

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

AB-8215

File: 20-357431 Reg: 03055425

UNITED EL SEGUNDO, INC. dba Rapid Gas 68
170 Hidden Valley Parkway, Norco, CA 92860,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 2, 2004
Los Angeles, CA

ISSUED NOVEMBER 9, 2004

United El Segundo, Inc., doing business as Rapid Gas 68 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk, Reinaldo Molina, having sold a 16-ounce can of Budweiser beer to Nicholas Hutchins, an 18-year-old minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant United El Segundo, Inc., appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 19, 2000.

¹The decision of the Department, dated December 4, 2003, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage to a minor. An administrative hearing was held on October 17, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Hutchins, the decoy, and by Raymond Huskey, a Riverside County deputy sheriff.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and appellant had failed to establish any affirmative defense. Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) There was no compliance with Rule 141(b)(4); and (2) there was no compliance with Rule 141(b)(2).

DISCUSSION

I

Rule 141(b)(4) requires a decoy to answer truthfully any question about his or her age. Appellant argues that this rule was violated by the decoy's failure to respond affirmatively to the clerk's question about his age "such that the clerk could hear his response." (App. Br., at page 4.)

The decoy testified that the clerk asked him for identification, which he provided, and asked how old he was. The decoy replied that he was 18. The Riverside County deputy sheriff who was in the store and observed the transaction testified that he heard the clerk ask for identification, but did not recall the clerk asking the decoy his age.

Appellant argues that if the deputy, standing two feet behind the decoy, close enough to hear, heard no response to a question about age, then the clerk, who was

behind a glass enclosure, also must not have heard the decoy's response. Thus, appellant argues, the decoy failed to give the "clear, audible and unambiguous response" that Rule 141(b)(4) requires, and his failure to do so rendered the decoy operation unfair, in violation of the requirement of Rule 141(a) that the decoy operation be conducted in a manner which promotes fairness.

Does it necessarily follow that, because the deputy did not recall hearing any question or response about the age of the decoy, the clerk did not hear it? We do not think so. Since the clerk did not testify, no one knows whether or not he heard the decoy's response. One might assume that if the clerk did not hear a response, he would have asked a second time. Since he did not testify, what he heard or did not hear is the subject of conjecture.

We do know that the administrative law judge believed the decoy's testimony that he responded to the clerk's question by stating his age. That, we think, is enough.

II

Citing the decoy's physical size, the likelihood that he might have had some facial hair growth, his experience as a police explorer, and his poise and confidence, appellant asserts that the decoy failed to present the appearance required by Rule 141(b)(2).²

The ALJ disagreed with appellant, finding as follows (Finding of Fact II-D):

The decoy's overall appearance including his demeanor, his poise, his

² Rule 141(b)(2) requires that a decoy "shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense."

mannerisms, his maturity, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that the decoy was approximately twenty-five pounds heavier at the time of the hearing.

The decoy is a youthful and chubby looking male who has a baby face. On the day of the sale the decoy was six feet in height, he weighed about two hundred pounds, he was essentially clean-shaven, but he may have had slight facial hair. His clothing consisted of blue jeans and a green pullover shirt with long sleeves. The photograph depicted in Exhibit 3 was taken shortly after the sale and it depicts what the decoy looked like and what he was wearing when he was at the premises.

The decoy had participated in one prior decoy operation and in one prior shoulder tap operation. He has also been an Explorer with the Riverside Sheriff's Department since December of 1998.

The decoy was rather soft-spoken at the hearing and he appeared to be a little nervous. However, the decoy testified that he was not nervous when he was at the premises on the day of the sale.

After considering the photograph (Exhibit 3), the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

The Board has said many times that, in the absence of extraordinary circumstances, none of which are present here, it will not second-guess the trier of fact on the question whether the decoy presented the appearance required by Rule 141(b)(2). There is no reason to do so here.

The ALJ considered the same indicia of age as does appellant, and has reached an opposite result. We are not inclined to disagree with his decision.

ORDER

The decision of the Department is affirmed.³

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

³ 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.