

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

AB-7948

File: 47-137174 Reg: 01051352

EL TORITO RESTAURANTS, INC. dba El Torito Bar & Grill
2840 E. Tulare Street, Fresno, CA 93721,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: March 13 2003
San Francisco, CA

ISSUED APRIL 30, 2003

El Torito Restaurants, Inc., doing business as El Torito Bar & Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for its bartender having sold an alcoholic beverage to a minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant El Torito Restaurants, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

¹The decision of the Department, dated February 28, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on July 12, 1983. Thereafter, on August 24, 2001, the Department instituted an accusation against appellant charging that, on June 14, 2001, appellant's bartender, Ramiro Partida, sold an alcoholic beverage (beer) to Dominic Storelli, a minor who was then approximately 18 years of age.

An administrative hearing was held on January 4, 2002, at which time oral and documentary evidence was presented. Testimony was presented by Storelli, the decoy; by Michelle Ceron, a second 18-year-old decoy, who accompanied Storelli; by Greg Noll, a Fresno police officer; and by Lauren Cabrera, the restaurant manager. Appellant's bartender did not testify.

Storelli testified that he and his companion, Ceron, ordered their drinks separately. He ordered a Corona beer, she ordered a Coke. The bartender first asked Storelli for identification, and, after examining it, asked Ceron for hers. After examining Ceron's identification, the bartender told her she was too young to be in the bar area. He said he would get their drinks, but they would have to leave the bar area. He brought the drinks, the two decoys left the bar area, the police became involved, and, at the police officer's request, Storelli identified the bartender as the seller of the beer.

Ceron's description of the events was essentially the same as Storelli's. She testified that her brother was a police officer, and that she had been a police decoy on five previous occasions. She said she did not have any conversation with the bartender, nor had Storelli.

Noll testified that he observed the transaction at the bar, but was unable to hear any conversation between the decoys and the bartender. He testified that he contacted

the manager, told her he wanted to meet with the bartender for a face-to face confrontation, and then had the decoys identify the bartender. The bartender told the officer he had checked the decoys' identification, and, after being shown both ID's, said he had made a mistake, that he had not calculated properly. Noll denied that Storelli exhibited beard growth at the time of the decoy operation, and said the shadow on the photograph marked as Exhibit 4 was due to something other than beard growth.

Cabrera testified that she and Partida had attended an ABC LEAD program within four or five days of the incident in question, and that Partida was terminated immediately.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and that appellant had failed to establish any defense to the charge.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the fairness requirement of Rule 141(a) was violated; and (2) Rule 141(b)(2) was violated.

DISCUSSION

I

Department Rule 141(a) (4 Cal. Code Regs., §141, subd.(a)) requires that a decoy operation be conducted "in a fashion which promotes fairness." Appellant contends that the use by the Fresno police of two decoys violated this portion of Rule 141.

Appellant argues that what made this decoy operation unfair was the fact that both decoys actively participated in the operation. According to appellant, the fact that the two approached the bar area, where minors are not allowed, created an inference

that they were old enough to purchase an alcoholic beverage.

In addition, argues appellant, both communicated with the bartender, and ordered something to drink. Further, the fact that one of the decoys ordered a non-alcoholic drink may have implied to the bartender that the other decoy was old enough to purchase an alcoholic beverage, or would not have been in the bar area.

Thus, argues appellant, the operation was unfair because the conduct of the decoys misled the bartender. Appellant quotes from *7-Eleven, Inc./Janizeh Corporation* (erroneously referred to as *Chevron*) (2002) AB-7790, where the Board stated that “the real question to be asked when more than one decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to obey the law.”

We do not see how the mere fact that the two decoys entered the area of the bar might reasonably have distracted the bartender, or impaired his ability to obey the law. Indeed, the only reasonable inference which can be drawn from the evidence is that the bartender simply misread the male decoy’s California driver’s license. He admitted to the police officer that he simply miscalculated the male decoy’s age.

There is no evidence that the bartender was distracted. He did not testify, and we do not consider the mere ordering of drinks to be conduct tending to distract. He certainly was not distracted from asking for identification and proof of drinking age. We are more inclined to think he was guilty of simple carelessness, behavior we see all too often in decoy and non-decoy sale-to-minor cases.

Finally, we do not believe it can fairly be said that the Administrative Law Judge (ALJ) erred by failing to address the fairness issue in his findings. At the hearing, appellant’s counsel argued that the presence of a younger person made her companion

appear older. The ALJ discussed and rejected the contention.

II

Appellant argues that Storelli's "five o'clock shadow," coupled with his height, preclude a finding by the ALJ that he displayed the appearance which could generally be expected of a person under twenty-one years of age.

The ALJ found as follows with respect to Storelli's appearance (Findings of Fact VII-A, B, and C):

Storelli weighed 150 pounds on June 14, 2001 and 160 pounds on the day of the hearing. His height was 6' 1" on both days. While at Respondent's premises, Storelli wore a short-sleeve shirt, Docker pants, a watch, and no jewelry. His hair was short and jelled. He was clean-shaven, but there was a "five o'clock shadow" on his face.

Storelli had been a decoy approximately once a month for the six months prior to June 2001. On each decoy operation, he visited five to ten licensed premises. Even with such extensive experience as a decoy, Storelli was nervous while in Respondent's restaurant. This nervousness was not obvious to Ceron.

While testifying, Storelli sat erect, with his hands on his hips. He was polite and did not appear nervous. The Administrative Law Judge observed Storelli's physical appearance, mannerisms, demeanor, poise, and maturity at the hearing. Based on this observation, the testimonies regarding Storelli's appearance on June 14, and the photograph (Exhibit 4) of him and Ceron taken that day, the Administrative Law Judge finds that Storelli displayed the appearance which could generally be expected of a person under twenty-one years old when he purchased the Corona beer from Partida.

Appellant focuses only on the decoy's "five o'clock shadow" and his height, ignoring his overall appearance. The ALJ, on the other hand, took the "five o'clock shadow" and height into account, along with other aspects of the decoy's appearance.

This case is just another in a long series of Rule 141 cases where the appellant would have this Board substitute its judgment for that of the ALJ, and where we decline to do so. The Board does not have the opportunity to observe the decoy, while the ALJ does. Much as with the issue of credibility, where the Board traditionally defers to the

trier of fact, the ALJ is in a much better position than is this Board to make the judgment that Rule 141(b)(2) requires.

ORDER

The decision of the Department is affirmed.²

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

² 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.