

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

AB-8032

File: 41-178270 Reg: 02052845

AMERICAN GOLF CORPORATION, dba National City Golf Course
1439 Sweetwater Road, National City, CA 91950,
Appellant/Licensee,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 14, 2003
Los Angeles, CA

ISSUED OCTOBER 3, 2003

American Golf Corporation, doing business as National City Golf Course (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, with five days stayed for a probationary period of one year for appellant's clerk selling an alcoholic beverage, a can of Coors Light Beer, to an 18-year-old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant American Golf Corporation, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated September 19, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on February 28, 1986. Thereafter, the Department instituted an accusation against appellant charging that, on January 9, 2002, appellant's snack bar clerk, Leticia Torres, sold an alcoholic beverage to 18-year-old Victoria Majewski.

An administrative hearing was held on July 18, 2002, at which time documentary evidence was received and testimony concerning the violation charged was presented by National City police officer David Kerr, by Majewski, and by Torres.

The testimony of the witnesses was essentially in agreement as to the basic circumstances of the violation. Majewski, the decoy, went into the golf course snack bar and walked up to the snack bar counter where Torres was working. Majewski asked for a Coors Light beer and Torres asked if she was 21 years old. Majewski replied "No" and giggled. Torres then sold her the beer.

At the hearing, Torres testified that she thought Majewski looked about 24 years old when she ordered the beer. Torres thought Majewski was joking when she said she was not 21 because she giggled when she said it.

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

Appellant filed a timely appeal in which it raises the following issues: (1) the decoy violated rule 141(b)(4),² and (2) the ALJ erred by failing to take into account the presence of the police officers at the time of the sale when determining that rule 141(a) and rule 141(b)(2) were not violated.

²References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

DISCUSSION

I

Rule 141(b)(4) requires a decoy to "answer truthfully any question about his or her age." Appellant contends the decoy, Majewski, attempted to mislead the clerk by the way she answered the clerk's question about her age. Appellant equates the circumstances in this case with those in *Thrifty Payless, Inc.* (1998) AB-7050 (*Thrifty*), where the decoy, instead of verbally responding to the clerk's question about her age, asked the clerk if she would like to see her (the decoy's) identification. In *Thrifty*, the Board reversed the decision of the Department, finding that the decoy's response was "borderline misleading."

Thrifty, supra, is readily distinguishable. In that case, when the clerk asked the decoy her age, the decoy did not state how old she was, but asked if the clerk would like to see her driver's license. The Board referred to this in its decision as a "non-verbal response . . . laden with ambiguity" that did not answer the question about her age. In the present case, when Torres asked if Majewski were 21, Majewski said "No," and giggled. Majewski complied with the requirement of rule 141(b)(4) that she answer truthfully any question about her age, where the decoy in *Thrifty* did not. The Board reversed the Department's decision in *Thrifty* because the response the decoy gave was not even the equivalent of a truthful answer to the question.

We do not quarrel with appellant's assertion that Torres believed Majewski was joking about not being 21 because she giggled when she answered. However, Torres's mistaken belief does not mean that the giggle made Majewski's answer so misleading that the answer failed to comply with rule 141(b)(4). The giggle could just as easily have been interpreted as consistent with Majewski's answer, indicating nervousness

because she was trying to buy beer even though underage, or even an acknowledgment that Torres had guessed correctly that Majewski was underage. We cannot say that the ALJ erred in finding that the giggle did not violate rule 141(b)(4) or make the decoy operation unfair.

II

Subdivision (a) of rule 141 provides that law enforcement agencies may conduct decoy operations only "in a fashion that promotes fairness." Subdivision (b)(2) of the rule requires that the decoy display an "appearance which could generally be expected of a person under 21 years of age." Appellant contends the ALJ erred when determining that rule 141(a) and rule 141(b)(2) were not violated, by failing to take into account the presence of the two police officers at the time of the sale to Majewski.

Appellant asserts that Torres saw the decoy approaching the location with the two officers and that she believed the decoy to be 24 years old based on her appearance and the two men with whom she entered the snack bar. It cites the holding in the appeal of *Hurtado* (2000) AB-7246, where a police officer, clearly over the age of 21, sat at the table with the decoy in an on-sale premises when the decoy ordered and was served an alcoholic beverage. The Board concluded there that the officer's presence misled the seller and rendered the decoy operation unfair.

The presence of the police officers in the present case is discussed in Finding of Fact II of the Department's decision:

B. There is a conflict in the evidence as to whether the decoy and the two police officers entered the premises together as a group and as to whether one of the officers was two to three feet behind the decoy when the decoy first approached the snack counter and contacted Torres. After evaluating the credibility of the witnesses pursuant to the factors set forth in Evidence Code Section 780, including their demeanor, their capacity to recollect and the existence or nonexistence of a bias or motive, greater

weight was given to the testimony of the decoy and Officers Kerr and Catanzarita than to that of the Respondent's clerk in resolving the conflict in the evidence. Although there were some minor inconsistencies between the testimony of the decoy and Officers Kerr and Catanzarita, their testimony was consistent in all material matters.

1. Officer Catanzarita credibly testified that he and Kerr agreed that Kerr would "take the case," that he entered the premises through the Pro Shop door, that he then entered the snack bar without going outside again, that he noticed that the decoy was at the counter, that he took a surveillance position, that he then saw Torres place a beer on the counter, and that Officer Kerr was two to three feet behind the decoy at that time.

2. Officer Kerr credibly testified that he entered the premises a few seconds after the decoy had entered, that he stood in the dining area while the decoy went to the service counter, that he followed the decoy to the counter, that the decoy arrived at the counter first, that he was three to six feet behind the decoy, that he saw Torres approach the decoy, that the decoy and Torres appeared to talk to each other but that he could not hear the initial conversation, that he moved closer to the decoy, that he heard Torres ask the decoy if she was over the age of twenty-one, that the decoy answered no and giggled, that he saw Torres retrieve a can of Coors Light beer and that he was approximately three feet from the decoy when Torres placed the beer on the counter.

3. The decoy credibly testified that she entered the premises before the police officers, that she went to the snack bar, that the officers were behind her but that she was not sure how far behind her, and Officer Kerr moved closer when she was having a conversation with Torres.

Appellant's contentions depend upon accepting the testimony of Torres rather than that of the officers and Majewski. As shown above, the ALJ made a clear credibility determination in favor of the testimony of Majewski and the two officers, rejecting the testimony of Torres on this subject. It is the ALJ, not this Board, who is charged with making credibility determinations, and this Board will not disturb those determinations unless the appellant can show a clear abuse of discretion, which it has not done. There is nothing in the testimony deemed credible by the ALJ to suggest that Majewski was with either or both of the officers when she entered the snack bar and when Torres sold her the beer. We have no reason to question either the ALJ's

credibility determinations or his conclusion that the officers did not cause a violation of rule 141.

Appellant's citation to *Hurtado, supra*, is inapposite. There was no question in that case that the 27-year-old officer was seated at the table with the decoy. Here, as just noted, the evidence deemed credible by the ALJ showed that no one else was with Majewski when the sale occurred. There is no basis for appellant's contention that the officers' presence made the decoy appear to be over 21.

Appellant asserts in its brief that "the weight of the evidence presented at the hearing indicates that the decoy had the appearance, maturity and demeanor of an individual 21 years of age or older." The ALJ considered the decoy's appearance, including her physical appearance, her clothing, her mannerisms and demeanor, and a photograph of her taken on the night of the sale, and concluded that Majewski displayed the appearance that could generally be expected of a person under the age of 21. He observed the decoy in person at the hearing, while this Board has not. We have no reason to question his determination.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.