California Minor Decoy Law

Part 2: Case Law and Board Review

Core question: when Rule 141 is satisfied, what may the Board do - and what may it not add?

Where Part 2 Fits

From written law to review of the record

Part 1 answered:

What authorizes minor decoy operations?

Constitutional authority
Business and Professions Code section 25658(f)
Department rulemaking authority
Rule 141 and Rule 141.1

Part 2 answers:

How should the Board review Rule 141 issues?

What strict compliance means
What counts as a face-to-face identification
When silence is not a Rule 141 violation
How the Board avoids adding extra-textual requirements

Rule 141 Refresher

The five minimum fairness safeguards for in-person operations

1	**Age**	Decoy must be less than 20 at the time of operation.
2	**Appearance**	Decoy must display the appearance generally expected of a person under 21 under the actual circumstances.
3	**Identification**	Decoy carries own ID and presents it if asked, or carries no ID.
4	**Truthful age answers**	Decoy truthfully answers questions about age.
5	**Face-to-face identification**	After a completed sale, officer makes reasonable attempt to enter and have decoy identify the seller face-to-face.

Rule 141(c): failure to comply is a defense to a section 25658 action.

The Case-Law Pattern

Strict compliance, but no extra requirements

Acapulco side of the rule

If Rule 141 expressly requires something, the Department and law enforcement must comply. If an express safeguard is missing, discipline cannot stand.

7-Eleven / CVS side of the rule

If Rule 141 does not require something, the Board cannot add it through a general appeal to fairness.

The Board enforces Rule 141; it does not rewrite Rule 141.

Case Roadmap

The cases move from authorization to boundaries on review

1994
Provigo
Decoy use is constitutional background.

1998
Acapulco
No face-to-face ID = defense.

2002/2003
7-Eleven / Keller
Face-to-face ID need not occur inside.

2015/2017
CVS Garfield Beach
Statement is not a question.

2016/2017
CVS Tahoe
No fixed distance requirement.

Case 1: Acapulco Restaurants

The express face-to-face requirement means what it says

ABCAB number

AB-6895

Court case

67 Cal.App.4th 575

Rule issue

Rule 141(b)(5)

Facts

A 19-year-old decoy ordered and bought beer at the bar. A police officer witnessed the transaction and later told the bartender she had sold beer to a minor.

The problem

The decoy did not make the face-to-face identification of the bartender. The officer identified the decoy instead.

Acapulco: Board Decision and Court Decision

The Court rejected a practical exception to an express rule

ABCAB decision

The Board affirmed. It reasoned there was no need for the identification where the officer witnessed the sale and identified the decoy to the bartender.

Court of Appeal

Reversed. The rule required a face-to-face identification by the decoy. Because no attempt was made, the Rule 141(c) defense was established.

Takeaway: the Board cannot excuse noncompliance with an express Rule 141 requirement.

Acapulco: Board Takeaway

The Board must ask whether the required act actually occurred

Board review checklist after Acapulco

Do not treat an officer-witnessed sale as a substitute for decoy identification.

Do not excuse a missing safeguard as harmless because the seller is obvious.

If an express element is absent, Rule 141(c) makes it a defense.

Case 2: 7-Eleven / Keller

The face-to-face requirement does not include an in-store-only rule

ABCAB number	Court case	Court of Appeal
AB-7848	**109 Cal.App.4th 1687**	**Fourth Dist., Div. One**

Facts

A 17-year-old decoy bought beer at an El Cajon 7-Eleven. The clerk checked ID showing the decoy would not be 21 until 2004, but sold the beer.

Identification

The officer escorted the clerk outside to avoid disrupting store operations. The decoy identified the clerk face-to-face from about five feet away.

7-Eleven / Keller: Board Decision and Court Decision

The Board added a location requirement that Rule 141 did not contain

ABCAB decision

The Board reversed the Department. It treated the outside identification as noncompliance because the officer did not reenter the premises with the decoy to conduct the identification.

Court of Appeal

Annulled the Board. Rule 141(b)(5) requires a face-to-face identification, but it does not require that the identification occur inside the store.

Takeaway: enforce the words of the rule; do not add a location requirement.

7-Eleven / Keller: Board Takeaway

A valid identification can be flexible in location and procedure

Rule 141(b)(5) requires an opportunity for the seller to come face-to-face with the decoy.

The rule leaves location and manner largely to the officer, so long as the required identification occurs.

A one-person show-up is not automatically unfair in a decoy operation.

The Board should focus on whether the identification was face-to-face, not whether it matched a preferred procedure.

Case 3: CVS Garfield Beach

The truthful-answer rule applies to questions, not statements

ABCAB number	Court case	Rule issue
AB-9434	**7 Cal.App.5th 628**	**Rule 141(b)(4)**

Facts

An 18-year-old decoy presented his California driver license. The clerk looked at it and said something like, "I would never have guessed it. You must get asked a lot."

The decoy response

The decoy said nothing. The clerk sold the beer. The Department imposed a 15-day suspension.

CVS Garfield Beach: Board Decision and Court Decision

Fairness did not create a duty to correct a clerk statement

ABCAB decision

The Board reversed. It concluded the decoy had an obligation to respond verbally and truthfully when the clerk made a statement that might reflect confusion about age.

Court of Appeal

Annulled the Board. Rule 141(b)(4) requires truthful answers to questions about age. It does not require a decoy to correct a clerk's mistaken statement.

Takeaway: silence in response to a statement is not the same as an untruthful answer to a question.

CVS Garfield Beach: Board Takeaway

Do not convert fairness into a free-standing defense

Start with the ALJ's factual finding: question or statement?

If it is a question about age, Rule 141(b)(4) applies.

If it is a statement, Rule 141(b)(4) does not require a response.

Rule 141(a) fairness is given legal effect through the five enumerated safeguards.

Useful phrase

The Board may not graft a new duty onto Rule 141 in the name of fairness.

Case 4: CVS Tahoe

The face-to-face requirement has no fixed-distance rule

ABCAB number	Court case	Rule issue
AB-9569	**18 Cal.App.5th 541**	**Rule 141(b)(5)**

Facts

An 18-year-old decoy bought Coors Light. The clerk asked for date of birth, and the decoy gave his correct date of birth. The clerk did not ask for ID.

Identification

The decoy returned with officers and pointed out the clerk from about 10 feet away. The officers then spoke with the clerk; the decoy stood nearby and a photograph was taken.

CVS Tahoe: Board Decision and Court Decision

The Court rejected proximity and exact-moment requirements

ABCAB decision

The Board reversed. It concluded that an identification from about 10 feet away, made to the officer and not directly to the clerk, was not a compliant face-to-face identification.

Court of Appeal

Annulled the Board. The identification strictly complied under the totality of the circumstances: in the clerk's presence, followed by immediate notice and a confirming photo.

Takeaway: the rule requires identification, not a particular distance, script, or confrontation.

CVS Tahoe: Board Takeaway

Look at the identification procedure as a whole

Was the decoy and seller in reasonable proximity?

Would the seller know or reasonably understand that they were being identified?

Was there evidence of misidentification, confusion, or unfairness?

Do not impose a fixed number of feet or a specific script that Rule 141 does not contain.

Synthesis: What the Appellate Cases Teach

The Board should ask two different questions

Question 1: Was an express requirement violated?

If yes, Acapulco teaches that the Rule 141(c) defense applies. The Board should not excuse the missing safeguard as harmless.

Question 2: Is the appellant asking for a requirement not in the rule?

If yes, Keller, CVS Garfield Beach, and CVS Tahoe teach that the Board should not add extra conditions through general fairness.

Strict compliance is not the same thing as extra-textual expansion.

A Practical Board Framework

A disciplined way to analyze future Rule 141 appeals

1. **Identify the exact Rule 141 subdivision at issue.**
2. **Separate facts from legal requirements.**
3. **Ask whether the rule expressly requires what the appellant claims.**
4. **Apply the narrow standard of review to the Department's findings.**

Bringing Parts 1 and 2 Together

Written authority plus case law gives the Board its lane

Part 1

Minor decoy operations are authorized by the Constitution, statutes, and regulations. Rule 141 defines the fairness safeguards.

Part 2

The cases teach how to apply those safeguards: enforce express requirements, but do not add new ones.

Board role: review the record, apply the rule, and stay within the rule's text.

California Minor Decoy Law

Part 2 Training Materials - Case Law

Packet tabs

Slide-to-Tab Guide

Tab	Slides	Topic	Source materials	Packet pages
A	Slides 3-5	Rule 141 refresher / five fairness elements	Title 4, California Code of Regulations, section 141	**3-5**
B	Slides 6-8	Express face-to-face requirement	Acapulco Restaurants, Inc. (1998) AB-6895; Acapulco Restaurants, Inc. v. ABC Appeals Bd. (1998) 67 Cal.App.4th 575	**6-25**
C	Slides 9-11	Face-to-face identification location	7-Eleven, Inc./Keller (2002) AB-7848; Dept. of ABC v. ABC Appeals Bd. (Keller) (2003) 109 Cal.App.4th 1687	**26-45**
D	Slides 12-14	Truthful answers; questions vs. statements	Garfield Beach CVS, LLC (2015) AB-9434; Dept. of ABC v. ABC Appeals Bd. (CVS Garfield Beach) (2017) 7 Cal.App.5th 628	**46-65**
E	Slides 15-17	Face-to-face identification distance	Garfield Beach CVS, LLC (2016) AB-9569; Dept. of ABC v. ABC Appeals Board (CVS Tahoe) (2017) 18 Cal.App.5th 541	**66-83**

Tab A Rule 141 Refresher

TAB A

Slides 3-5

The five minimum fairness safeguards for in-person minor decoy operations.

Materials in this tab

- Title 4, California Code of Regulations, section 141

Barclays California Code of Regulations
Title 4. Business Regulations
Division 1. Department of Alcoholic Beverage Control (Refs & Annos)
Article 22. Suspension or Revocation of Licenses

4 CCR § 141

§ 141. Minor Decoy Requirements.

Currentness

(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:

(1) At the time of the operation, the decoy shall be less than 20 years of age;

(2) 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;

(3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages;

(4) A decoy shall answer truthfully any questions about his or her age;

(5) 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.

(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

Credits
NOTE: Authority cited: California Constitution, article XX, section 22; and section 25750, Business and Professions Code. Reference: Section 25658, Business and Professions Code; and *Provigo Corporation v. Alcoholic Beverage Control Appeals Board* (1994) 7 Cal.4th 561, 28 Cal.Rptr. 638.

HISTORY

1. New section filed 1-2-96; operative 2-1-96 (Register 96, No. 1).

This database is current through 6/5/26 Register 2026, No. 23.

Cal. Admin. Code tit. 4, § 141, 4 CA ADC § 141

End of Document

TAB A

Tab B Acapulco Restaurants

TAB B

Slides 6-8

Acapulco shows the strict-compliance side of Rule 141: if the rule expressly requires a decoy face-to-face identification, the required act must actually occur.

Materials in this tab

- Acapulco Restaurants, Inc. (1998) AB-6895
- Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd. (1998) 67 Cal.App.4th 575

ISSUED JUNE 29, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ACAPULCO RESTAURANTS, INC. dba Acapulco 1109 Glendon Avenue Los Angeles, CA 90024, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-6895 File: 47-182069 Reg: 96037110 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: May 6, 1998 Los Angeles, CA

Acapulco Restaurants, Inc., doing business as Acapulco (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its on-sale general public eating place license suspended for 15 days, for appellant's bartender having sold an alcoholic beverage (Budweiser beer) to a 19-year-old minor decoy, 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 Acapulco Restaurants, Inc., appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

[1] The decision of the Department, dated June 19, 1997, is set forth in the appendix.

TAB B

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on March 3, 1986. Thereafter, the Department instituted an accusation against appellant charging that appellant’s bartender, Diana Sussman, sold a glass of Budweiser beer to Victoria Brown, a 19-year-old minor participating in a decoy operation being conducted by the Los Angeles Police Department.

An administrative hearing was held on May 8, 1997, at which time oral and documentary evidence was received. At that hearing, Victoria Brown, the decoy, testified that she entered appellant’s restaurant, seated herself at the bar, and when asked by the bartender whether she would like anything, ordered a glass of Budweiser. The bartender, Diana Sussman, without requesting identification or proof of age, served the glass of beer as requested. The decoy paid for the beer with a pre-marked $5 bill. As the bartender returned with the beer and the change from the $5 bill, Los Angeles police officer Adam Adler, who was already in the restaurant, and saw and overheard the transaction, approached the bar, identified himself as a policeman to the bartender, and advised her she had just sold an alcoholic beverage to a minor. He then showed the bartender Brown’s identification, which he obtained from Brown immediately after having identified himself. Adler then directed Brown to leave the restaurant, which she did. Brown was later asked to return to the restaurant to see the manager, and did so. The bartender was present at this encounter, according to both Brown and Adler.

Adler testified further, over appellant's objection, that the bartender told him she normally checks identification, but did not do so in this case because she was in the process of closing the register.

Adler denied on cross-examination that the conversation took place in the lobby of the restaurant, insisting it occurred in the cantina area. He also denied that, when Brown was asked to reenter the premises, the citation had already been issued and another officer was present other than himself. Adler also denied that he had interceded in the transaction before the bartender had even served the beer or returned the change.

Adler acknowledged having received a training memo after this incident which stated that in all police decoy cases it was the policy of the LAPD to make sure there was a face-to-face confrontation between the decoy and the server.

Diana Sussman admitted she had not requested identification, but claimed she still had the beer in her hand when officer Adler confronted her. She testified Adler told her to dump the beer and give him the glass for evidence. Sussman could not recall whether or not she had handled any money, but said she was prepared to ask the decoy for identification before serving the beer, but was prevented from doing so by officer Adler's intervention. Sussman claims the decoy "vanished," and she never saw her again. However, she did agree with Adler's testimony that she, Sussman, was present during his conversation with her manager, and that the conversation took place in the cantina. Sussman was discharged shortly following, and because of, the transaction.

Stacy Franscella, appellant's Director of Human resources, testified concerning the training program appellant provides for its employees who serve alcoholic beverages, and identified certain training documents which are used.

Fred Wolfe, a senior vice-president of appellant, testified that if a two-week suspension were imposed, the restaurant would lose approximately $22,000 in alcohol and approximately $35,000 in gross sales.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision which determined that the charge in the accusation had been established. The ALJ rejected appellant's arguments that the police had failed to comply with Rule 141 (b)(5) (Cal.Code Regs., title 4, §141 subd. (d)(5)) ("the rule"), stating:

> "The transaction was witnessed by a police officer who was seated at a table near the fixed bar. The police officer and the decoy testified consistently and positively regarding the sale of the beer. In light of their testimony, the bartender's testimony that the police officer stopped her before she served the beer to the decoy is found not to be reliable. (Finding V.)
>
> "After the transaction was completed, the police officer identified the decoy to the bartender and informed her that she had sold beer to a minor. The officer's actions meet the requirements of the Department's Rule 141(b)(5), 22 Calif. Code of Regulations Section 141(b)(5). (Finding VI.)"

The ALJ also rejected the Department's recommendation that appellant's license be suspended for 45 days, finding that the prior disciplines upon which the Department relied for enhancement were too remote. Instead, he ordered a 15-day suspension. The Department adopted the proposed decision, following which appellant filed a timely notice of appeal.

TAB B

In its appeal, appellant raises a single issue, asserting that the failure of the police officer to comply with Rule 141 affords it a complete defense.

DISCUSSION

Appellant contends that officer Adler failed to comply with the identification requirements of Rule 141, and that his failure to do so affords it a complete defense to the charges of the accusation.[2] The Department argues, in accordance with the findings of its decision, that there was sufficient compliance with the rule, rendering the defense inapplicable.

The decision of the Board in Kviatkosky (AB-6856), issued in January of this year, and the decisions in Chicago Pizza, Inc. (AB-6874) and Rajab Ali and Azad A. Virani (AB-6873), following the January 1998 hearing, all involved similar Rule 141 issues, and in each the Board voted to affirm the Department. Appellant's briefs cite Kviatkosky as support for its position, relying on the paragraph stressing the

[2] Appellant contends in its brief (App.Br. 5) that Brown was not present when the police officer showed the bartender Brown's identification. This is incorrect. While Brown did testify, at the point in the transcript cited by appellant, that she did not believe she was present at that moment, she later testified as follows [RT 27]:

> "Q. And you did not stay there during any conversations with the bartender person because you testified earlier that you gave your identification to the officer and he showed it. You weren't there when that took place?
>
> "A. I was standing right there when he handed it to her, and then I went outside ... ."

TAB B

importance of compliance with Rule 141. Other than that admonition to the Department, the decision offers little support to appellant.

