training took place just over a week before the violation.

Appellant reads more into Southland and R.A.N. than is there. In that appeal, the Board, having already decided that reversal of the Department's decision was necessary, addressed the argument that the decoy's appearance in that case did not comport with the "clues" to determining whether an individual was a minor described in the Department's LEAD training material used to educate licensees about avoiding sales to minors. The Board criticized the document used by the Department because it

did not help licensees identify "non-neophyte underage purchasers," but this was merely dicta, not a holding. The appeal had already been decided on other grounds and no holding was made, or was necessary, on that argument.

Appellant's argument does have some surface appeal; however, the facts simply do not support a conclusion that use of this decoy was unfair. A major consideration must be that the bartender did not testify, so we cannot know if he used the criteria from the training in evaluating the decoy in this case or, if he used them, whether they misled him into thinking that the decoy was not a minor. The June 7, 2000, training was not the only training the bartender received regarding sales to minors; we do not know if he used some other criteria he may have picked up at other training. The bartender was not new to the job; he had worked for appellant for at least eight years [RT 64], and he may have developed his own criteria for evaluating a patron's age over the course of those years.

The list of "Warning Signs" provided in the June 7 training was clearly not a comprehensive list of all possible signs that might indicate a patron was a minor. Since this page was torn out of the manual used in the training, we have no idea of what may have been taught along with this list. Even if we had the entire manual, we would not know what was conveyed verbally during the training. In other words, this page is taken out of context and cannot be assumed to be the only information conveyed to the bartender about how to identify a minor.

Appellant's contention also depends upon its conclusion that the decoy's appearance did not correspond in any way with the "Warning Signs" criteria. Appellant's counsel, in closing argument at the hearing, admitted that at least one of the

criteria was met by the decoy: "Looks under 30." The ALJ found, and appellant does not contest, that the decoy displayed the appearance generally to be expected of a person under the age of 21.

During cross-examination, appellant's witness, Robin Corey, expressed her belief that a cotton T-shirt and shorts would be "trendy clothes"; the decoy wore a cotton T-shirt and shorts on the night in question and it is conceivable that the bartender who sold to him also thought he was wearing "trendy clothes." This points up the real possibility of different interpretations of some of the terms used in the "Warning Signs" list and the resulting impossibility of saying that this decoy, as observed by this bartender, did not meet any of the "Warning Signs" criteria.

We conclude that it is not "inherently unfair" to use the "Warning Signs" in training and this decoy in a decoy operation 10 days later. Nor has appellant shown any actual unfairness in this instance.

ORDER

The decision of the Department is affirmed.²

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

²This 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.