

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

AB-8828a

File: 21-425676 Reg: 07065802

SHARMEENS ENTERPRISES, INC., dba La Placita Market
10402 Laurel Canyon Boulevard, Pacoima, CA 91331,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: June 3, 2010
Los Angeles, CA

ISSUED AUGUST 5, 2010

Sharmeens Enterprises, Inc., doing business as La Placita Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 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 Sharmeens Enterprises, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated December 23, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 13, 2005. The Department filed an accusation charging that, on February 2, 2007, appellant's clerk sold an alcoholic beverage to 18-year-old David Calderon. Although not noted in the accusation, Calderon was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on December 14, 2007, documentary evidence was received, and testimony concerning the sale was presented. Subsequent to the hearing, the Department adopted the proposed decision of the administrative law judge (ALJ) which determined that the violation charged was proved and no defense was established.

Appellant filed an appeal, but the Department asked that the matter be returned to it because the record on appeal included a transcript improperly identified as the transcript of the hearing in the instant matter, when it was actually the transcript of a hearing in a different matter. The matter was remanded and the court reporting service provided a correctly identified transcript of the hearing in this matter.²

The Department once again adopted the proposed decision of the ALJ and appellant once again appealed to this Board. In this second appeal, appellant contends the decision must be reversed because of existing procedural irregularities and violation of rule 141(b)(5).³

²The court reporting service asserted that incorrect cover pages had been attached to transcripts "due to a production error."

³References 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

Appellant contends that changing the cover page on the transcript "does not solve the inaccuracies surrounding this case." (App. Br. at p. 2.) It points out that on the exhibit list in the administrative record, the file and registration numbers are crossed out and new numbers are written in. Additionally, appellant points out that exhibit 1 on that list is described as a "photocopy" when the exhibit is actually a photograph of two individuals.

Although appellant asserts that the "discrepancies" it enumerates require, at a minimum, remand for "clerical clarification" (App. Br., *supra*), it provides no rationale to support that result. More is required than simply pointing out what it calls inaccuracies. Appellant must show it has been prejudiced or injured because of these inaccuracies. It has failed to do so.

Contrary to appellant's assertion, the correct cover on the correct hearing transcript does solve the problem of the administrative record. Appellant does not allege that the transcript is still incorrect or that it does not support the decision. In fact, the transcript now fully supports all the findings and determinations in the Department's decision.

As to the change of file and registration numbers, appellant has only to read the first few pages of the transcript, where the ALJ realized that certain material from one of appellant's other licensed premises was erroneously placed in the file for this matter, causing a mix-up of file and registration numbers. During a pause in the proceedings, matters were apparently sorted out and the ALJ struck out the erroneous numbers he had written on the exhibit list and wrote in the correct ones. We cannot see how this sorting out and correction should provide a basis to remand the matter.

Finally, exhibit 1 is, in fact, a color photocopy of a photograph of two individuals. Even if exhibit 1 had been misdescribed, appellant has given no indication that this caused confusion or prejudice.

None of appellant's allegations of irregularities have merit.

II

Appellant contends that there is not substantial evidence in the record to support the finding that there was a face-to-face identification in compliance with rule 141(b)(5), because the evidence does not show strict adherence to the terms of that rule as required by *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126]. Additionally, appellant asserts, "[t]he ALJ said on the record that there was no face-to-face identification and it was an abuse of discretion for him to subsequently rule to the contrary." (App. Br. at p. 6.)

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

If any of the requirements of rule 141 are violated, subdivision (c) of the rule provides that the licensee has a complete defense to a sale-to-minor charge.

The crux of appellant's argument is that the identification was not done face-to-face, but side-by-side as shown in the photograph of the decoy and the clerk. However, the testimony of the officer and the decoy clearly establish that the decoy identified the seller when standing only about a foot away from him.

In *7-Eleven/Lo* (2006) AB-8384, the Board addressed the question of what "face-to-face" means in a case where the appellants' contention was almost exactly the same

as that made by appellant here – that the identification was not face-to-face because the photograph shows the decoy and the clerk side-by-side. The Board provided an extensive analysis of the meaning of face-to-face and concluded that it does not require the decoy and the clerk to be directly facing each other when the identification is made.

In *Chun* (1999) AB-7287, the Board defined "face-to-face" to mean:

the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

The important question is whether the seller knew or should have known that he was being identified as such. Substantial evidence exists in the present appeal to support the conclusion that the seller was aware. Therefore, the identification complied with rule 141(b)(5).

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.