In Kviatkosky, the Board sustained the Department where the "face to face identification" consisted of the police officer pointing out the two minors to the bartender and having them remove their identification so he could show the bartender the two were both minors. The two minors were sitting on stools directly across from the bartender.

The Board said, in Kviatkosky:

> "The inferences to be drawn from this scenario would seem obvious. As indicated, the four actors in the event were situated so that the opposing interests were facing each other. In the presence of the minors, the police officer demonstrated to the bartender he should not have sold them an alcoholic beverage, and the minors were participating in the demonstration by exhibiting their identification for the bartender to examine. All of the actors were proceeding on the unspoken but ineluctable premise that they, and no one else, were the persons involved in the incident. In such circumstances, the only thing lacking was the physical act of pointing fingers.
>
> "There is an ancient legal maxim that the law neither does nor requires idle acts. Our reference to this maxim is not intended to suggest that the Appeals Board does not consider the identification requirement of Rule 141 important. To the contrary, its purpose, which is to ensure that it is the person who made the sale of the alcoholic beverage who is the person charged, and not an innocent employee who happens to be a bystander, is not to be demeaned. But where, as here, the line between substantial compliance, as the Department found, and strict compliance, which appellants demand, is so thin as to be virtually invisible, justice would not be served by a reversal of the Department's decision."[1]
>
> "[1] Indeed, now that Rule 141 has become effective and identification of the seller by the minors is mandatory, the Department would be well-advised to again remind law enforcement authorities of the importance that there be reliable evidence of compliance with Rule 141."

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In Virani (AB-6873), the police officers were apparently outside the store when the sale took place. However, when they entered the store, the minor returned with them, and, according to the testimony of the minor, "that's when they confronted the clerk." The rationale of the decision is that since the minor was present when the officers confronted the clerk, and the clerk had to have been identified in order to be confronted, and since the minor was then present, there was sufficient evidence to support a reasonable inference that the minor made the requisite identification.

In Chicago Pizza, Inc. (AB-6874), the minor was standing directly next to the police officer; the bartender was directly opposite them. The Board's decision addressed the interpretation of the rule in such circumstances:

> "Rule 141 became operative in February 1996, and cases involving its application are just now beginning to ripen into appeals. Thus far, the focus has, for the most part, been on the alleged absence of compliance with the identification provisions of the rule in subdivision (b)(5).
>
> "Given the nature of the evidence on the compliance issue in this case, it is useful to look at the relevant text of the rule, against which the evidence must be measured:
>
> "'Rule 141. Minor Decoy Requirements
> ...
> (5) 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.
>
> (6) Failure to comply with this rule shall be a defense to any action brought pursuant to Section 25658.'
>
> "The classic pointing of a finger, accompanied with the spoken declaration "That's the man," is not present in this case. The Department,

however, contends that what occurred was the equivalent of a face-to-face identification, and, accordingly, there was compliance with both the rule and the purpose of the rule.

"Appellant argues for a stricter application of the rule, asserting that it demands nothing less than a clear-cut determination that the minor, by word and/or gesture, so singled out the seller as to label him or her the transgressor. In this case, the minor stood next to the police officer, said nothing, and did not affirmatively identify the bartender.

"The Department, in turn, argues for an interpretation of the rule that permits it to be satisfied by circumstances where there can be no doubt from the evidence that the person who is being cited is the person who sold the alcoholic beverage to the minor. In this case, the Department points to the fact that the police officer observed the sale, and that there was no question as to the identity of the seller. (Footnote omitted.)

"In other cases before the Appeals Board, appellants have argued that one of the purposes of the rule was to afford the seller an opportunity to confront the minor, presumably to be able to challenge in some manner the conduct of the minor that induced the seller to make the sale.

"The Department routinely argues that the purpose of the rule is to protect the seller against a mistaken accusation in those situations where the police officer was outside the premises, or otherwise not in a position to observe the transaction take place.

"Certain portions of the language of the rule tend to support the Department's argument. The rule requires the officer, before a citation is issued, to "make a reasonable attempt to enter the licensed premises and have the minor decoy make a face to face identification ... ." Thus, the rule does contemplate possible situations where the officer who may intend to issue a citation was outside the premises, and not in a position to see for himself what actually took place. In such a circumstance, the minor's identification could be critical.

"Under the Department's view, the purpose of the identification is for the assistance of the officer so that he can cite the person who ought properly to be cited, and for the protection of other clerks or employees against being falsely accused. Thus, where the officer has observed the transaction, and would, in a non-decoy context, be able to cite the seller without more, the need for the face- to-face identification has been satisfied by the circumstances surrounding the transaction, and the interests protected of all the persons for whom the rule exists.

> "From a strict legal standpoint, on the facts of this case, the rule has effectively been satisfied. There is nothing in the record that suggests unfairness in the citation having been issued, or in the Department's disciplinary proceeding having been brought. On the other hand, with an obvious violation committed in the presence of the police officer, and no doubt that the transaction took place exactly as described by the witnesses, it would be unfair to apply the restrictive interpretation urged by appellant.
>
> "Appellant argues that, if allowed to stand, the decision will stand for the proposition that law enforcement agencies need not follow Department rules. On the facts of this case, that argument is unpersuasive. This is not a case where the minor is whisked out the door, or where the officer issuing the citation is not the officer who observed the transaction, or some other scenario that, measured against the mandate of the rule, might warrant reversal. Such a case might well serve as a message from the Appeals Board to the law enforcement community that Rule 141 has teeth. This is not such a case."

Nor is this such a case. Here, there is only a technical non-compliance with the most rigid and literal interpretation of Rule 141. It is clear that neither the Board, the Department, or the administrative law judges have thus far seen any merit or wisdom in dismissing cases for a failure to comply with Rule 141 when the police officer has observed the entire transaction while sitting or standing only a few feet away, where there was no question that the violation occurred, and where there was no claim of mis-identification.

There is something to be said for an interpretation of a statute or rule which takes into account reality. And the reality of this case, illustrative of the cases the Board is being asked to review, is that there is no need for the requirement of identification when the peace officer is already within the premises and is an eyewitness to the transaction. In that sense, the interaction between the minor and the seller is itself a face-to- face identification.

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This interpretation does no violence to the rule, and eliminates the need for a purposeless exercise that assumes the peace officer did not see what had just taken place before his eyes.

Thus, we are persuaded that we should adopt an interpretation of the rule in accord with that asserted by Administrative Law Judge Lo, to be applied where the officer has witnessed the transaction while inside the premises. Any claim of mis-identification, albeit infrequent, then becomes a straight-forward factual issue for the trier of fact.

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There is nothing profound in reading Rule 141 to apply only where the police officer is outside the premises or has otherwise been unable to see (and, in most cases, hear) the transaction in real time.[3] Indeed, such an interpretation injects common sense into the rule without distorting or ignoring its literal text.

The Department and appellants have both argued in support of their respective positions that the rule is unambiguous. In fact, it is ambiguous on the critical element in issue. Does the phrase "the peace officer directing the decoy shall make a reasonable attempt to enter" meaningfully apply to a peace officer who is already inside the premises? Does it not make more sense for the rule to be understood to apply only where the officer is outside the premises and not in a position to observe the transaction, so that identification of the seller is necessary?

The rule's requirement that identification occur before a citation is issued is

[3] Of course, a peace officer who witnesses the transaction while inside the premises, but is unable to hear the conversation between the minor and the seller, is still a competent witness with respect to the identification of the seller.

consistent with the notion that it is the object of the rule to prevent a mistaken accusation. As stated earlier, when the peace officer watches the transaction while inside the premises and is able to see clearly what has transpired, it is as if a face-to=face identification, by both word and gesture, has taken place before his eyes. He should then be free to issue a citation, if one is otherwise warranted.

Appellants make much of the language in subdivision (a) of the rule which provides that the use of decoys must be "in a fashion that promotes fairness." They argue that it is unfair to omit the identification ritual even though the peace officer has witnessed the transaction, but the only thing they point to as constituting unfairness is the omission of the minor's affirmative identification of the person who sold him or her the alcoholic beverage.

We do not think it can be said that the police are engaged in some sort of scheme to circumvent Rule 141 by placing themselves inside the store. In all probability, what is happening is simply the result of a police belief that the decoy program will operate more successfully, and more safely, if the officer is inside the premises, in a position to view and, if necessary, to protect the minor while he or she attempts to make a purchase. Indeed, appellants' theory, pursued to its logical end, would almost require the peace officer to remain outside the premises while the minor attempts the purchase, and await the minor's exit from the store or bar before taking any enforcement action.[4]

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[4] It may very well be that in some communities, the peace officers necessarily may remain outside because their identities are known to the licensees. In those circumstances, their entry into the premises in advance of the minor would doom the decoy operation to failure at the outset.

Finally, there is the general rule, reiterated in Judson Steel Corp. v. Workers' Comp. Appeals Board (1978) 22 Cal.3d 658, 668-669 [150 Cal.Rptr. 250]:

> "While the ultimate interpretation of a statute is an exercise of the judicial power (Whitcomb Hotel, Inc. v. Cal. Emp. Com. (1944) 24 Cal.2d 753, 757 [151 P.2d 233 ...), when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts 'and will be followed if not clearly erroneous. [Citations.]' (Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal.2d 321, 325-326 [109 P.2d 935].)"

:In George v. Department of Alcoholic Beverage Control (1957) 149 Cal.App.2d 702 [308 P.2d 773, 779], the court, citing Coca-Cola Co. v. State Board of Equalization (1945) 25 Cal.2d 918 [156 P.2d 1, 2-3]), ruled similarly:

> "[W]here a statute needs construction, or implementation by rule or regulation, or where a valid rule requires interpretation, an administrative agency charged with its enforcement may reasonably furnish such construction or interpretation in aid of the purpose of the law, and that contemporaneous administrative construction is entitled to great weight and courts generally will not depart from it unless it is clearly erroneous or unauthorized."

The Department's interpretation of Rule 141 is manifested in the uniformity in which it has held the rule not to preclude a finding of a violation of the statute prohibiting a sale of an alcoholic beverage to a minor in the context of a decoy operation where the peace officer was inside the premises and situated in a position to see, and sometimes even hear, the entire transaction.[5] While the various proposed decisions written by administrative law judges which we have seen

[5] Of course, a peace officer who witnesses the transaction while inside the premises, but is unable to hear the conversation between the minor and the seller, is still a competent witness with respect to the identification of the seller.

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reflect minor differences in approach, they are all consistent in their unwillingness to read Rule 141 to require a result they consider absurd.

The preamble to Rule 141, in subdivision (a) of the rule, admonishes the police: “A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages ... in a fashion that promotes fairness.” We find nothing unfair in a decoy operation where the peace officer enters the premises and observes the transaction as it takes place. Nor do we find anything unfair in dispensing with a meaningless identification ritual when, in any realistic assessment, the peace officer was already a participant, so to speak, in the transaction - albeit in the role of an observer.

The requirement that the “ peace officer directing the decoy shall make a reasonable attempt to enter ...” is posited by Rule 141 as a “minimum standard.” The objective is eliminate the officer’s reliance only on a description given to him by the minor after a sale is made and reported to the officer upon the minor’s exit from the licensed premises, or, in some instances, as overheard via a concealed radio transmitter.

“It is elementary that, if possible, statutes will be so construed as to avoid absurd applications and to uphold their validity.” (In re Cregler (1961) 56 C.2d 308 [14 Cal.Rptr. 289, 291].)

A practical reading of the rule, rather than a technical one, results in wise policy and avoids mischief or absurdity. The object sought to be accomplished by the rule, the risk of false or mistaken accusation, is eliminated. The evil to be

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remedied, the sale of alcoholic beverages to minors, is addressed, Perhaps the best proof of the validity of the position urged by the Department is that neither in this nor in any of the other cases presently before the Board is there any claim of mistaken identification.

It seems clear from the uniformity of the Department's rulings that its interpretation of Rule 141 is essentially as articulated explicitly or implicitly by the other administrative law judges who have written proposed decisions on the issue. In our considered view, this interpretation is not unreasonable, is consistent with the overall objective of Rule 141 and Business and Professions Code §25658, subdivision (a), avoids results which, viewed objectively, would seem absurd, and is not unfair to either the Department or the licensee.[6]

CONCLUSION

The decision of the Department is affirmed.[7]

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

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[6] The parties have debated the question whether the defense created in Rule 141 (b)(5) is an absolute defense or something less. We do not need to reach that issue where, as here, the peace officer witnessed the entire transaction from a vantage point within the licensed premises and we find that no defense is available.

[7]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 decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.

67 Cal.App.4th 575
Court of Appeal, Second District, Division 1, California.

ACAPULCO RESTAURANTS, INC., Petitioner,
v.
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, Respondent.

No. B123929.
|
Oct. 28, 1998.

Synopsis

Liquor licensee brought original writ proceeding for review of decision of Alcoholic Beverage Control Appeals Board, AB–6895, No. 47-182069, which affirmed 15-day suspension order of Department of Alcoholic Beverage Control for sale to minor. The Court of Appeal, Miriam A. Vogel, J., held that suspension of liquor licensee for sale to minor was invalid where peace officer did not make reasonable attempt to have underage decoy who purchased alcohol make face-to-face identification of seller after sale.

Reversed; writ issued.

Attorneys and Law Firms

***576** ****126** Solomon, Saltsman & Jamieson, Ralph Barat Saltsman and Stephen Warren Solomon, Playa Del Rey, for Petitioner.

***577** Hinman & Carmichael, John A. Hinman, Richard D. Warren, Beth Aboulafia, San Francisco, Nielsen, Merksamer, Parrinello, Mueller & Naylor, James R. Parrinello, and John E. Mueller, Mill Valley, as Amici Curiae on behalf of Petitioner.

Daniel E. Lungren, Attorney General, Martin H. Milas, Senior Assistant Attorney General, Silvia M. Diaz, Supervising Deputy Attorney General, and Laura Lee Gold, Deputy Attorney General, for Respondent.

Opinion

MIRIAM A. VOGEL, Associate Justice.

The Department of Alcoholic Beverage Control regulates the use of underage decoys to enforce the constitutional and statutory prohibitions against the sale of alcoholic beverages to minors. In this case, we address the requirement that, after a completed sale and no later than the time at which a citation 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* ****127** *make a face to face identification of the alleged seller* of the alcoholic beverages." (Cal.Code Regs., tit. 4, § 141, subd. (b)(5), italics added.) [1] "Failure to comply with this rule *shall* be a defense to any action brought pursuant to Business and Professions Code [s]ection 25658." [2] (Rule 141(c), italics added.)

In the case now before us, a 19–year–old decoy working with the Los Angeles Police Department entered the Acapulco restaurant, sat down at the bar, and ordered a beer. Without first requesting identification, the bartender served the decoy. The decoy paid for the beer. A police officer seated at a nearby table observed the transaction. The restaurant's owner (Acapulco Restaurants, Inc.), the holder of an on-sale general (public eating place) liquor license, was cited by the Department for selling an alcoholic beverage to a minor in violation of section 25658, subdivision (a). Acapulco denied the accusation and a hearing was held. The police officer and the decoy testified about the sale, and the officer testified that, upon completion of the transaction, he had informed the bartender that she had sold beer to a minor, and identified the decoy as the minor. It is undisputed that the police officer did not have the decoy make the required face-to-face identification of the ***578** bartender. [3] An administrative law judge sustained the charge and ordered a 15–day suspension of Acapulco's liquor license.

Acapulco appealed to the Alcoholic Beverage Control Appeals Board, contending the decoy's failure to make a face-to-face identification of the bartender was a complete defense to the Department's charge. (Rule 141(c) [a failure to comply with the provisions of rule 141 "shall be a defense to any action" alleging a violation of section 25658].) The Board refused to give rule 141(c) a "rigid and literal interpretation" because the police officer had been sitting only a few feet away at the time of the sale. According to the Board, the rule must "take[ ] into account reality," and the "reality of this case" is that "there is no need for the requirement of identification when the peace officer is already within the premises and is an eyewitness to the transaction." The Board affirmed the 15–day suspension.

At Acapulco's request, we issued a writ of review, ordered the Board to provide us with a record of the proceedings, and set

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the matter for oral argument. For the reasons explained below, we now command the Board to reverse its decision.

DISCUSSION

When alcoholic beverages are sold to a minor, the seller and purchaser are both subject to criminal prosecution. (Cal. Const., art. XX, § 22; § 25658, subds. (a), (b).) In *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 28 Cal.Rptr.2d 638, 869 P.2d 1163, our Supreme Court upheld the use of underage decoys, finding that, in a criminal prosecution of a licensee based on a sale to a decoy, the licensee could not claim entrapment or otherwise object to the use of an underage decoy. (*Id.* at pp. 567–571, 28 Cal.Rptr.2d 638, 869 P.2d 1163.) In passing, the court noted the absence of an "express immunity" protecting the underage decoy from prosecution and the existence of "the general ban on *purchases* by minors," and noted that the "Legislature may well have assumed that providing such immunity was unnecessary." (*Id.* at p. 568, 28 Cal.Rptr.2d 638, 869 P.2d 1163.)

