ISSUED JULY 6, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

RALPH E. LARSON dba Tavern Chie 3048 Midway Drive San Diego, CA, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7200 File: 48-323698 Reg: 98043166 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: June 3, 1999 Los Angeles, CA

Ralph E. Larson, doing business as Tavern Chie (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his on-sale general public premises license for 15 days, for his bartender, Melanie Curtis, having sold and furnished a bottle of Budweiser beer to Sami Touri, an 18-year-old minor participating in a decoy operation conducted by the San Diego Police Department, said conduct being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant, Ralph E. Larson, and the

[1]The decision of the Department, dated July 30, 1998, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on November 14, 1996. On April 13, 1998, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage (Budweiser beer) to a minor on December 17, 1997.

An administrative hearing was held on June 11, 1998, at which time oral and documentary evidence was received. At that hearing, Touri, the decoy, testified that he was not asked his age or for identification before being served the beer [RT 10-11].

Appellant Larson testified that Melanie Curtis was a new bartender, but had been thoroughly instructed by him and by other bartenders to check for identification, and to watch for minors entering and trying to purchase at the bar. His attempts to offer the statements made by the two bartenders to the police officers on the night in question were rejected on hearsay grounds.

Subsequent to the hearing, the Department issued its decision which determined that appellant, through his bartender, had sold an alcoholic beverage to a minor, and ordered his license suspended for 15 days.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the decoy did not possess the appearance required by Rule 141(b)(2); (2) appellant was denied the opportunity to conduct a full cross-examination; and (3) there was no proof an alcoholic beverage was sold.

DISCUSSION

I

Appellant contends that his bartender was entrapped by the police use of a minor who appeared to be over the age of 21, in violation of Department Rule 141(b)(2). Rule 141(b)(2) provides:

> "The 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."

The Administrative Law Judge (ALJ) found against appellant on this issue, stating:

> "Sami Touri (hereinafter the 'minor') is a youthful looking male, whose face and physical features are such as to be reasonably considered as being under 21 years of age and who would reasonably be asked for identification to verify that he could legally purchase alcoholic beverages. The minor's appearance at the time of his testimony was substantially the same as his appearance at the time of the sale which occurred on the licensed premises on December 17, 1997."

The Department's findings with respect to the decoy's appearance are almost identical to findings it has made in other cases recently before the Board in which the Board concluded such findings did not comply with the requirements of Rule 141(b)(2), but with one difference.

In the decisions the Board has concluded should be reversed because the finding regarding the minor's appearance was defective, the critical portion of the finding read as follows:

> "[The decoy] is a youthful looking [female], whose physical appearance is such ..."

In Circle K Stores, Inc. (April 14, 1999) AB-7112, we examined one of several decisions by this same ALJ which used "physical appearance" as a guide:

> "Nonetheless, while an argument might be made that when the ALJ used the term "physical appearance," he was reflecting the sum total of present sense impressions he experienced when he viewed the decoys during their testimony, it is not at all clear that is what the ALJ did in this case. We see the distinct possibility that the ALJ may well have placed too much

> emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms, and the like. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.
>
> It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.
>
> Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department's concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).

The difference in the instant case is that the current finding substitutes the phrase "face and physical features" for the phrase "physical appearance " following the word "whose" that appeared in the decisions the Board considered in the earlier cases.

We can only speculate why the ALJ made specific reference to the decoy's face. He may have been responding to appellant's suggestion that, because the decoy began to shave at the age of 14, anyone looking at his face would believe him to be over the age of 21. Or, possibly, the ALJ may have felt a need to neutralize the fact that the decoy was 5'10" tall and weighed 210 pounds.

We conclude that, despite the slight difference in phraseology, this case should be resolved in the same manner as the decision from which we have quoted. We do

not believe that a simple reference to "face" and "physical appearance" meets with our expectation that there be a finding which assures the Board that the Department has taken into account the whole person, when judging the appearance of the decoy as a person who could generally be considered to present the appearance of a person under 21 years of age.

II

Appellant contends he was unduly restricted in his cross-examination of the decoy on issues of credibility. The ALJ sustained Department counsel's relevancy objections to questions about the decoy's education and the reasons he was no longer a police cadet [RT 19].

Ordinarily, a party is allowed wide latitude in cross-examination. (See 3 Witkin, California Evidence, §1874, page 1828 (3d ed. 1986).) That is not to say that a party need be permitted to conduct a fishing expedition in the guise of testing credibility or honesty.

Appellant was permitted to explore the decoy's ancestry, which would not appear to have any relevance to the issues, and to inquire about the decoy's California driver's license, even though appellant's bartender never asked to see it. Further, appellant was permitted to ask the decoy if he had a criminal record - he did not - and whether he had ever purchased alcoholic beverages before.

Appellant's contention that the decoy had on a previous occasion attempted to enter the premises was based on hearsay, and denied by the decoy.

The issue appellant sought to explore -the decoy's credibility - was of no relevance at all. The issue was whether he was sold an alcoholic beverage. Nothing that occurred in the course of that transaction raised any issue of credibility. No

legitimate purpose would have been served by permitting further examination concerning the decoy's education and the reasons he is no longer a police cadet.

III

Appellant contends there was no proof that the beverage purchased by Touri was alcoholic.

The decoy testified that he ordered "a Budweiser." As the Board has observed on other occasions, the name "Budweiser" is synonymous with "beer." He further testified that he saw the bartender remove "the bottle" from the cooler, open it, and serve it to him [RT 9].

Appellant did not raise this issue at the administrative hearing. However, in closing argument, Department counsel argued for the legal presumption that the contents of a sealed container are what the label says they are.

The evidence that what the bartender removed from the cooler was the Budweiser beer is not particularly strong. No one testified that the label said "Budweiser." The entirety of the evidence on the issue is that the minor ordered a Budweiser, the bartender removed "the bottle" from the cooler, opened it, and served the minor, who held "the beer" for a time, and who later identified the bartender who sold him "the beer" [RT 10-12]. Neither "the bottle", the label, or even a photograph of the bottle or label, was placed in evidence.

Nonetheless, as stated in Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 [301 P.2d 474, 481, ''[T]here is a disputable presumption that the drinks served were what were ordered." Appellant offered no evidence at the hearing to show that the decoy was given anything other than the Budweiser beer he ordered.

Based on the above, we can only conclude that this contention lacks merit.

ORDER

Because we have concluded there was inadequate compliance with Rule 141(b)(2), the decision of the Department must be reversed.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[2] This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.