

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

AB-8189

File: 41-219208 Reg: 03054763

CEC ENTERTAINMENT, INC. dba Chuck E. Cheese #443
624 West Mission, Escondido, CA 92025,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED JULY 30, 2004

CEC Entertainment, Inc., doing business as Chuck E. Cheese #443 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk, Monica Lopez, having sold a glass of Budweiser beer to Nancy Duran, a 19-year-old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant CEC Entertainment, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on

¹The decision of the Department, dated August 28, 2003, is set forth in the appendix.

August 29, 1988. On March 28, 2003, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on November 22, 2002. An administrative hearing was held on July 24, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision from which this timely appeal has been taken.

In its appeal, appellant raises the following issues: (1) There was no compliance with Rule 141(b)(2); (2) the face-to-face identification was conducted in an unduly suggestive manner; and (3) there was no compliance with Rule 141(b)(1).

DISCUSSION

I

Appellant contends that the administrative law judge (ALJ) should have compelled the presence of Carlos Perez, a second decoy who accompanied the decoy to whom the beer was sold, so that he (the ALJ) could conduct a full and fair analysis of the apparent age of Duran. Appellant cites *Hurtado* (2000) AB-7246, a decision of the Appeals Board which ruled that consideration of the effect of another person who accompanied a decoy was “essential for disposition.”

In *Hurtado*, a 27-year-old plain-clothed policeman sat at a small table with a minor decoy. Each ordered and were served a beer. The Appeals Board concluded that the “active participation” of the police could have misled the seller as to how the decoy appeared. Thus, the decoy operation was unfair and violated Rule 141.

This case is nothing like *Hurtado, supra*. There is no evidence in this case that the second decoy did anything, by way of word or gesture, that might have distracted

the clerk or caused the kind of confusion that was the concern of the Board in *Hurtado*, *supra*, or *Southland Corporation/R.A.N., Inc.* (1998), another Board decision cited by appellant.

In *7-Eleven, Inc./Jamizeh* (2002) AB-7790, the Board explained that "the real question to be asked when more than a single 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 comply with the law."

Thus, the mere fact that a second decoy accompanied the decoy who made the purchase is not, in and of itself, enough to persuade us that the decoy operation was unfair. The clerk did not testify, so any claim that the clerk was actually misled is wholly speculative.

Appellant has not claimed that Duran lacked the appearance of a person under 21 years of age. Our review of the ALJ's findings as to her appearance (Findings of Fact II-D and II-E) and of the photograph of the decoy (Exhibit 2) satisfies us that he ruled correctly.

II

Appellant contends that the face-to-face identification was conducted in an unduly suggestive manner, claiming that the officer identified the seller, and the decoy only confirmed the officer's identification.

Escondido police detective Shannon Murphy conducted the face-to-face identification. Detective Murphy testified that she did not enter the store until after she had been told by another officer that there had been a violation. She approached the

table where the two decoys were seated, and asked Duran to point in the direction of the person who had sold her the beer. Duran did so. The officer then went to the clerk pointed out by Duran, brought the clerk to where Duran was seated, and asked Duran if she was the person who sold the beer to Duran. Duran said she was, and a photograph of the two was taken.

We think the testimony of the decoy and Detective Murphy, read as a whole, requires us to reject appellant's contention. It was the decoy who first identified the seller. Detective Murphy did not witness the transaction, and necessarily depended upon the decoy to know which clerk to bring before the decoy.

III

Appellant argues that the requirement of Rule 141(b)(1) that a decoy be under the age of 20 extends not only to the decoy to whom the alcoholic beverage is sold, Duran, but also to Lopez, the decoy who accompanied her. Since there is no evidence in the record as to Lopez's age, appellant contends, there has been no compliance with the rule.

Appellant argues that the ALJ refused to take into consideration "the impact of the apparent age of the first [sic] decoy had on the apparent age of the purchasing decoy." (App.Br., page 3.) The problem with appellant's argument is that there is nothing to indicate that the presence of a second decoy had any impact. As noted above, there is no evidence that Lopez did anything that might reasonably distracted the clerk. The clerk did not testify, and we cannot speculate as to what, if anything, she may have thought about the presence of the second decoy. In such circumstances, the

apparent age of the second decoy is irrelevant.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.