In response to *Provigo,* the Legislature enacted subdivision (e) of section 25658 to confirm the right of the Department and law enforcement to use "[p]ersons under the age of 21 ... to apprehend licensees, or employees or ***579** agents of licensees, who sell alcoholic beverages to minors," and to provide that, notwithstanding the provision (in subdivision (b)) making the minor's purchase a misdemeanor, "*any person under the age of* ****128** *21 years who purchases or attempts to purchase any alcoholic beverage while under the direction of a peace officer is immune from prosecution for that purchase or attempt to purchase an alcoholic beverage.* Guidelines with respect to the use of persons under the age of 21 years as decoys shall be adopted and published...." (Italics added.)

As directed by subdivision (e) of section 25658, the required guidelines were adopted and published by the Department in accordance with the rulemaking provisions of the Administrative Procedure Act, Government Code section 11340 et seq. These are the Guidelines set out in rule 141, including the requirement of a face-to-face identification by the decoy and the defense triggered by law enforcement's failure to obtain the decoy's identification. [4]

Since it is undisputed that the required face-to-face identification by the decoy was not made in this case, it follows ineluctably that Acapulco's defense was established as a matter of law. As Acapulco puts it, when a rule requires certain affirmative acts by law enforcement, law enforcement must comply. To avoid this result, the Board urges upon us a "common-sense interpretation" of rule 141 and asks us to reject the plain language of the rule. The way the Board sees it, rule 141, subd. (b)(5) applies only when it is necessary to prevent a mistake in the description of the seller, and the defense created by rule 141, subd. (c) is unavailable in a case where, as here, the officer was present at the time of the sale.

***580** We reject the Department's contention that its refusal to apply rule 141, subd. (b)(5) and (c) is no more than an exercise of its right to "interpret" a rule governing its enforcement obligations. [5] To ignore a rule and the defense that arises from law enforcement's failure to comply with that rule is not a matter of "interpretation." What the Department has done is to unilaterally decide that rule 141, subd. (b)(5) applies in some situations but not others, a decision that exceeds the Department's power. By its refusal to apply rule 141, subd. (b)(5) when a police officer is present at the time of the sale, the Department has crossed the line separating the interpretation of a word or phrase on one side to the legislation ****129** of a different rule on the other, thereby substituting its judgment for that of the rulemaking authority. It might as well have said that rule 141, subd. (b)(5) applies on Mondays but not Thursdays. The Board offers no authority for its right to do this and we know of none.

Without legal or factual authority, the Department myopically suggests that rule 141 may make sense "in some communities [where] the peace officers necessarily may remain outside because their identities are known to the licensees. In those circumstances, their entry into the premises in advance of the minor would doom the decoy operation to failure at the outset." [6] At the request of the California Retailers Association, a trade association representing major California chain grocery, drug and convenience stores, and The Southland Corporation, the owner of the 7–Eleven ***581** trademark and name (both appearing as amici curiae), we have judicially noticed the Department's own statistics—which disclose 18,577 reported attempts by underage decoys to buy alcoholic beverages between mid–1994 and September 1998, and which also disclose that the use of minor decoy programs has increased substantially since 1995. Forty-eight percent of all violations over the past three years have been based on decoy sales. The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public and the decoys

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themselves. If the rules are inadequate, the Department has the right and the ability to seek changes. It does not have the right to ignore a duly adopted rule. [7]

We hold that rule 141, subd. (b)(5) means what it says and that, "[f]ollowing 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." A "[f]ailure to comply with [rule 141(b)(5)] shall be a defense to any action brought pursuant to ... [s]ection 25658." (Rule 141, subd. (c).)

Since it is undisputed that no attempt (reasonable or otherwise) was made to reenter ****130** Acapulco's premises (or remain on those premises) so that the decoy who purchased the beer could make a face-to-face identification of the ***582** bartender, and since it is undisputed that subdivision (c) of rule 141 provides a defense when there is a failure to comply with the requirements of rule 141, it follows that Acapulco's suspension cannot stand. [8]

DISPOSITION

The Board's decision affirming the Department's order and the Department's order are both reversed, and the Department is directed to enter a new order withdrawing the accusation. Acapulco is entitled to its costs of these writ proceedings.

ORTEGA, Acting P.J., and MASTERSON, J., concur.

All Citations

67 Cal.App.4th 575, 79 Cal.Rptr.2d 126, 98 Cal. Daily Op. Serv. 8064, 98 Daily Journal D.A.R. 11,177

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Footnotes

1 Undesignated rule references and references to "Guidelines" are to Title 4 of the California Code of Regulations.

2 Undesignated section references are to the Business and Professions Code.

3 It appears from the record that the police officer was unaware of the rule requiring a face-to-face identification by the decoy, and that he learned about rule 141(b)(5) only after this incident.

4 In its entirety, rule 141 provides:

"(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

"(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage: [¶] (1) At the time of the operation, the decoy shall be less than 20 years of age; [¶] (2) 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; [¶] (3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages; [¶] (4) A decoy shall answer truthfully any questions about his or her age; [¶] (5) *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.*

"(c) Failure to comply with this rule *shall be a defense* to any action brought pursuant to Business and Professions Code Section 25658." (Italics added.)

5 The general rules of statutory interpretation are not disputed: Although an administrative agency's interpretation of its own rules is generally given great weight (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658, 668–669, 150 Cal.Rptr. 250, 586 P.2d 564), the ultimate interpretation of an administrative regulation is by the courts, not the enforcing agency. (*Department of Health Services v. Civil Service Com.* (1993) 17 Cal.App.4th 487, 494–495, 21 Cal.Rptr.2d 428; *Delta Air Lines, Inc. v. State Bd. of Equalization* (1989) 214 Cal.App.3d 518, 525, 262 Cal.Rptr. 803.) The fundamental rules of statutory construction apply to administrative regulations, and a dispute about the meaning of a word or phrase will be resolved by reference to the legislative intent so that we can effectuate the purpose of the law. (*Hogoboom v. Superior Court* (1996) 51 Cal.App.4th 653, 659, 59 Cal.Rptr.2d 254; *Cal. Drive–In Restaurant Assn. v. Clark* (1943) 22 Cal.2d 287, 292, 140 P.2d 657; *People ex rel. Younger v. Superior Court* (1976) 16 Cal.3d 30, 40, 127 Cal.Rptr. 122, 544 P.2d 1322; *In re Bandmann* (1958) 51 Cal.2d 388, 393, 333 P.2d 339.)

6 The Department's ignorance about these rules is self-imposed. As a matter of "policy," the Department does not use or employ decoys to conduct enforcement activities involving the sales of alcoholic beverages to minors. But in 1996, the Department adopted a set of "Decoy Program Guidelines" (separate and distinct from the rules adopted under the mandate of section 25658) to allow "the local law enforcement community to use persons under 20 years of age as decoys to purchase alcoholic beverages from licensed premises." These "Guidelines" (submitted by amicus curiae, not the Department) blur the line between the Department's avowed avoidance of decoys and its declared support for law enforcement's use of decoys by offering up a "Decoy Program training video" and detailed recommendations about the things that law enforcement ought to be doing—e.g., who to notify about the use of a decoy program, how to select a decoy, instructions to be given to the decoy, surveillance, and so on. We find it significant that these Department-prepared Guidelines state, in no uncertain terms, that *law enforcement "must make a reasonable attempt to re-enter the premises and have the decoy identify the seller, face to face. The face-to-face identification must be done after the sale, but no later than at the time a citation, if any, is issued.*" (Italics added.) The Department's Guidelines do not suggest that a face-to-face identification is superfluous when an officer is present.

7 Licensees who sell alcoholic beverages to minors are subject to criminal prosecution, fines, and temporary and permanent loss of their licenses. (§§ 25658, 25658.1; *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd., supra,* 7 Cal.4th at p. 570, 28 Cal.Rptr.2d 638, 869 P.2d 1163; *Walsh v. Dept. of Alcoholic Bev. Control* (1963) 59 Cal.2d 757, 764–765, 31 Cal.Rptr. 297, 382 P.2d 337 [without regard to whether a particular action arises out of an administrative proceeding, a penal statute shall not be enlarged by the courts].) The Department nevertheless says the decoy's face-to-face identification is superfluous where, as here, a police officer who was present throughout the transaction has identified the seller. Acapulco and its amici curiae say the decoy's face-to-face identification is required to give the seller a fair opportunity to see the decoy's appearance in order to decide whether to defend on the ground that the decoy does not display the appearance which could be generally expected of a person under the age of 21 (as required by rule 141(b)(2)). From the seller's perspective, the police officer's identification of the decoy does not serve this purpose. It is neither our role nor the Department's role to resolve this dispute. That right belongs to the Legislature or the appropriate rulemaking body.

8 The concession in this case that no attempt was made to comply with rule 141(b)(5) makes it unnecessary to decide what would constitute a sufficient effort to reenter or what would constitute a face-to-face identification by the decoy.

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End of Document

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Tab C 7-Eleven / Keller

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Slides 9-11

7-Eleven / Keller shows that Rule 141(b)(5) requires a face-to-face identification, but does not add an in-store-only location requirement.

Materials in this tab

- 7-Eleven, Inc./Keller (2002) AB-7848
- Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Keller) (2003) 109 Cal.App.4th 1687

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

AB-7848
File: 20-269236 Reg: 01050460

7-ELEVEN, INC., LUCINDA D. KELLER, and WILBUR L. KELLER
dba 7-Eleven Store #13655
2270 Fletcher Parkway, El Cajon, CA 92021,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 4, 2002
Los Angeles, CA

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ISSUED AUGUST 14, 2002

7-Eleven Inc., Lucinda D. Keller, and Wilbur L. Keller, doing business as 7-Eleven Store #13655 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for appellants' clerk selling an alcoholic beverage to a minor decoy, 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 appellants 7-Eleven Inc., Lucinda D. Keller, and Wilbur L. Keller, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated June 14, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 2, 1992. Thereafter, the Department instituted an accusation against appellants charging that, on December 20, 2000, appellants' clerk, Brandon Rogers ("the clerk"), sold an alcoholic beverage to 17-year-old Michael Pollard. Pollard was acting as a decoy for the El Cajon Police Department at the time of the sale.

An administrative hearing was held on May 8, 2001, at which time documentary evidence was received and testimony concerning the transaction was presented by Pollard ("the decoy") and by El Cajon police officer Matthew Conlon.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and determined that no defense had been established.

Appellants thereafter filed a timely notice of appeal in which they raise the following issues: (1) the Administrative Law Judge (ALJ) erred by refusing to allow appellants' counsel to videotape the decoy's testimony; (2) the ALJ erred in refusing to bifurcate and continue the hearing; (3) the ALJ erred in not allowing the testimony of another clerk who sold to this decoy at another premises; (4) there was not compliance with Rule 141(b)(5) (4 Cal. Code Regs. §141, subd. (b)(5)); and (5) Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)) was violated.

DISCUSSION

I

Appellants contend the ALJ should have granted counsel's request to videotape the decoy's testimony because the ALJ relied on the decoy's appearance at the hearing in making his finding regarding the decoy's apparent age at the time of the sale and the videotape would assist the Appeals Board in reviewing the ALJ's finding.

This Board has acknowledged previously the necessity for an ALJ to use the decoy's appearance at the hearing to aid in determining whether the decoy displayed the appearance of a person under the age of 21 at the time of the violation. We said, in Circle K Stores, Inc. (2000) AB-7265:

> "We are well aware that the rule requires the ALJ to undertake the difficult task of assessing [the] appearance [of a decoy] many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date."

This Board has repeated many times that it is not in a position to second-guess the finding of the ALJ, who has the opportunity, which this Board does not, of observing the decoy in person, and we have deferred to the judgment and discretion of the ALJ's in most instances. Occasionally there have been cases where circumstances compel us to re-examine the ALJ's finding. Those instances, however, have not been the result of the Board's disagreement based upon looking at a photograph of the decoy, but upon some indication that the ALJ has taken into consideration (or omitted from consideration) some factor that may have unfairly or improperly affected the ALJ's determination of the decoy's apparent age.

There is nothing in this decision or record that causes this Board to question the fairness or propriety of the ALJ's finding as to the apparent age of the decoy, and a videotape of the decoy's testimony is neither necessary nor desirable for our limited review.

The ALJ has great discretion in the conduct of the hearing, and it would have been no abuse of discretion for the ALJ in this instance to deny the videotaping on simply practical grounds, such as the time it would take. Indeed, the ALJ gave a

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perfectly acceptable and sufficient reason for prohibiting the videotaping when he said that he believed that videotaping would be disruptive of the hearing and likely to intimidate witnesses and prevent them from acting naturally. [RT 16.]

II

Appellants contend the ALJ erred in refusing to bifurcate the hearing to allow the clerk to testify at a later date. The clerk signed a declaration on April 28, 2001, stating that he was then playing professional baseball in Iowa for the Cedar Rapids Kernels, but would return to California "by October 2001," and, if subpoenaed, would be available to testify at that time. As the ALJ observed [RT 114], appellants were essentially requesting a continuance so that they could present the clerk as a witness. Appellants assert that the denial of the request violates their statutory hearing rights under the Administrative Adjudication Bill of Rights (Gov't Code §11425.10 et seq.).

When initially requesting the continuance, appellants' counsel stated that the clerk would be called to testify regarding the decoy's appearance on the night of the violation and his belief that the decoy appeared to be over 21 at that time [RT 9]. Later, appellants' counsel stated that he wanted to have the clerk testify "regarding what took place" during the transaction with respect to the decoy's manner of showing his identification to the clerk.

The ALJ deferred consideration of the request for a continuance until after the testimony of the witnesses was completed. At that time, he considered the arguments made by appellants in support of granting the continuance and those of the Department opposing it. After counsel for the Department withdrew her objection to the introduction into evidence of the clerk's declaration, the ALJ denied appellants' request for continuance, stating [RT 120]:

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> "All right. Based upon the fact that Ms. Kim has withdrawn her objection to Exhibit B, that we have Exhibit B into evidence based upon the fact that you initially asked for a continuance or of a bifurcation because you wanted the witness to testify regarding the appearance of the minor decoy, and based on the fact that you did not make a timely request for a continuance prior to today's hearing, as you should have, I do not find good cause to continue this case until sometime in October simply hoping that this witness will be available at that time, because you give us no assurances that he might not be transferred to some other ball club or he may decide to stay in Iowa or somewhere else, not in California. "

Pursuant to Government Code §11524, the ALJ has the right to grant or deny a request for a continuance for good cause. Under subdivision (b) of that section, a party is ordinarily required to apply for the continuance within 10 working days after discovering the good cause for the continuance, unless that party did not cause and sought to prevent the condition or event establishing the good cause. An appellant has no absolute right to a continuance; one is granted or denied at the discretion of the ALJ and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Givens* v. *Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

The ALJ based the denial, in part, on the failure of appellants to make a timely request for a continuance. He noted that appellants knew of the unavailability of the clerk more than 10 days before the hearing, yet did not request a continuance at that time. Appellants' counsel stated that, although the clerk told him he was out-of-state, counsel wanted to have a declaration to that effect so that he would know the clerk was not "yanking [counsel's] chain." Apparently the ALJ did not find that an adequate reason for not making more timely contact with Department counsel to arrange a continuance. Based on our reading of the record, we cannot say that the ALJ abused his discretion in finding counsel's explanation insufficient.

The ALJ also found insufficient the justification offered by appellants' counsel for granting the continuance. As noted above, counsel at first asserted the need for the clerk's testimony with regard to the decoy's apparent age. After appellants' exhibit B, the declaration of the clerk, was admitted into evidence, appellants' counsel stated that he was still requesting a continuance. When the ALJ asked why, counsel replied [RT 117]:

> MR. BUDESKY: Because I want to have the clerk here testifying regarding what took place.
> JUDGE ECHEVERRIA: Regarding what? What aspects of the – of Mr. Rogers' testimony do you feel are critical to your case and why do you think that having this declaration from Mr. Rogers in evidence, why you need him in person, why we should have to continue this matter until sometime after October to finish the hearing to get his testimony?
> MR. BUDESKY: Well, because I learned some new things from Mr. . . . Raymond. And I would like to have Mr. Rogers be here and tell us what happened on 12-20-2000.

