

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

AB-8758

File: 21-423959 Reg: 06064248

ROY & JAY LABEL, INC., dba Royal Market & Liquor
835 West Chapman Avenue, Orange, CA 92868,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: August 7, 2008
Los Angeles, CA

ISSUED NOVEMBER 17, 2008

Roy & Jay Label, Inc., doing business as Royal Market & Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 21 days for appellant's clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Roy & Jay Label, Inc., appearing through its counsel, Rick A. Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Cottrell.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 16, 2005. On November

¹The decision of the Department, dated October 4, 2007, is set forth in the appendix.

7, 2006, the Department filed an accusation against appellant charging that, on September 15, 2006, appellant's clerk, Arturo Hernandez (the clerk), sold an alcoholic beverage to 18-year-old Phillip Rombough. Although not noted in the accusation, Rombough was working as a minor decoy for the City of Orange Police Department at the time.

At the administrative hearing held on August 9, 2007, documentary evidence was received, and testimony concerning the sale was presented by Rombough (the decoy) and by Aaron Drootin, a City of Orange Police officer. Both the decoy and Officer Drootin testified that the sale was made without the decoy having been asked his age or for identification.

Dae Ju Kim, president of appellant, testified on its behalf. Hernandez, the clerk, did not testify. According to Kim, he was terminated shortly after the event.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established under Department Rule 141(b)(2) (4 Cal. Code Regs., §141(b)(2)). The 21-day suspension reflected the fact that appellant had committed an earlier violation of section 25658, subdivision (a), on December 29, 2005.

Appellant has filed a timely appeal, again contending that there was no compliance with Rule 141(b)(2).

DISCUSSION

Appellant bases his argument on two premises: the decoy appeared to be 21 years of age or older because seven of the 14 premises he visited sold to him; and the administrative law judge (ALJ) evaluated the decoy's appearance as he presented himself at the hearing, when the rule requires that evaluation to be as of the time of the

violation.

The ALJ's evaluation of the decoy's appearance is set forth in Findings of Fact 5 and 11 and Conclusion of Law 5:

FF 5: Rombough appeared at the hearing. He stood about 6 feet tall and weighed approximately 180 pounds. On September 15, 2006, at Respondent's store, Rombough was an inch shorter and weighed about the same. At the store and at the hearing Rombough was dressed as is shown in Exhibits 2 and 3, wearing blue jeans, brown leather shoes and a blue and beige checked short-sleeved, collared shirt. (*Id.*) As is seen in Exhibit 2, the decoy's brown hair was neatly trimmed, with the top front combed back and to stand up a bit. He wore his hair in about the same style at the hearing. He had a pair of sunglasses up on top of his head in Exhibit 2, but had never worn them over his eyes while in Respondent's store. Decoy Rombough appeared substantially the same at the hearing as he did in front of Respondent's clerk at the Licensed Premises on September 15, 2006.

FF11: Decoy Rombough is a male adult who appears his true age, 19 years of age by the time of the hearing. Based on his overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of Respondent's clerk at the Licensed Premises on September 15, 2006, Rombough displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to the clerk. Rombough has a youthful facial appearance with a clear, clean complexion and rosy cheeks. Rombough presented the appearance both at the hearing and in front of Respondent's clerk of the teenager he is and was.

CL5: Respondent argued that there was a failure to comply with section 141(b)(2) of Chapter 1, title 4, California Code of Regulations [Rule 141]. Therefore, Rule 141© applies and the Accusation should be dismissed. Respondent argued that decoy Rombough did not meet the requirement of Rule 141(b)(2) because 7 of 14 locations visited sold him an alcoholic beverage and Respondent felt that Rombough appeared older in Exhibit 2 than he did in person at the hearing. These arguments are rejected in this case. First, the decoy's overall appearance was assessed above in Findings of Fact, paragraphs 5 and 11. While 7 sales out of 14 attempts are high, it is certainly not dispositive of the contention that the decoy presented an appearance out of compliance with the rule. Phillip Rombough gave an overall appearance well within the Rule.

Appellant would have the Appeals Board treat the fact that the decoy was able to purchase an alcoholic beverage in 50 percent of the premises he visited as conclusive proof that he appeared to be over 21. This argument was put to rest in *Punjabi King*,

Inc. (2007) AB-8562. In that case, the Board acknowledged that “a very high ‘success rate’ is strong evidence of the decoy looking over 21,” but, quoting from *7-Eleven, Inc./Jain* (2004) AB-8082, was “in itself ... not enough to show that rule 141(a) or rule 141(b)(2) were violated.”

In *Punjabi King, Inc.*, *supra*, the ALJ recognized the decoy’s 80 percent “success rate” as simply one more factor to be considered. The ALJ in the present case did so as well, concluding that it was outweighed by the other aspects of the decoy’s appearance.

Appellant’s argument that the ALJ evaluated the decoy’s appearance at the time of the hearing rather than at the time of the sale, reflects a misreading of the ALJ’s findings. Of course, he considered the decoy’s appearance at the hearing, but what he then observed, considered in context, is necessarily what guided him in determining how the decoy would have appeared almost a year earlier, when the decoy was only 18 years of age. His findings make that clear.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.