Earlier in the hearing, appellants' counsel wanted to have another clerk, Tucker Raymond, from a different store, testify about the manner in which this same decoy had presented his identification. When asked to justify that line of questioning, counsel responded [RT 101]:

> MR. BUDESKY: . . . . Okay. I think Mr. Raymond's testimony regarding the I.D. not being handed over to him is relevant because, as you know, I'm going to make a request to bifurcate the hearing so we can have Mr. Rogers testify regarding what took place.
> JUDGE ECHEVERRIA: All right. Are you saying that Mr. Rogers will be testifying that the minor either – in this particular case, either did not hand his identification to the clerk, Mr. Rogers, or that he had a tug of war with Mr. Rogers over the identification?
> MR. BUDESKY: I'm not saying that. I don't know what Mr. Rogers will testify with respect to that because I concentrated on other things when I interviewed.
> JUDGE ECHEVERRIA: So you don't know what Mr. Rogers will testify to. Fine. . . .

We agree with the ALJ's implicit conclusion that appellants' speculations about what the clerk might testify to do not provide a basis for asserting that the clerk's

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testimony was necessary for appellants' case. Appellants assert in their brief on appeal that the clerk's "testimony would have constituted evidence in and of itself, and it would have rebutted the Department's evidence . . . ." Appellants offer no more justification of this statement on appeal than they offered at the hearing.

There was no abuse of discretion in the ALJ's denial of the continuance.

III

Appellants contend the ALJ erred in not allowing the testimony of another clerk, Tucker Raymond, who sold to this decoy at another premises on the same night as appellants' clerk sold to him. They assert that Raymond would have testified that the decoy tugged at his identification when presenting it to Raymond, which, they say, would have violated both the fairness requirement of Rule 141(a) and the requirement of Rule 141(b)(3) that the decoy present his identification when asked. It would show, appellants assert, the decoy's habit and practice, and "it also was necessary for Mr. Rogers' testimony, which could have corroborated it . . . ." (App. Br. at 14.)

Again, as discussed in part II, above, appellants are trying to turn their mere speculation about the clerk's testimony into solid evidence of a violation of Rule 141. Speculation about what certain testimony might be does not provide a sufficient justification for allowing that testimony. In any case, the testimony of the other clerk, Raymond, could not possibly show the decoy's "habit and practice," since more than one occurrence of an event or action is necessary to establish the existence of "habit" and "practice."

The ALJ would have allowed this witness to testify regarding his opinion of the decoy's age, but not about other aspects of the decoy transaction with which he was involved. The testimony of this witness about the decoy presenting his identification was not relevant, and the ALJ properly disallowed it. Appellants' counsel then chose not to question his witness.

IV

Appellants contend there was not compliance with Rule 141(b)(5) (4 Cal. Code Regs. §141, subd. (b)(5)), arguing that the evidence does not show that a face-to-face identification occurred. The ALJ found that the identification did occur, as follows (Finding II.C.):

> "C. The preponderance of the evidence established that a face to face identification of the seller of the beer did in fact take place.
>
> "1. The decoy initially testified that he had returned to the premises to identify the clerk who had sold him the beer. However, after viewing the videotape (Exhibit C) which does not show him going back into the premises, he testified that he was confused as to whether the identification had taken place inside or outside the premises. However, he did recall identifying the clerk who had sold him the beer and he remembered that he and the clerk were within five feet of each other when this identification took place. He was just not sure as to whether the identification had taken place inside or outside the premises.
>
> "2. Although the police report indicates that Officer Moulton escorted the decoy back into the premises, Officer Conlon testified that the report was in error in that respect, and that he did not discover that mistake until he viewed the videotape (Exhibit C) at the hearing. Conlon did not take notes on the night of the sale and he prepared his report the next day. Conlon testified that the videotape refreshed his recollection and that he has an independent recollection that the identification took place outside the premises. This testimony is consistent with the videotape that shows the clerk being escorted outside. This testimony is also consistent with the photograph depicted in Exhibit 3 that shows the clerk and the decoy outside the premises. Conlon also testified that while outside the premises, Officer Moulton escorted the decoy to a location which was about five feet from the clerk, that either he or Moulton then asked the decoy to identify the person who had sold beer to him and that the decoy pointed to the clerk and stated that he was the clerk who had sold beer to him. The clerk was issued a citation after he had been identified by the decoy."

It was not unreasonable for the ALJ to conclude that the decoy identified the clerk. However, that does not mean that Rule 141(b)(5) was complied with. That rule provides:

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"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."

The court in *Acapulco Restaurants, Inc.* v. *Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] addressed the requirements of Rule 141(b)(5):

“The Department’s increasing reliance on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public and the decoys themselves. If the rules are inadequate, the Department has the right and the ability to seek changes. It does not have the right to ignore a duly adopted rule. [Fn. omitted.]

“We hold that rule 141, subdivision (b)(5) means what it says and that ‘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 premises and have the minor decoy who purchased the alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.’ A ‘[f]ailure to comply with [rule 141(b)(5)] shall be a defense to any action brought pursuant to . . . [s]ection 25658.’ (Rule 141, subd. (c).)”

The court's call for strict adherence to the rule compels us to conclude that the face-to-face identification made in this case did not comply with the rule. The officers did not have the decoy re-enter the premises and identify the seller. Instead, after the decoy left the store with the beer he had purchased, officer Conlon, who was inside the store and observed the sale from a distance of 12 to 15 feet, approached the counter, identified himself to the clerk as a police officer, and told the clerk he had sold to a minor decoy [RT 69-70]. His testimony continued:

Q. What happened after you identified yourself to the clerk?
A. We began identifying him, getting his information, and then we were – I'm sorry. Go ahead.
Q. I'm sorry. You say "we." So who was "we"?
A. I'm sorry. There was also other officers involved. Shortly after Pollard exited the store, Officer Kirk and Taub entered the store and then a short time after that Officer Moulton entered the store.

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Q. All right. So the officers – other officers and yourself are getting identifying information from the clerk. Did you do anything after that?
A. We escorted the clerk outside.
Q. And why was that done?
A. So that we could conduct our business without disrupting the operation of the store.
* * *
Q. What was done at that location outside the store?
A. We took our Polaroid photo of him and the decoy and the beer. We did our – not necessarily in this order, our face-to-face.

Rather than the decoy identifying the seller for the officers, in this case the officers, essentially, identified the seller for the decoy by bringing the clerk outside to the decoy for identification. By bringing the clerk outside for the identification, they created something akin to a line-up with only one person in the line. The court in *Acapulco*, *supra*, made it clear that the officer's observation of the sale did not obviate the requirement of the decoy re-entering the premises and identifying the seller of the alcoholic beverage. The rule was presumably designed, at least in part, to help ensure an unbiased identification process. Although the officer who observed the violation presumably brought out the right clerk and there is no indication in the present case that the decoy mis-identified this clerk as the seller, the manner in which the identification process was handled does not comply with the strict adherence to the rule dictated by the court in *Acapulco*, *supra*. This failure to strictly adhere to the rule creates a complete defense to the accusation. (4 Cal. Code Regs. §141, subd. (c).) Therefore, the decision of the Department must be reversed.

V

Appellants contend Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)) was violated in that the decoy "had the looks and demeanor of an individual who appeared over 21 years of age at the time of the sale, in violation of Rule 141(b)(2)." Rule

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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;"

Appellants rely for this contention on the decoy's height of six feet and weight of 142 pounds. If anything, such a combination of height and weight in most young people would cause one to be described as a "gangly youth."[2] There is certainly nothing about that size that would lead us to believe that the decoy's appearance was that of a person over the age of 21.

They also rely on the decoy's prior experience playing soccer and volunteering for law enforcement work.[3] As with any other prior experience, these factors are relevant only insofar as they have an observable effect on the decoy's appearance, something the appellants do not allege to have existed.

The only other factor cited by appellants in support of this contention is that, according to them, officer Conlon testified that the clerk told him that the decoy appeared to be 21 years old. They cite page 75 of the transcript for that testimony. However, on that page, officer Conlon's testimony was that the clerk "indicated to me that [the decoy] appeared to be *under* 21." (Emphasis added.)

None of the "factors" relied on by appellants provide any support for their contention that the decoy's appearance violated Rule 141(b)(2).

ORDER

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[2]See, e.g., Naeem (2002) AB-7798, in which the ALJ described the 5'11", 164-pound decoy as a "gangly youth."

[3]His "law enforcement volunteer work" consisted of posting and distributing road closure signs along the route of a "Mother Goose [as in fairy tales] Parade."

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The decision of the Department is reversed for failure to comply with Rule 141(b)(5).[4]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.

109 Cal.App.4th 1687
Court of Appeal, Fourth District, Division 1, California.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Petitioner,
v.
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, Respondent;
7–Eleven, Inc., et al., Real Parties in Interest.

No. D040790.
|
June 30, 2003.

Synopsis

Background: Liquor licensees appealed decision of the Department of Alcoholic Beverage Control (ABC) suspending license for 10 days after clerk at a store operated by licensees sold an alcoholic beverage to a minor acting as a police decoy. The Alcoholic Beverage Control Appeals Board reversed. ABC filed petition for writ of review.

The Court of Appeal, Benke, Acting P.J., held that law enforcement officer complied with face-to-face confrontation requirements of ABC regulation governing minor decoy operations by conducting face-to-face identification outside store, rather than reentering store for identification.

Petition granted; order annulled.

Attorneys and Law Firms

***1689** ****340** Bill Lockyer, Attorney General, Dennis W. Dawson and Chris A. Knudsen, Deputy Attorneys General, for Petitioner.

No appearance for Respondent.

Solomon, Saltsman & Jamieson, Ralph B. Saltsman, R. Bruce Evans and James S. Eicher, Los Angeles, for Real Parties in Interest.

Opinion

BENKE, Acting P.J.

Real parties in interest Lucinda D. Keller, Wilbur L. Keller and 7–Eleven, Inc. (licensees), are holders of a liquor license issued by petitioner Department of Alcoholic Beverage Control (ABC). A clerk at a store operated by licensees sold an alcoholic beverage to a minor acting as a police decoy. ABC suspended the license for 10 days. Respondent Alcoholic Beverage Control Appeals Board (Appeals Board) reversed, finding that while the police required their decoy to make a face-to-face identification of the clerk as required by California Code of Regulations, title 4, section 141, subdivision (b)(5) (hereafter Regulations), they violated the section by conducting the identification outside rather than inside the store. ABC sought and we issued a writ of review. (See Bus. & Prof.Code, [1] § 23090.) We annul the decision of the Appeals Board.

****341** BACKGROUND

On December 20, 2000, at approximately 6:45 p.m., El Cajon police officers using an underage decoy conducted an alcoholic beverage buy at a convenience store operated by licensees. Officer Matthew Conlon and 17–year–old Michael P. entered the store. Michael took a six-pack of beer from a cooler to the checkout counter. The clerk asked Michael for his identification. Michael handed him a driver's license indicating in bold print that he would be 21 years old in 2004. The clerk looked quickly at the license, handed it back to Michael and sold him the beer. After Michael left the store Officer Conlon, who had witnessed the transaction, identified himself to the clerk and told him he had sold beer to a minor. In order not to disrupt the operation of the store, the officer escorted the clerk, Brandon Rogers, outside where Michael made a face-to-face identification of him from a distance of ***1690** approximately five feet. Photographs were taken of Michael and the clerk. The clerk was issued a citation for selling an alcoholic beverage to a minor.

On March 8, 2001, ABC filed an accusation, alleging that an agent of the licensees sold beer to a minor in violation of section 25685, subdivision (a). The accusation sought revocation or suspension of their license. A hearing on the matter was conducted on May 20, 2001. It was concluded the police officers complied with the requirements for conducting a decoy buy operation as defined in Regulations section 141, subdivision (b)(5). Licensees were found in violation of section 25685, subdivision (a), and their license was suspended for 10 days.

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Licensees appealed to the Appeals Board. The Appeals Board found that a face-to-face identification of the clerk was made by the decoy after the sale. It noted, however, Regulations section 141, subdivision (b)(5), requires that following a sale "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." Citing *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581, 79 Cal.Rptr.2d 126, the Appeals Board held the requirements of Regulations section 141, subdivision (b)(5), must be strictly followed and, citing Regulations section 141, subdivision (c),[2] a failure by the officer to reenter the premises with the decoy to conduct the face-to-face identification was a complete defense to the accusation. The Appeals Board noted that rather than reenter the premises with the decoy, the officer took the clerk outside for identification. The Appeals Board concluded an identification conducted in this manner was essentially a lineup containing a single individual. It noted the court in *Acapulco* concluded the confrontation requirements of Regulations section 141, subdivision (b)(5), were not obviated by an officer observing the transaction. The Appeals Board stated "presumably" the section was designed at least in part to ensure an unbiased identification process. It concluded that while there was no indication of a misidentification, Regulations section 141, subdivision (b)(5), had not been strictly complied with and the failure to do so was a complete defense. The decision of ABC suspending licensees' liquor license was reversed.

We grant ABC's petition for a writ of review.

*1691 **342 DISCUSSION

Citing *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd., supra,* 67 Cal.App.4th 575, 79 Cal.Rptr.2d 126, and Regulations section 141, subdivision (c), licensees and the Appeals Board conclude the requirements of Regulations section 141, subdivision (b)(5), must be strictly followed. They read Regulations section 141, subdivision (b)(5), as requiring the identification to be made inside the premises rather than, as occurred here, outside the premises. They assert the reasonable basis for this confining provision is to avoid suggestive and unfair lineups.[3] We conclude this interpretation is not supported by the language or history of the section.

1. Regulations section 141 and Its Origins

In *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 28 Cal.Rptr.2d 638, 869 P.2d 1163, the court upheld the use of underage decoys in buy operations but noted the lack of an express statutory immunity protecting such decoys from prosecution. (*Id.* at p. 568, 28 Cal.Rptr.2d 638, 869 P.2d 1163.) Five days after the decision in *Provigo,* Assembly Bill 3805, originally dealing only with placing conditions on liquor licenses, was amended to include language authorizing the use of and providing immunity for underage decoys in alcoholic beverage buy operations. (Assem. Bill No. 3805 (1993–1994 Reg. Sess.) §§ 3, 4, as amended Apr. 12, 1994.)

As originally written the amendment contained alternative sections defining specific guidelines for conducting buy operations. The first allowed such operations only if there was reasonable cause to believe a licensee had sold an alcoholic beverage to a minor. The bill required the decoy be 18 years of age or younger; if asked, the decoy was to present proper identification; the decoy was to be photographed and was to be under the constant surveillance of a peace officer. (Assem. Bill No. 3805 (1993–1994 Reg. Sess.) § 3, as amended Apr. 12, 1994.)

The section also required: "After the sale is complete, the decoy shall be stopped by the peace officer or peace officers after leaving the premises and escorted back into the premises by the officer to make an immediate confrontation with the seller in order to elicit any statements." (Assem. Bill No. 3805 (1993–1994 Reg. Sess.) § 3(b)(5), as amended Apr. 12, 1994.)

The alternative section contained in the bill placed more demanding requirements on decoy buy operations. It required that before a buy operation could be undertaken, an affidavit was required stating the facts supporting reasonable cause to believe sales to minors had been made by the *1692 licensee. It forbid underage buy operations at any establishment that had not been notified in the previous six months of the possibility such operations would be conducted. It allowed the use of a decoy who was under the age of 21 years but required the decoy appear to be 18 years of age or younger. A male decoy could not have a mustache or beard and a female decoy could not use make-up or display jewelry. The section made it a defense if the decoy's appearance, mannerism and dress were not those of a person 18 years of age or younger. The decoy was to be photographed, no attempted buy could be made when three or more persons were in line to make purchases, the decoy was to carry

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identification and if the seller asked to see identification, the decoy was required **343 to immediately identify him- or herself as a decoy. (Assem. Bill No. 3805 (1993–1994 Reg. Sess.) § 4, as amended Apr. 12, 1994.)

The section also required: “Following the completion of the sales transaction, or if there is no completed transaction, the attempted transaction, the police officer or agent of the department accompanying the decoy shall inform the seller that the purchaser is a decoy and shall display the decoy to the person in charge of the establishment.” (Assem. Bill No. 3805(1993–1994 Reg. Sess.) § 4, as amended Apr. 12, 1994.)

Failure to observe the required procedures was a defense to any prosecution or accusation proceeding. (Assem. Bill No. 3805 (1993–1994 Reg. Sess.) § 4, as amended Apr. 12, 1994.)

The bill was amended several times and was eventually enacted amending section 25658. Section 25658, subdivision (f), permits decoy buy operations using persons under 21 years of age and grants immunity to those decoys. It contains no requirements for carrying out decoy buys but directs ABC to adopt guidelines for such operations. [4]

In responses to the directive of section 25658, subdivision (f), ABC adopted Regulations section 141, which reads:

***1693** “Minor Decoy Requirements

“(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

“(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:

“(1) At the time of the operation, the decoy shall be less than 20 years of age;

“(2) 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 **344 of alcoholic beverages at the time of the alleged offense;

“(3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages;

“(4) A decoy shall answer truthfully any questions about his or her age;

“(5) 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.

“(c) Failure to comply with this section shall be a defense to any action brought pursuant to Business and Professions Code section 25658.”

***1694** 2. *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.*

As we have indicated, the Appeals Board and licensees rely heavily on the decision in *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd., supra,* 67 Cal.App.4th 575, 79 Cal.Rptr.2d 126, to support their position that Regulations section 141, subdivision (b)(5), prohibits identification of the seller by the decoy outside the premises where the sale was made.

In *Acapulco* a 19–year–old decoy sat at a restaurant bar and ordered a beer. Without requesting identification the bartender served him and the decoy paid for the beverage. A police officer seated at a nearby table observed the transaction. The officer, who apparently was unaware of the requirement for a face-to-face identification of the seller by the decoy, informed the bartender she had sold beer to a minor, identified the decoy as a minor but did not have the decoy make a face-to-face identification of the seller. [5]

The restaurant was cited and its liquor license suspended by ABC for 15 days. Acapulco appealed to the Appeals Board, contending that the failure to conduct a face-to-face identification of the bartender was a complete defense. The Appeals Board rejected the argument, holding that since the officer was an eyewitness to the transaction, there was no need for a face-to-face identification by the decoy. The Court of Appeal issued a writ of review and reversed. (*Acapulco*

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Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd., supra, 67 Cal.App.4th at p. 578, 79 Cal.Rptr.2d 126.)

The court noted the requirement in Regulations section 141, subdivision (b)(5), for a post-sale face-to-face identification of the seller by the decoy and the provision of Regulations section 141, subdivision (c), that a failure to comply with he requirements of Regulations section 141, subdivision (b), was a defense to any action brought pursuant to section 25685. (*Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd., supra,* 67 Cal.App.4th at p. 579, 79 Cal.Rptr.2d 126.)

The Appeals Board asked the Court of Appeal to reject the plain language of Regulations ****345** section 141, subdivision (b)(5), and instead apply a "common sense interpretation" of the regulation. Under the Appeal Board's interpretation, a face-to-face identification was only required if necessary to prevent ***1695** a mistake in the description of the seller. For its part, ABC stated it had not ignored Regulations section 141, subdivision (b)(5), but had merely interpreted it. (*Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd., supra,* 67 Cal.App.4th at pp. 579–580, 79 Cal.Rptr.2d 126.)

The court rejected these arguments, stating, "To ignore a section and the defense that arises from law enforcement's failure to comply with that section is not a matter of 'interpretation.' What the Department has done is to unilaterally decide that Regulations section 141, subdivision (b)(5) applies in some situations but not others, a decision that exceeds the Department's power." (*Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd., supra,* 67 Cal.App.4th at p. 580, 79 Cal.Rptr.2d 126.)

The court stated: "Since it is undisputed that no attempt (reasonable or otherwise) was made to reenter Acapulco's premises (or remain on those premises) so that the decoy who purchased the beer could make a face-to-face identification of the bartender, and since it is undisputed that subdivision (c) of Regulations section 141 provides a defense when there is a failure to comply with the requirements of Regulations section 141, it follows that Acapulco's suspension cannot stand." (*Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd., supra,* 67 Cal.App.4th at p. 581–582, 79 Cal.Rptr.2d 126, fn. omitted.)

Importantly, the court went on to state: "The concession in this case that no attempt was made to comply with Regulations section 141, subdivision (b)(5), makes it unnecessary to decide what would constitute a sufficient effort to reenter or what constitutes a face-to-face identification by the decoy." (*Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd., supra,* 67 Cal.App.4th at p. 582, fn. 8, 79 Cal.Rptr.2d 126.)

3. Analysis

In the present case the police officer was aware of and intended to comply with Regulations section 141, subdivision (b)(5), and a face-to-face identification of the seller was made by the decoy. We must, therefore, confront the issue specifically not addressed in *Acapulco,* i.e., what constitutes the face-to-face identification required by Regulations section 141, subdivision (b)(5). We conclude that while the section requires a face-to-face identification of the seller by the decoy, it does not require the identification to take place inside the premises where the sale was made.

Generally, the same sections of construction and interpretation applicable to statutes are used in the interpretation of administrative regulations. (*Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1710–1711, 42 Cal.Rptr.2d 172.) The interpretive task is to determine the intent ***1696** of the adopting authority. We look first at the language of the regulation. If its words, given their usual and ordinary meaning, are clear and unambiguous, we presume the adopting authority meant what it said and the plain language of the regulation applies. If the words are unclear or ambiguous, we examine the context in which the language appears using the interpretation that best harmonizes the statute internally and with related statutes. We consider the core objective of the regulation (see *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192–193, 96 Cal.Rptr.2d 463, 999 P.2d 686) and its history and background. (See *Kraus v. Trinity Management Services,* ****346** *Inc.* (2000) 23 Cal.4th 116, 129, 96 Cal.Rptr.2d 485, 999 P.2d 718.) If possible, every word, sentence and phrase of a regulation is given significance. (*Phelps v. Stostad* (1997) 16 Cal.4th 23, 32, 65 Cal.Rptr.2d 360, 939 P.2d 760.) Regulations are not interpreted in a manner that results in absurd consequences or defeats the core purpose of their adoption. (See *People v. Souza* (1993) 15 Cal.App.4th 1646, 1652, 19 Cal.Rptr.2d 731.) "The contemporaneous administrative construction of a regulation by the agency charged with its enforcement and interpretation is entitled to great weight. Accordingly, courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." (*Maples v. Kern County*

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Assessment Appeals Bd. (2002) 96 Cal.App.4th 1007, 1015, 117 Cal.Rptr.2d 663.)

We begin with the observation that Regulations section 141, subdivision (b)(5), as a device for directing the conduct of peace officers, could be better drafted. It seems to assume for instance that the peace officer will be outside the premises during the sale. However, as *Acapulco* notes, the section, while not so stating, must also mean "remain on the premises" since in some situations, like that in *Acapulco,* the officer is at all times on the premises. (See *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd., supra,* 67 Cal.App.4th at p. 581, 79 Cal.Rptr.2d 126.) Surely the section does not require an officer already present to leave and then, in some comic opera fashion, return. The use of the word "enter" seems to arise from an assumption concerning the usual mode of decoy buy operations, i.e., the officer remaining outside the premises while the sale is transacted. (See generally *id.* at p. 580, 79 Cal.Rptr.2d 126.)

We also note the language of Regulations section 141, subdivision (b)(5), gives direction to the officer, not the decoy. The section states: "the *peace officer* directing the decoy shall make a reasonable attempt to enter the licensed premises." (Italics added.) Nowhere does the section expressly direct reentry by the decoy once the decoy has exited the premises. The entry by the peace officer is in order to "have the minor decoy ... make a face to ***1697** face identification of the alleged seller." While the peace officer is directed to "have" a face-to-face identification, Regulations section 141, subdivision (b)(5), does not address the location or manner of such identification.

We conclude the language of Regulations section 141, subdivision (b)(5), only requires the peace officer to enter or remain on the premises *to arrange* a face-to-face identification. The literal terms of the section leave the location of the identification to the discretion of the peace officer. Given the variety of circumstances surrounding the sale of alcohol, such discretion is necessary. For example, an officer might conclude for his or her own safety or the safety of the decoy that the decoy should not reenter the premises. An officer might also defer to an owner's request that patrons not witness a public accusation.

The history of Regulations section 141, subdivision (b)(5), supports our interpretation of the language. Committee reports concerning Assembly Bill No. 3805 (1993–1994 Reg. Sess.) noted a conflict between alcoholic beverage retailers and city governments concerning the nature of decoy buy operation guidelines. Retailers sought strict and confining guidelines, while cities desired no regulation or at least more general and flexible guidelines. A central concern of the retailers was the claim that overzealous police departments intentionally used decoys who did not appear ****347** to be underage. (Assem. Comm. on Govern. Org., Bill Analysis of Assem. Bill No. 3805 (1993–1994 Reg. Sess.); Sen. Comm. on Govern. Org., Bill Analysis of Assem. Bill No. 3805 (1993–1994 Reg. Sess.); Sen. Jud. Comm. on Govern. Org., Bill Analysis of Assem. Bill No. 3805 (1993–1994 Reg. Sess.).)

The committee reports noted ABC already had nonbinding guidelines for conducting buy operations. Those guidelines suggested notifying retailers by mail or newspaper of possible buy operations, that the decoy be 18 or 19 years of age and appear to be well under 21 years of age, a male decoy should not be large in stature or have a beard or mustache, a female decoy should not use makeup or wear jewelry, the decoy should be viewed by an ABC investigator and photographed, busy sales hours be avoided and the decoy be kept under the constant surveillance of an officer. (Assem. Comm. on Govern. Org., Bill Analysis of Assem. Bill No. 3805 (1993–1994 Reg. Sess.); Sen. Comm. on Govern. Org., Bill Analysis of Assem. Bill No. 3805 (1993–1994 Reg. Sess.); Sen. Jud. Comm. on Govern. Org., Bill Analysis of Assem. Bill No. 3805 (1993–1994 Reg. Sess.).)

There is nothing in the language of the Regulations section 141, subdivision (b)(5), in the history of section 25658, subdivision (f), or in the ***1698** arguments advanced by the Appeals Board that suggest the section was written to require any particular kind of identification procedure except that it be face-to-face. There is no suggestion the section was promulgated to correct identification procedures which resulted in a history of misidentification of sellers. Indeed, there is no suggestion that correct identification of sellers by decoys presented any problem whatsoever.

We note that single person show-ups are not inherently unfair. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386, 269 Cal.Rptr. 447.) While an unduly suggestive one-person show-up is impermissible (*ibid.*), in the context of a decoy buy operations, there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

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We conclude that while the identification of the seller is of obvious importance, Regulations section 141, subdivision (b)(5), was primarily designed to deal with a different issue. The core rationale for the creation of binding sections concerning the conduct of buy operations was to allow such buys in a manner fair to sellers. Regulations section 141, subdivision (b)(1–3), requires that the decoy reasonably appear to be underage and act in a manner consistent with that appearance. Regulations section 141, subdivision (b)(5), ensures—admittedly not as artfully as it might—that the seller will be given the opportunity, soon after the sale, to come "face to face" with the decoy. For reasons left to the sound discretion of the peace officer alone, or in conjunction with the business owner, Regulations section 141, subdivision (b)(5), does not require the identification be done on the premises where the sale occurred. The officer in this case complied with the face-to-face confrontation requirements of Regulations section 141, subdivision (b)(5).

The decision of the Appeals Board is annulled. The matter is remanded to the Appeals Board for further proceedings consistent with this opinion reinstating the license suspension.

WE CONCUR: NARES, P.J., and McDONALD, J.

All Citations

109 Cal.App.4th 1687, 1 Cal.Rptr.3d 339, 03 Cal. Daily Op. Serv. 5755, 2003 Daily Journal D.A.R. 7295

TAB C

Footnotes

1 All further statutory references are to the Business and Professions Code unless otherwise specified.

2 Regulations section 141, subdivision (c), states: "Failure to comply with this section shall be a defense to any action brought pursuant to Business and Professions Code Section 25658."

3 There is no allegation the identification in this case was suggestive.

4 Section 25658, subdivision (f), states: "Persons under the age of 21 years may be used by peace officers in the enforcement of this section to apprehend licensees, or employees or agents of licensees, who sell alcoholic beverages to minors. Notwithstanding subdivision (b), any person under the age of 21 years who purchases or attempts to purchase any alcoholic beverage while under the direction of a peace officer is immune from prosecution for that purchase or attempt to purchase an alcoholic beverage. Guidelines with respect to the use of persons under the age of 21 years as decoys shall be adopted and published by the department in accordance with the sectionmaking portion of the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code). Law enforcement-initiated minor decoy programs in operation prior to the effective date of regulatory guidelines adopted by the department shall be authorized as long as the minor decoy displays to the seller of alcoholic beverages the appearance of a person under the age of 21 years. This subdivision shall not be construed to prevent the department from taking disciplinary action against a licensee who sells alcoholic beverages to a minor decoy prior to the department's final adoption of regulatory guidelines. After the completion of every minor decoy program performed under this subdivision, the law enforcement agency using the decoy shall notify licensees within 72 hours of the results of the program. When the use of a minor decoy results in the issuance of a citation, the notification required shall be given within 72 hours of the issuance of the citation. A law enforcement agency may comply with this requirement by leaving a written notice at the licensed premises addressed to the licensee, or by mailing a notice addressed to the licensee." As amended by Stats.1998, ch. 565, § 3; Stats.1999, ch. 786, § 1.

5 The *Acapulco* opinion states the officer "identified the decoy as the minor." (*Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd., supra,* 67 Cal.App.4th at p. 577, 79 Cal.Rptr.2d 126.) It is unclear whether the officer, when the decoy was no longer present, told the bartender the customer she just served

was underage or if, while the decoy was still at the bar, the officer pointed out the decoy and told the bartender the decoy was underage or made such identification when the decoy, while still in the room, was not face to face with the bartender.

End of Document

TAB C

Tab D CVS Garfield Beach

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Slides 12-14

CVS Garfield Beach explains that the decoy must answer questions about age truthfully, but the Board cannot transform a clerk statement into an added duty to correct.

Materials in this tab

- Garfield Beach CVS, LLC (2015) AB-9434
- Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (CVS Garfield Beach) (2017) 7 Cal.App.5th 628

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

AB-9434
File: 21-477914 Reg: 13079382

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9174
11411 Deerfield Drive, Truckee, CA 96161-0506,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: January 8, 2015
Sacramento, CA

ISSUED JANUARY 30, 2015

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Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9174 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for fifteen days for their clerk selling an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, through their counsel, Ralph Barat Saltsman and Margaret Warner Rose of the law firm of Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Kelly Vent.

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[1]The decision of the Department, dated April 23, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On October 21, 2013, the Department filed an accusation against appellants charging that, on June 3, 2013, appellants' clerk, Candice Lenihan (the clerk), sold an alcoholic beverage to eighteen-year-old Joseph Childers. Although not noted in the accusation, Childers was working as a minor decoy for the Department at the time.

At the administrative hearing held on February 6, 2014, documentary evidence was received and testimony concerning the sale was presented by Childers (the decoy). Appellants did not present any witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and proceeded immediately to the alcoholic beverage section. He selected a 24-ounce can of Corona beer and took it to the register where the clerk was working. The clerk scanned the beer and asked the decoy for identification. The decoy presented his California driver's license, and the clerk took possession of it. The clerk looked at the identification, tried to scan it, and then looked at it again. The clerk said something to the effect of, "I would never have guessed it. You must get asked a lot." The decoy said nothing in response. The clerk completed the sale and the decoy left the premises with the beer.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending rule 141(b)(4)[2] was violated. Also, on the date of the hearing for this appeal, appellants submitted to the Board a motion to

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[2]References 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.

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continue oral argument until such time as all three Board members could be present to hear it.

DISCUSSION

I

Appellants contend the decoy operation was not conducted in a fashion that promotes fairness, in violation of rule 141(a), because the decoy failed to speak up when the clerk said, "I would never have guessed it. You must get asked a lot." Appellants maintain this failure to speak violated rule 141(b)(4)[3] and that both the administrative law judge (ALJ) and the Department misapplied the standards set forth by previous decisions of this Board as to what constitutes compliance, or lack thereof, with the rule.

Rule 141(a) requires "fairness" in the use of minor decoys:

> A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors . . . and to reduce sales of alcoholic beverages to minors in a *fashion that promotes fairness*.

(Emphasis added.) The requirements of rule 141 must be strictly obeyed: "The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection for the licensees, the public, and the decoys themselves." (*Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126].)

In the Proposed Decision, the ALJ made the following observations about appellants' rule 141(b)(4) argument:

---

[3]Rule 141(b)(4) provides: "A decoy shall answer truthfully any questions about his or her age."

> The Appeals Board has ruled where there is a verbalization by the clerk expressing the mistaken notion that the decoy is 21 years or older, then a decoy has a duty to rectify the error in the interest of fairness. (Garfield Beach CVS, LLC and Longs Drug Stores California, LLC [(2013)] AB-9271.) Underpinning this holding, the Appeals Board noted that while Rule 141(b) (4) expressly requires a decoy to answer truthfully any *questions* about his or her age, there is no requirement for the decoy to volunteer his or her true age or "to clear up what may be a misconception about age where a seller is silent and simply goes ahead with the sale either without having requested proof of age or, upon request, having been provided identification." (Id.) The Appeals Board concluded by recognizing that since decoys are engaged in a law enforcement process designed to test the extent to which sellers are complying with laws pertaining to alcoholic beverage sales to minors, it would be "*unreasonable to expect that process to function if the decoy was obligated to clear up what might be a mistake or misconception on the part of the seller.*" [Citation.]
>
> The Court is reluctant to draw a distinction between verbal and non-verbal mistakes made by sellers about a decoy's age. One form of misconception about a buyer's age (verbal) should not invoke Rule 141(a) while another (non-verbal) does not. It is unreasonable to relieve a seller of alcoholic beverages from liability, who has been presented with unambiguous proof (Childers' CDL - State's Exhibit 3) of an underage buyer's age, because they verbalize their mistake or misconception while penalizing those purveyors that remain silent after receiving and reviewing bona fide evidence of a buyer's underage status.
>
> There was nothing inherently unfair about the fashion in which this decoy operation was conducted. The Respondent failed to establish an affirmative defense.

(Determination of Issues, emphasis in original.)

The Board is puzzled by some aspects of the ALJ's reasoning. For instance, the ALJ's analysis mentions the difference between verbal and non-verbal mistakes and the Board's supposed reluctance to afford much weight to it. But *Garfield Beach*, s*upra*, the opinion of this Board relied upon by the ALJ, makes clear that the distinction

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between verbal and non-verbal mistakes is critical in cases such as this.[4]

The Southland Corp./Dandona (1999) AB-7099 reversed a decision of the Department where the decoy did not respond to the clerk's remark, "1978. You're 21." The decoy testified she understood the clerk's remark to be a statement rather than a question, but also testified that she had been instructed by the police that if she presented her driver's license, she did not have to answer a question about her age. (*Id*. at pp. 4-6.) The Board observed:

> It is clear from the testimony of the decoy that it would have meant little to her whether [the clerk's] remark was a question or a statement . . . . Consequently, to accept her after-the-fact characterization of the clerk's remark as a mere statement is too charitable. There can be a very fine line between a remark that is a mere statement and a remark that is really a question. Delegating that determination to one who believed she should not have answered in either case tacitly ignores the requirement of fairness.

(*Id*. at pp. 7-8.)

In *Lucky Stores, Inc*. (1999) AB-7227, cited extensively by appellants, the Board reversed a decision of the Department where the decoy made no response when the clerk said, "1978. You are just 21" (per the decoy) or "1978. You are 21" (per the clerk). The clerk testified he intended what he said to be a question, and got only a grin in response, while the decoy testified he understood it to be a statement, to which no reply was necessary. (*Id*. at p. 4.) The Board stated:

> Our concern is that it is asking too much of a decoy to leave it to him or to her to make that critical judgment whether a remark about age is intended to elicit from them either a confirmation or a correction, or is

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[4]There, the Board observed that while there is nothing in rule 141(b)(4) that requires a decoy to clear up what may be a misconception about his or her age when a clerk simply remains silent and completes the sale, "where there has been a verbalization of the seller's thought processes . . . a decoy may be expected to respond." (*Garfield Beach*, *supra*, at pp. 4-5.)

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> simply conversation. If fairness of the decoy operation is an important goal, as the Rule proclaims, then, in its implementation, it ought to be the case that where the clerk's remark about age is such that an honest clarification from the decoy may prevent the sale from occurring, the decoy has the obligation to offer such clarification by saying "No, I am not 21," or words to that effect.

(*Id*. at p. 6.)

Next, in *Equilon Enterprises, LLC* (2002) AB-7845, the Board reversed a decision of the Department where the decoy remained silent after the clerk examined the decoy's driver's license, which showed he would be 21 in 2003, and said, "Born in 1981. You check out okay." The Board explained why it thought the decision merited reversal:

> Rule 141 requires that a decoy shall answer truthfully questions about his or her age. There is nothing in the rule that requires a decoy to volunteer information about his or her age, or to clear up what may be a misconception about age when a seller is silent and simply goes ahead with the sale either without having requested proof of age or, upon request, having been provided identification. Since a decoy is engaged in a law enforcement process to determine the extent to which sellers are complying with the law regarding sales of alcoholic beverages to minors, it would seem unreasonable to expect that process to function if the decoy was obligated to clear up what might be a mistake or misconception on the part of the seller.
>
> For example, many transactions involve a seller who requested identification, was furnished identification which showed the decoy to be a minor, yet proceeded with the sale. It could reasonably be assumed the seller was careless, or unable to interpret the information provided. It might also be assumed the seller did not really care, although this is undoubtedly much less frequent.
>
> However, where there has been a verbalization of the seller's thought processes such as that in this case a decoy may be expected to respond. Rule 141 says that a decoy is required to respond to a question. As this Board has said in an earlier case, there may be a thin line between what is a statement and what is a question. And when that line blurs, and the verbalization borders on the ambiguous, it may well be that a response is required.

(*Id*. at p. 5.)

As mentioned, *Garfield Beach*, *supra*, a case similar to *Lucky Stores*, found that where there is a verbalization by a clerk or employee expressing the mistaken notion that the decoy is over 21, the decoy has a duty to respond in the interest of fairness. In that case, the clerk said "I know you are over 21 and this is only for the cameras," and the decoy said nothing in response. (*Id*. at p. 2.) In both *Lucky Stores* and *Garfield Beach*, the clerk uttered words which clearly expressed that a mistaken calculation had been made. Even though both cases involved statements and not questions, the Board found that a response by the decoy was required in the interest of fairness.

Within the past year this Board considered a case in which the clerk stated "Oh, you are so young" and received only a nod and a slight light laugh from the decoy in response. (*7-Eleven, Inc./Johal Stores, Inc.* (2014) AB-9403.) Although we determined that rule 141(b)(4) had not been violated, we surveyed the above line of cases and determined "[i]t is apparent from the Board's prior cases involving this rule, that it considers an appropriate response — whether to a statement or a question by a clerk — to be one which is free of ambiguity, unlikely to cause confusion or distraction, and which *errs on the side of responding if the clerk has made a mistaken calculation as to age*." (*Id*. at pp. 11-12, emphasis added.)

Viewing the instant case through the lens established by this Board's precedent, we find this is an instance where the clerk's mistaken thought process has been verbalized, thereby requiring a response from the decoy. Here, the clerk said: "I would never have guessed it. You must get asked a lot." (RT at p. 18.) Obviously, this case is

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markedly different from cases such as *Lucky Stores*[5] and *Garfield Beach*,[6] *supra*, where the mistake concerning the decoy's age was explicit in the clerks' respective comments. However, while this clerk's comments did not *explicitly* reveal her mistake, *implicit* in them was the notion that she had made such a mistake.

The most reasonable interpretation of the phrase "I would never have guessed it," as used in this context,[7] is that the clerk was telling the decoy, because he looked so young, she was surprised that he was of the appropriate age to purchase alcoholic beverages. Her subsequent comment "You must get asked a lot" is indicative that she believed her mistake — that the decoy was at least 21 years old but looked younger — must have been a common one. This commonsense interpretation of the clerk's comments is buttressed by the decoy's testimony concerning his own interpretation:

> MS. CARR (counsel for appellant): Of course. What -- after the clerk made that statement to you, what did you take that statement to mean?
>
> A. Casual conversation.
>
> Q. And that casual conversation did you see it related in any way to your age?
>
> A. Yes and no.
>
> Q. When you say "Yes and no," what do you mean?
>
> A. Yes, that maybe *I looked younger*. No, because *she thought I was older* or thought that I do it a lot, you know.

(RT at p. 19, emphasis added.)

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[5]"1978. You are just 21" or "1978. You are 21." (*Lucky Stores*, *supra*, at p. 4.)

[6]"I know you are over 21 and this is only for the cameras." (*Garfield Beach*, *supra*, at p. 2.)

[7]This context being that the seller of alcoholic beverages has requested proof of majority from the buyer, has both received and reviewed identification provided by the buyer in response, and has then completed the sale.

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When the decoy believes, as here, that a clerk's remarks are ambiguous as to his or her age, the decoy has an obligation to respond verbally and truthfully. That is the plain meaning of rule 141(a)'s language instructing that minor decoy operations must be conducted in a "*fashion that promotes fairness*." Implicit in the clerk's remarks here is the mistaken notion that the decoy was old enough to purchase alcoholic beverages. This is therefore a case where the seller's remark was such that an honest clarification from the decoy may have prevented the sale from occurring, and thus, in the interest of fairness, the decoy had an obligation to offer such clarification. (See *Lucky Stores*, *supra*, at p. 6; *Garfield Beach*, *supra*, at pp. 4-5.) We accordingly reverse the decision of the Department.

On a final note, we observe that this case lies remarkably close to the line where a decoy's duty to clarify a clerk's mistake concerning his or her age arises. We do not intend to impose on minor decoys the obligation to make a split-second, critical judgment whether a remark about age is intended to elicit from them either a confirmation or a correction, or is simply conversation. That said, we firmly believe that the Department itself is in the best position to eradicate the need for such an obligation via proper training of its minor decoys. Where, as here, the decoy him or herself interprets a seller's comments to *in any way* pertain to the decoy's age, the Department should insist that the decoy err on the side of responding with clarification. (See *Johal*, *supra*, at pp. 4-5.) Such a protocol would promote fairness in the spirit of rule 141(a) because an otherwise diligent seller would no doubt refuse to complete the transaction upon realizing the decoy's true age, whereas it can reasonably be inferred that a seller who proceeds with the sale after receiving such clarification has done so intentionally,

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and is therefore properly subject to discipline. As such, we encourage the Department to train its decoys accordingly respecting the meaning and application of rule 141a).

II

In their motion for a continuance, appellants contend that, because Article XX of the California Constitution states that the Alcoholic Beverage Control Appeals Board shall consist of three members, oral argument on this matter should be continued until such time as all three Board members would be present. The Board explained to appellant's counsel that it would proceed to hear the matter as the presence of two members constituted a quorum, but if in the deliberations there was a difference of opinion between the members present as to the proper disposition of the case, we would reset it for reconsideration and hearing (unless waived) when all members could be present. Accordingly, we denied the motion, but, to avoid a party making future motions on this same reasoning, further clarify our reasons and authority for denying it.

There is nothing in the language of the California Constitution creating the Appeals Board or in the legislation implementing its provisions that addresses the question of whether the Board may hear and decide an appeal when it does not have a full complement of members. Similarly, there is no general statutory provision applicable to the Board or other administrative agencies, and our research has not disclosed any California case law addressing the subject. While some California administrative agencies are governed by statute as to what constitutes a quorum for conducting business, (see, e.g., Bus. & Prof. Code § 5524 [California Architects Board]; Bus. & Prof. Code § 8524 [Structural Pest Control Board]), the Appeals Board is not one of them.

However, authorities from courts of other jurisdictions, relying on common law, support the Board's long-standing practice of deciding cases when a simple majority of the three-member Board is present for oral argument. (See, e.g., *Fed. Trade Comm. v. Flotill Prods., Inc.* (1967) 389 U.S. 179, 183-184 [88 S.Ct. 401] ("[I]n the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to that common-law rule."). See also *Ho Chong Tsao v. Immigration & Naturalization Service* (5th Cir. 1976) 538 F.2d 667, 669. Until such time as an appellant provides us with persuasive law to the contrary, or a reviewing court or the California Legislature holds otherwise, our position stands.

ORDER

The decision of the Department is reversed.[8]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[8]This 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 is 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.

7 Cal.App.5th 628
Court of Appeal, Third District, California.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Petitioner,
v.
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, Respondent;
Garfield Beach CVS, LLC et al., Real Parties in Interest.

C078574
|
Filed 1/17/2017

Synopsis

Background: Department of Alcoholic Beverage Control appealed decision of the Alcoholic Beverage Control Appeals Board, No. AB9434, which reversed suspension of store's off-sale general license for selling alcohol to a minor decoy.

Holdings: The Court of Appeal, Hoch, J., held that:

Alcoholic Beverage Control rule which required that minor decoys "truthfully answer any questions about his or her age," did not require minor decoy to truthfully respond to clerk's statement, after looking at driver's license, that "I would not have guessed it, you must get asked a lot," as rule only required decoys to answer questions, and

rule did not impose affirmative duty on minor decoy to speak up in order to clarify any mistake regarding age articulated by sales clerk.

Annulled; reinstated and remanded.

****132** ORIGINAL PROCEEDING: Petition for writ of review. Petition granted. Alcoholic Beverage Control Appeals Board No. AB9434.

Attorneys and Law Firms

Kamala D. Harris, Attorney General, Alicia M.B. Fowler, Assistant Attorney General, Peter D. Halloran and Lauren Sible, Deputy Attorneys General for Petitioner.

Linda A. Mathes, Sarah M. Smith, John D. Ziegler for Respondent Alcoholic Beverage Control Appeals Board.

****133** Solomon, Saltsman & Jamieson, Stephen Warren Solomon, Ralph Barat Saltsman, Stephen Allen Jamieson, R. Bruce Evans, Ryan M. Kroll, Jennifer L. Oden, Los Angeles, and Margaret Warner Rose for Real Parties in Interest.

Opinion

HOCH, J.

***630** California Constitution, article XX, section 22, prohibits the sale of alcoholic beverages to persons under 21 years of age. (See also Bus. & Prof. Code, § 25658, subd. (a)),[1] [making it a misdemeanor to sell alcohol to a person under 21 years of age]. Here, the Department of Alcoholic Beverage ***631** Control (Department) issued a 15–day suspension of an off-sale general license held by the Garfield Beach CVS LLC Longs Drug Stores California LLC, doing business as CVS Pharmacy Store 9174 (CVS) after an administrative law judge found the store clerk sold alcohol to a minor decoy.[2] The Alcoholic Beverage Control Appeals Board (Appeals Board) reversed the suspension based on California Code of Regulations, title 4, section 141 (Rule 141), which allows a law enforcement agency to use an underage decoy only "in a 'fashion that promotes fairness.' (*Id.*, subd. (a).) In the Appeals Board's view, the suspension was unfair because the minor decoy did not respond about his age when the store clerk looked at his driver license and remarked, "I would never have guessed it, you must get asked a lot." To challenge the reversal of the license suspension, the Department petitioned for a writ of review in this court. (§ 23090.)

The Department contends it correctly interprets Rule 141 to require minor decoys to answer only questions about their ages. Based on the administrative law judge's finding in this case that the store clerk's remark constituted a statement rather than a question, the Department argues its decision was legally correct and supported by substantial evidence. The Appeals Board counters Rule 141 is ambiguous and results "in confusion and manifest unfairness." CVS argues the Department's interpretation of Rule 141 unfairly allows decoys to remain silent in the face of mistaken statements about age. According to CVS, affirming the license suspension would allow deceptive and misleading silence in the face of a store clerk's explicit mistake about the minor decoy's age.

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We conclude Rule 141 is not ambiguous in requiring minor decoys to answer truthfully only questions about their ages. Because substantial evidence supports the administrative law judge's factual finding the decoy in this case was not questioned about his age, we determine as a matter of law that Rule 141 does not provide CVS with a defense to the accusation it sold an alcoholic beverage to an underage buyer. Accordingly, we annul the Appeals Board's decision.

BACKGROUND

The Department's Imposition of a 15–day License Suspension

In October 2013, the Department accused CVS of selling alcohol to an underage person at its Garfield Beach store. An administrative hearing was ***632** held in February 2014, in which the administrative law judge made the following findings of fact:

CVS has held an off-sale general license to sell alcohol since June 2009, with no prior record of discipline by the Department. On June 3, 2013, Joseph Childers was 18 years old and had the appearance and mannerisms of a person under the age of 21. On that date, Childers accompanied ****134** Department agents and law enforcement officers to conduct an alcoholic beverage decoy operation at the Garfield Beach CVS store. Childers entered the store at 2:30 p.m., went to the beer cooler where he selected a 24–ounce bottle of beer, and took the beer to the checkout line. The CVS store clerk scanned the bottle of beer and asked Childers for identification. Childers handed his California driver license to the clerk. The driver license indicated Childers's date of birth and had a red stripe with white letters that stated, “AGE 21 IN 2015.” In addition, the driver license had a blue stripe with white letters that stated, “PROVISIONAL UNTIL AGE 18 IN 2012.”

The administrative law judge made the following factual findings: “The clerk looked at Childers's [driver license], tried to scan it, and looked at the [license] again. She then stated, ‘I would never have guessed it, you must get asked a lot,’ or words to that effect. The clerk's remark was framed as a statement not a question. The decoy did not say anything to the clerk in response to her remark. He thought the clerk's statement was ‘casual conversation.’ The decoy also testified the statement might or might not have been related to his age. Thus, in his mind it was unclear what the clerk meant by her statement. [¶] The clerk sold Childers the 24-ounce bottle of Corona beer. At no time during the transaction did the clerk ask Childers how old he was or his age. Following the sale of the beer, the decoy exited the premises.” The administrative law judge found Childers's testimony at the hearing to be clear, concise, and credible. On this basis, the administrative law judge decided there was cause to suspend CVS's off-sale general license for 15 days.

In April 2014, the Department adopted the administrative law judge's proposed decision as its decision in this case. CVS appealed the decision to the Appeals Board.

The Appeals Board's Reversal of License Suspension

In January 2015, the Appeals Board issued its decision. The Appeals Board's decision relied upon its prior decision to conclude Rule 141 required the decoy to respond to the store clerk's statement upon looking at his driver license. The Appeals Board's decision emphasized the following testimony by the decoy at the administrative hearing:

***633** “[Counsel for CVS]: [A]fter the clerk made that statement to you, what did you take that statement to mean?

“A. [Childers]: Casual conversation.

“Q. And [in] that casual conversation did you see it related in any way to your age?

“A. Yes and no.

“Q. When you say ‘Yes and no,’ what do you mean?

“A. Yes, that maybe *I looked younger*. No, because she *thought I was older* or thought that I do it a lot, you know.”

The Appeals Board reasoned that “[w]hen the decoy believes, as here, that a clerk's remarks are ambiguous as to his or her age, the decoy has an obligation to respond verbally and truthfully. That is the plain meaning of rule 141(a)'s language instructing that minor decoy operations must be conducted in a ‘fashion that promotes fairness.’ ” (Italics omitted.) The Appeals Board further stated that whenever “the decoy him or herself interprets a seller's comments to *in any way* pertain to the decoy's age, the Department should insist that decoy err on the side of responding with clarification.” On these grounds,

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the Appeals Board reversed the Department's decision and rescinded the ****135** suspension of CVS's off-sale general license.

Petition for Writ of Review

In February 2015, the Department filed in this court a petition for writ of review from the decision of the Appeals Board. We issued a writ of review in March 2015. (§ 23090.)

DISCUSSION

I

Standard of Review

In addition to prohibiting the sale of alcohol to minors, the California Constitution "vests the Department with broad discretion to revoke or suspend liquor licenses 'for good cause' if continuing the license would be 'contrary to public welfare or morals.' (Cal. Const., art. XX, § 22.) In the ***634** absence of a clear abuse of discretion, the courts will uphold the Department's decision to suspend a license for violation of the liquor laws. (E.g., *Martin v. Alcoholic Bev. etc. Appeals Bd*. (1959) 52 Cal.2d 238, 248–249 [340 P.2d 1].)" (*Provigo Corp. v. Alcoholic Beverage Control Appeals Bd*. (1994) 7 Cal.4th 561, 566, 28 Cal.Rptr.2d 638, 869 P.2d 1163 (*Provigo*).) " 'The administration of the Alcoholic Beverage Control Act, within the scope of the purposes of that act, is initially vested in the department. Its decisions, however, are subject to administrative review by the board and a final order of the board is, in turn, subject to judicial review.' " (*Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094, 1099, 121 Cal.Rptr.2d 758, quoting *Walsh v. Kirby* (1974) 13 Cal.3d 95, 102, 118 Cal.Rptr. 1, 529 P.2d 33.)

The scope of review of the Department's decisions is the same in the Appeals Board and this court. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1071, 123 Cal.Rptr.2d 278 (*Deleuze*).) Section 23090.2 provides that review "shall not extend further than to determine, based on the whole record of the department as certified by the board, whether: [¶] (a) The department has proceeded without or in excess of its jurisdiction. [¶] (b) The department has proceeded in the manner required by law. [¶] (c) The decision of the department is supported by the findings. [¶] (d) The findings in the department's decision are supported by substantial evidence in the light of the whole record. [¶] (e) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department." Section 23090.2 also excludes the power to make findings of fact from the scope of review. (*Ibid.*)

In conducting our review, " '[w]e defer to the Department's interpretation of its own rules, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.' (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 [78 Cal.Rptr.2d 1, 960 P.2d 1031], (*Yamaha Corp*.).) Courts generally will not depart from the Department's contemporaneous construction of a rule enforced by the Department unless such interpretation is clearly erroneous or unauthorized. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2003) 109 Cal.App.4th 1687, 1696 [1 Cal.Rptr.3d 339] ....)" (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 128 Cal.App.4th 1195, 1205, 27 Cal.Rptr.3d 766.) In short, the Department's decisions are ****136** "subject to review only for insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion." (*Deleuze*, at p. 1072, 123 Cal.Rptr.2d 278.)

***635** II

Rule 141

The Department contends it correctly rejected CVS's reliance on Rule 141 as providing a defense to its sale of alcohol to the underage decoy in this case. We agree.

A.

The Department's Reliance on Minor Decoys

The Department relies on minor decoy operations as an integral part of its enforcement of the constitutional and statutory prohibitions on sales of alcohol to persons under 21 years of age. (Cal. Const., art. XX, § 22; § 25658, subd. (a).) The California Supreme Court has approved

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of the practice, noting that "[t]he use of underage decoys to enforce laws against unlawful sales to minors clearly *promotes* rather than hinders" the California constitutional and statutory prohibitions on sales of alcoholic beverages to minors. (*Provigo*, *supra*, 7 Cal.4th at p. 567, 28 Cal.Rptr.2d 638, 869 P.2d 1163.)

The Business and Professions Code provides that "[p]ersons under 21 years of age may be used by peace officers in the enforcement of this section to apprehend licensees, or employees or agents of licensees, or other persons who sell or furnish alcoholic beverages to minors." (§ 25658, subd. (f).) In pertinent part, subdivision (f) of section 25658 further provides: "Guidelines with respect to the use of persons under 21 years of age as decoys shall be adopted and published by the department in accordance with the rulemaking portion of the Administrative Procedure Act ...." To comply with subdivision (f) of section 25658, the Department promulgated Rule 141. (*Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 579, 79 Cal.Rptr.2d 126 (*Acapulco Restaurants*).) In its entirety, Rule 141 states:

"(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

"(b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage: [¶] (1) At the time of the operation, the decoy shall be less than 20 years of age; [¶] (2) The decoy ***636** 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; [¶] (3) A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages; [¶] (4) *A decoy shall answer truthfully any questions about his or her age*; [¶] (5) 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.

****137** "(c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658." (Italics added.)

B.

Availability of the Rule 141 Defense

The Appeals Board contends subdivision (b)(4) of Rule 141 required the minor decoy in this case to truthfully respond to the clerk's statement, "I would never have guessed it, you must get asked a lot." Similarly, CVS argues the minor decoy's lack of response violated Rule 141 and provided a defense to the Department's accusation. The Department counters by noting the administrative law judge made the factual finding that the CVS clerk's words to the minor decoy constituted a statement rather than a question. On this basis, the Department argues the defense supplied by Rule 141 does not apply here. Resolving these contentions requires us to construe the meaning of Rule 141.

As this court has previously explained, "Generally, the same rules governing the construction and interpretation of statutes apply to the construction and interpretation of administrative regulations. (*In re Richards* (1993) 16 Cal.App.4th 93, 97–98, 19 Cal.Rptr.2d 797.) Accordingly, ' "we begin with the fundamental rule that a court should ascertain the intent of the Legislature so as to effectuate the purpose of the law." ' [Citations.] 'An equally basic rule of statutory construction is, however, that courts are bound to give effect to statutes according to the usual, ordinary import of the language employed in framing them.' [Citations.] Although a court may properly rely on extrinsic aids, it should first turn to the words of the statute to determine the intent of the Legislature. [Citations.] 'If the words of the statute are clear, the court should not add to or alter them to accomplish a ***637** purpose that does not appear on the face of the statute or from its legislative history.' (*California Teachers Assn. v. San Diego Community College Dist*. (1981) 28 Cal.3d 692, 698 [170 Cal.Rptr. 817, 621 P.2d 856].)" (*Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1710–1711, 42 Cal.Rptr.2d 172.) " 'The construction of an administrative regulation and its application to a given set of facts are matters of law.' " (*Ibid.*, quoting *Auchmoody v. 911 Emergency Services* (1989) 214 Cal.App.3d 1510, 1517, 263 Cal.Rptr. 278.)

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In enacting the Alcoholic Beverage Control Act (Act) (§ 23000 et seq.), the Legislature declared the Act "involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people." (§ 23001.) The Act establishes the Department "to provide a governmental organization which will ensure a strict, honest, impartial, and uniform administration and enforcement of the liquor laws throughout the State." (§ 23049.) To that end, section 23001 declares that "[a]ll provisions of this division shall be liberally construed for the accomplishment of these purposes."

Rule 141, subdivision (b)(4) provides that "[a] decoy shall answer truthfully any questions about his or her age." The Rule's guidance is clear and unambiguous. Minor decoys do not need to respond to *statements* of any kind nor do they need to respond truthfully to *questions* other than those concerning their ages. Thus, Rule 141 does not require minor decoys to correct mistakes articulated by licensed alcohol sellers. Instead, the minor decoys need to respond truthfully only to questions about their ages. In short, Rule 141 sets forth clear, unambiguous, and fair guidance for minor decoys to follow during the Department's operations. Consequently, the Department properly construed the ****138** plain language of Rule 141 in determining the minor decoy in this case was not required to respond to the clerk's statement that might have related to the decoy's age.

The Appeals Board disagrees with the Department's plain-meaning interpretation of Rule 141, asserting the Rule is ambiguous and unfair. The Appeals Board argues that "the language of Rule 141[(b)(4)] is ambiguous, and decoys lack the expertise to make a fair decision about whether a clerk's words are a 'question' 'about his or her age.' " The Appeals Board bases its argument on the assertion that "[t]he word 'question' is, especially when uttered vocally as opposed to being written, not free from doubt." In support, the Appeals Board argues the ambiguity of the word "question" is demonstrated by the need for an evidentiary hearing to determine the nature of the store clerk's communication to the minor decoy. We reject the argument.

Courts have long resolved factual issues concerning whether a spoken communication constitutes a question that invited an answer. In ***638** *Rhode Island v. Innis* (1980) 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297, the United States Supreme Court articulated a test for determining when *Miranda* advisements must be given to a suspect that "come[s] into play whenever a person in custody is subjected to either express questioning or its functional equivalent." (*Id.* at pp. 300–301, 100 S.Ct. 1682.) The test under *Rhode Island v. Innis* requires that police officers understand not only whether they are engaging in "express questioning," but also when their words or actions "are reasonably likely to elicit an incriminating response from the suspect." (*Id.* at p. 301, 100 S.Ct. 1682. fn. omitted.) The United States Supreme Court's decision establishes the unproblematic nature of distinguishing between oral communications constituting questions (and even their functional equivalents) and statements not reasonably likely to elicit an incriminating answer. Courts even require law enforcement officers to distinguish between suggestive and nonsuggestive questions. (*People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1590, 62 Cal.Rptr.3d 418.) Here, the determination required of minor decoys is more clear than the *Rhode Island v. Innis* test or the distinction between suggestive and nonsuggestive questions because subdivision (b)(4) of Rule 141 applies *only* to questions relating to age. "Question" is not an ambiguous term and does not lead to confusion in limiting spoken communications to those involving inquiries that contemplate answers.

We also reject the Appeals Board's contention Rule 141 is ambiguous because "no definition is provided as to what 'fairness' means or how it is to be determined." The lack of a definition of fairness, by itself, does not render Rule 141 ambiguous. (Cf. *Nava v. Mercury Cas. Co*. (2004) 118 Cal.App.4th 803, 805, 13 Cal.Rptr.3d 816 [lack of definition does not render a term ambiguous].) Contrary to the Appeals Board's contention, Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141, subd. (b)(1)-(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation. ****139** (*Acapulco Restaurants, supra,* 67 Cal.App.4th at p. 580, 79 Cal.Rptr.2d 126.) Consequently, Rule 141's use of the word "fairness" does not render the rule ambiguous or confusing.

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In support of the Appeals Board's argument Rule 141 is ambiguous regarding what constitutes fairness, it points to its earlier decisions in *7–Eleven, Inc. & Johal Stores, Inc.* (Oct. 1, 2014) AB–9403 (*7–Eleven*), *Equilon Enterprises, LLC* (July 26, 2002) AB–7845 (*Equilon*), *Lucky Stores, Inc*. (Oct. 13, 1999) AB–7227 (*Lucky*), *Southland Corp. & Dandona* (Apr. ***639** 16, 1999) AB–7099 (*Southland*), and *Thrifty Payless, Inc*. (Dec. 30, 1998) AB–7050 (*Thrifty*). We may take judicial notice of decisions of the Appeals Board. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2005) 128 Cal.App.4th 1195, 1208, fn. 5, 27 Cal.Rptr.3d 766; accord *Reimel v. Alcoholic Beverage Control Appeals Bd*. (1967) 254 Cal.App.2d 340, 62 Cal.Rptr. 54.) Thus, although we are not bound by the Appeals Board's decisions, we take judicial notice of the cited decisions and consider their reasoning for persuasive value.

Regarding agency decisions, the California Supreme Court has noted that "[w]here the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. [Citation.] Considered alone and apart from the context and circumstances that produce them, agency interpretations are not binding or necessarily even authoritative." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7–8, 78 Cal.Rptr.2d 1, 960 P.2d 1031.) Based on our review, we conclude the Appeals Board's cited decisions vary in their persuasiveness and fidelity to Rule 141.

In *7–Eleven*, *supra,* AB–9403, the Appeals Board affirmed the suspension of an off-sale license based on sale to a minor decoy after the store clerk looked at the minor decoy's identification and stated, "oh, you are so young." (*7–Eleven*, at pp. 2, 14.) In affirming the suspension, the Appeals Board concluded the minor decoy was not required to respond because the store clerk did not ask a question or indicate a mistake as to the minor decoy's age. The Appeals Board reasoned that "[t]he wor[d] 'young' is a subjective term, and gives no indication that the clerk has made a miscalculation and as a result believes the decoy to be over 21" years of age. (*Id.* at p. 12.) Under the reasoning of *7–Eleven*, the Appeals Board should have affirmed the license suspension in this case as well. Here, the administrative law judge found the store clerk did not ask a question of the minor decoy. And the store clerk did not clearly demonstrate confusion as to the minor's age in the statement, "I would never have guessed it, you must get asked a lot." The minor decoy testified he thought the statement might mean either that "she thought I was older *or thought that I do it a lot* ...." (Italics added.) Because the store clerk in this case made a statement akin to that in *7–Eleven*, the reasoning employed in *7–Eleven* should have led the Appeals Board to affirm the Department's decision.

We reject the reasoning contained in the remainder of the Appeals Board's earlier decisions because the reasoning in each would require minor decoys to speak up to clarify any mistake about their ages even in the absence of a question. (*Equilon,* supra, AB-7845, at p. 2 [concluding Rule 141 "was ***640** violated when the decoy failed to respond to a statement by the clerk which implied that she was 21 years of age or older"], *Lucky*, supra, AB-7227, at p. 4 [same where minor decoy did not respond to mistaken statement, "1978. You are 21"], and *Southland*, supra, AB-7099, at pp. 6, 7 [same where decoy did not respond to statement, "You are 21"]. In each of these decisions, ****140** the Appeals Board relied on the notion of fairness to craft a new requirement for Rule 141, namely the obligation of a minor decoy to respond to any indication of mistake regarding age even in the absence of a question. Rule 141, however, expressly requires minor decoys only to answer questions relating to their ages. (Rule 141, subd. (b)(4).) The Appeals Board lacks the power to add a new defense to Rule 141.

The Appeals Board's decision in *Thrifty, supra,* AB–7050 involved a reversal of the Board's decision based on the minor decoy's silent tendering of a driver license rather than answering the clerk's question about her age. (See *Thrifty*, at p. 6 [speculating about the minor decoy's motivation in offering her identification rather than answering about her age].) Unlike this case, *Thrifty* involved an actual question by the clerk about the minor decoy's age and is therefore inapposite in this case where the administrative law judge determined the clerk did not ask any questions. (*Id.* at pp. 5–6.) Consequently, we need not consider whether *Thrifty* was correctly decided in harmony with Rule 141.

Ultimately, we are not persuaded by the Appeals Board's prior decisions that Rule 141 is ambiguous in requiring decoys to answer truthfully only questions relating to their ages.

Next, the Appeals Board argues the principle of fairness upon which Rule 141 is founded imposes an affirmative duty on minor decoys to speak up in order to clarify any mistake regarding age articulated by the vendor. If the Department had wanted to provide license holders with a defense for mistakes about a minor decoy's age or based on a minor decoy's failure

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to respond to a statement by the clerk, the Department could have done so by including express language to that effect in Rule 141. However, as we explained above, the language of Rule 141 requires minor decoys to respond only to questions about their ages. We reject the Appeals Board's attempt to add a new defense to Rule 141 that is not expressed in the rule. (*Acapulco Restaurants*, *supra*, 67 Cal.App.4th at p. 580, 79 Cal.Rptr.2d 126.)

Acapulco Restaurants involved a minor decoy operation in which the Department did not comply with Rule 141's requirement the minor decoy make a face-to-face identification of the clerk who sold the alcoholic beverage. (Acapulco Restaurants, supra, 67 Cal.App.4th at p. 577, 79 Cal.Rptr.2d 126; see also Rule 141, subd. (b)(5).) Despite the failure to follow this express requirement ***641** of Rule 141, the Department imposed and the Appeals Board affirmed a 15–day license suspension on grounds a law enforcement officer witnessed the entire transaction. (*Acapulco Restaurants,* at p. 577, 79 Cal.Rptr.2d 126.) However, the *Acapulco Restaurants* court reversed, explaining, "[t]o ignore a rule and the defense that arises from law enforcement's failure to comply with that rule is not a matter of 'interpretation.' What the Department has done is to unilaterally decide that rule 141[ ](b)(5) applies in some situations but not others, a decision that exceeds the Department's power. By its refusal to apply rule 141[ ](b)(5) when a police officer is present at the time of the sale, the Department has crossed the line separating the interpretation of a word or phrase on one side to the legislation of a different rule on the other, thereby substituting its judgment for that of the rulemaking authority. It might as well have said that rule 141[ ](b)(5) applies on Mondays but not Thursdays." (*Acapulco Restaurants*, *supra*, 67 Cal.App.4th at p. 580, 79 Cal.Rptr.2d 126.)

The result in *Acapulco Restaurants* followed the well-established rule that " '[a]n exception to a statute is to be narrowly construed. (Citation.) When a statute specifies an exception, no others ****141** may be added under the guise of judicial construction. (Citations.)' " (*Kirby v. Alcoholic Beverage Control Appeals Bd*. (1968) 267 Cal.App.2d 895, 898, 73 Cal.Rptr. 352, quoting *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181, 189, 67 Cal.Rptr. 734.) Fairness does not require the new exception to be judicially grafted into Rule 141 to provide additional defenses that require a minor decoy to speak up in the absence of a question by the store clerk. As the California Supreme Court has noted, "licensees have a ready means of protecting themselves from liability by simply asking any purchasers who could possibly be minors to produce bona fide evidence of their age and identity." (*Provigo*, *supra*, 7 Cal.4th at p. 570, 28 Cal.Rptr.2d 638, 869 P.2d 1163.)

Likewise, we reject the argument made by CVS that the minor decoy's silence in response the clerk's statement about his youthful appearance was "deceptive and misleading." As this court has previously noted in a case involving a claim a governmental agency engaged in fraudulent concealment, "Courts uniformly distinguish between the misleading half-truth, or partial disclosure, and the case in which defendant says nothing at all. The general rule is that silence alone is not actionable." (*Wiechmann Engineers v. State of California ex rel. Dept. Pub. Wks.* (1973) 31 Cal.App.3d 741, 751, 107 Cal.Rptr. 529.)

Here, the minor decoy did not say anything untrue. To the contrary, the minor decoy presented accurate information in the form of his driver license. Thus, the minor decoy did not engage in deceptive and misleading communication with the clerk. Notably, the California Supreme Court has rejected a claim the use of a "mature-looking" decoy constitutes an unfair practice by ***642** the Department in a case in which a minor decoy "simply bought beer and wine, *without attempting to pressure or encourage the sales in any way*." (*Provigo*, *supra*, 7 Cal.4th at p. 569, 28 Cal.Rptr.2d 638, 869 P.2d 1163, italics added.) The same reason applies here. The minor decoy's silence in this case did not involve any attempt to pressure or encourage the sale of an alcoholic beverage to him. The minor decoy's silence did not render the Department's operation unfair.

CVS's argument its clerk was deceived and misled by the minor decoy in this case is based on the same premise as that advanced by the Appeals Board, namely a minor decoy has a duty to speak up in response to a statement indicating a mistaken calculation of age. However, as we have explained, Rule 141 does not supply a defense based on a minor decoy's failure to respond to statements made by the clerk. Consequently, we conclude the Department properly rejected CVS's argument the minor decoy's silence rendered the operation unfair under Rule 141.

C.

Substantial Evidence Supports the Department's Decision

As part of its argument Rule 141 is ambiguous, the Appeals Board asserts the minor decoy's testimony during the hearing was equally uncertain. Specifically, the Appeals Board asserts that "[t]he decoy's testimony is as ambiguous as [Rule 141], and certainly does not support the conclusion, reached by the Department, that the clerk's words were '[i]ndisputably a statement' falling outside the Rule." In light of the administrative law judge's factual finding, we disagree.

Viewed in the light most favorable to the Department's decision, we conclude substantial evidence supports the administrative law judge's decision. As the administrative law judge found, the minor decoy's ****142** testimony was clear and credible. The administrative law judge also expressly found the testimony established the store clerk's communication to the minor decoy was a statement and not a question. Under section 23090.2, the Appeals Board lacks power to disregard the Department's factual findings, which includes findings made by the administrative law judge. (*Hasselbach v. Department of Alcoholic Beverage Control* (1959) 167 Cal.App.2d 662, 667, 334 P.2d 1058 ["The statement made in the opinion of the appeals board was not a finding of fact for that board is without power to make findings of fact"].) Accordingly, we reject the Appeals Board's argument the store clerk's statement might have been a question instead of a statement.

***643** DISPOSITION

The decision of the Alcohol Beverage Control Appeals Board is annulled. The decision of the Department of Alcoholic Beverage Control is reinstated and the case is remanded to the Alcohol Beverage Control Appeals Board for further proceedings consistent with this opinion.

We concur:

BLEASE, Acting P.J.

RENNER, J.

All Citations

7 Cal.App.5th 628, 213 Cal.Rptr.3d 130, 17 Cal. Daily Op. Serv. 384, 2017 Daily Journal D.A.R. 402

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Footnotes

1 Undesignated statutory references are to the Business and Professions Code.

2 The license is held by Garfield Beach CVS LLC Longs Drug Stores California LLC, doing business as CVS Pharmacy Store 9174.

Tab E CVS Tahoe

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Slides 15-17

CVS Tahoe explains that Rule 141(b)(5) has no fixed-distance or exact-moment requirement when the identification procedure, considered as a whole, satisfies the rule.

Materials in this tab

- Garfield Beach CVS, LLC (2016) AB-9569
- Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (CVS Tahoe) (2017) 18 Cal.App.5th 541

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

AB-9569
File: 21-477719 Reg: 15082671

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy #9376
3471 Lake Tahoe Boulevard, South Lake Tahoe, CA 96150-8948,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: October 6, 2016
Sacramento, CA

ISSUED NOVEMBER 18, 2016

Appearances: *Appellants*: Jennifer L. Oden and Saranya Kalai, of Solomon Saltsman & Jamieson, as counsel for appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC.
Respondent: Jacob L. Rambo and Sean Klein as counsel for the Department of Alcoholic Beverage Control.

TAB E

OPINION

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy #9376 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for ten days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

[1] The decision of the Department, dated January 20, 2016, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On June 27, 2015, the Department filed an accusation against appellants charging that, on May 2, 2015, appellants' clerk sold an alcoholic beverage to 18-year-old Christian Ivan Bernal-Ruiz. Although not noted in the accusation, Bernal-Ruiz was working as a minor decoy for the South Lake Tahoe Police Department at the time.

On July 17, 2015, appellants filed and served on the Department a Request for Discovery pursuant to Government Code section 11507.6 demanding, inter alia, the names and addresses of all witnesses. On August 24, 2015, the Department responded by providing the address of the South Lake Tahoe Police Department in lieu of the decoy's home address. On September 2, 2015, appellants sent a letter to the Department demanding that it furnish the decoy's contact information by September 8, 2015. On September 8, 2015, appellants received a response from the Department asserting that the contact information for the South Lake Tahoe Police Department was sufficient.

On September 11, 2015, appellants filed a Motion to Compel Discovery. On September 22, 2015, the Department responded and opposed the motion.

On September 30, 2015, the ALJ denied appellants' motion, arguing that the statute requires only an "address" and not necessarily a home address, and further, that this Board's decision in *Mauri Restaurant Group* (1999) AB-7276 was on point and mandated denial of the motion.

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The administrative hearing proceeded on December 15, 2015. Documentary evidence was received and testimony concerning the sale was presented by Bernal-Ruiz (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and proceeded to the coolers in the alcoholic beverage section, located in the back, left-hand side of the store. The decoy was familiar with the licensed premises because he had patronized the store three to five times in the past. Once he reached the alcoholic beverage coolers, the decoy retrieved a can of Coors Light beer. The decoy took the beer to the cash register section. There were two female clerks on duty. As the decoy approached the sales counter, a customer was just leaving. The decoy placed the beer on the sales counter. One of the female cashiers said “hello” to the decoy and asked for his date of birth. The decoy provided his correct date of birth: November 27, 1996. The clerk appeared to punch the date into the cash register. The clerk never asked for the decoy’s identification. The decoy paid for the beer and exited the premises.

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The decoy then proceeded to the automobile where law enforcement officers were waiting. The decoy told them he purchased beer in the store.

The decoy was escorted back inside the store to conduct a face-to-face identification of the seller. He could not recall which officers took him back inside the store. As they entered the store, the decoy pointed to the clerk who sold him the beer. The decoy was about ten feet away from the clerk at this time. The other female clerk was behind the sales counter, but she was not near the selling clerk. The decoy could not recall specifically if the clerk that sold him the beer was waiting on a customer at the time he identified her to the officers. However, he did testify that it appeared a customer might have just finished a transaction and the clerk was “alone.” The law enforcement officials proceeded to the sales counter and identified themselves to the clerk. One of the officers showed the clerk his badge and told her she had sold alcohol to a minor. The decoy was standing next to the officers at the time. The clerk “freaked out” a bit and said she was “sorry.” The officers escorted the clerk and the decoy to the front door area and took a picture of them standing together.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed an appeal contending (1) the ALJ abused his discretion by denying appellants’ motion to compel discovery of the decoy’s home address, and (2) the face-to-face identification did not comply with rule 141(b)(5).

DISCUSSION

I

Appellants contend the ALJ abused his discretion by denying their motion to compel discovery of the address of the minor decoy to the extent known by the Department. (App.Br. at p. 5.) Appellants argue that “only information which is ‘privileged from disclosure by law or otherwise made confidential’ is disqualified from disclosure” under Government Code section 11507.6. (App.Br. at p. 7.) They insist “no statute or rule” protects a decoy’s personal contact information from disclosure. (*Ibid.*) They reject this Board’s conclusion, reached in several factually indistinguishable cases,

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that a decoy's personal information is protected under section 832.7 of the Penal Code because, according to appellants, "minor decoy are never identified as peace officers in the statutory scheme that identifies the class of persons whose personnel records are made confidential" by that provision of law. (*Ibid.*, rejecting by implication this Board's interpretation of the law in *7-Eleven, Inc./Joe* (2016) AB-9544.) Appellants contend that, because the Department failed to abide by the discovery standards of the Administrative Procedure Act, they were "prejudiced in preparing for the hearing and defending [themselves]." (App.Br. at pp. 7-8.)

This Board has recently addressed a number of cases raising this purely legal issue. In *7-Eleven, Inc./Joe*, *supra*, we held that the decoy's personal address is protected under section 832.7 of the Penal Code. (*Id.* at pp. 6-10.)

While appellants do not cite *Joe*, they do object to the reasoning therein, arguing that a decoy does not qualify as peace officer as defined by the Penal Code. (App.Br. at p. 7; see also Pen. Code, § 830 et seq.)

In another recent case, *7-Eleven, Inc./Dhillon* (2016) AB-9556, we addressed the same objections raised during oral argument. We analyzed the specific language of section 830, and reiterated our conclusion that the decoy "qualifies as a peace officer, by delegation of limited powers, under section 830.6(c)" and is therefore "protected from disclosure of her personal information, including home address, by section 832.7 of the Penal Code." (*Id.* at p. 9.) We also rejected the appellants' assertion that this interpretation of the law granted the decoy all the privileges typically afforded a trained law enforcement officer. (*Id.* at p. 7.) We wrote:

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> The language [of section 830.6(c)] expressly restricts the "powers of a peace officer" to those "expressly delegated . . . by the summoning officer." The grant of authority is quite limited and entrusted to the judgment of the summoning officer. Contrary to appellants' claim, it does not permit an untrained minor decoy to wield a loaded sidearm or careen an ambulance willy-nilly through the city streets.

(*Ibid.*) We refer appellants to that case for a full discussion of the law.

As we emphasized in both *Joe* and *Dhillon*, however, this holding

> does not excuse the Department from providing a valid address. In *7-Eleven, Inc./Nagra* (2016) AB-9551, we emphasized that the decoy must *actually be reachable* at the address provided. (*Id.* at p. 5, citing *7-Eleven, Inc./Joe*, *supra*, at p. 11.) We noted that "the Department is accountable for the validity of the addresses it provides." (*Id.* at p. 7.) "It is not enough to provide a Department District Office address if the District Office is unable or unwilling to forward communications to the decoy." (*Id.* at p. 6.) This Board will offer relief in the form of reversal if "we are presented with a well-established record showing that a decoy was legitimately unreachable at the address the Department provided during discovery, and the Department took no steps to provide an address at which the decoy could actually be reached." (*Id.* at p. 8.)

(*7-Eleven, Inc./Dhillon*, *supra*, at p. 9; see also *7-Eleven, Inc./Joe*, *supra*, at pp. 11-12.) The same reasoning applies where, as here, the contact information provided belongs to a law enforcement agency rather a Department District Office.

Appellants, however, have presented no evidence that they attempted to reach the decoy through the South Lake Tahoe Police Department, let alone that their attempts failed. We therefore follow our decisions in *Joe* and *Dhillon*, and find appellants' contentions meritless.

II

Appellants contend that the face-to-face identification did not comply with rule 141(b)(5) because the clerk neither knew nor could reasonably have known that she

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was being pointed out as the seller. (App.Br. at pp. 8-11.) Appellants argue that, according to the decoy's testimony, he was asked to identify the clerk upon reentering the store—at which point the clerk was ten feet away and preoccupied with other customers. (App.Br. at pp. 9-10.) When the decoy approached the counter with law enforcement, an officer identified himself to the clerk, but the decoy neither identified the clerk nor engaged in any conversation with her. (App.Br. at p. 10.) Appellants further argue that a photograph of the clerk and the decoy together does not cure shortcomings in the face-to-face identification process. (*Ibid.*)

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.

The rule provides an affirmative defense. The burden of proof is therefore on the appellants to show noncompliance.

In *Acapulco Restaurants*, a decoy took a seat at a bar, and the bartender served the decoy a beer without requesting identification. (*Acapulco Restaurants v. Alcoholic Bev. Control App. Bd.* (1998) 67 Cal.App.4th 575, 577 [79 Cal.Rptr.2d 126].) An officer seated at a nearby table witnessed the transaction. (*Ibid.*) The officer approached the bartender, informed her that she had sold alcohol to a minor, and identified the minor decoy. (*Ibid.*) It was undisputed that no face-to-face identification took place. (*Ibid.*) Nevertheless, an ALJ sustained the charge, finding only that "[a]fter the transaction was completed, the police officer identified the decoy to the bartender and informed her that

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she had sold beer to a minor," and based on that finding, concluding that "[t]he officer's actions meet the requirement of the Department's Rule 141(b)(5)." (Dept. Decision, reprinted in Appendix, *Acapulco Restaurants, Inc.* (1998) AB-6895, at p. 13.) The Appeals Board affirmed, declining to find "anything unfair in dispensing with a meaningless identification ritual when, in any realistic assessment, the peace officer was already a participant, so to speak, in the transaction." (*Acapulco Restaurants, Inc.* (1998) AB-6895, at p. 13, reversed by *Acapulco Restaurants*, *supra*.)

The court of appeal, however, reversed the Department's decision. It rejected the Appeals Board's holding that where the supervising officer witnessed the sale firsthand, no face-to-face identification was necessary:

> The Board refused to give rule 141, subdivision (c) a "rigid and literal interpretation" because the police officer had been sitting only a few feet away at the time of the sale. According to the Board, the rule must "take[ ] into account reality," and the "reality of this case" is that "there is no need for the requirement of identification when the peace officer is already within the premises and is an eyewitness to the transaction."

(*Acapulco Restaurants v. Alcoholic Bev. Control App. Bd.* (1998) 67 Cal.App.4th 575, 577-578 [79 Cal.Rptr.2d 126].) According to the court, the plain language of the rule required a face-to-face identification, and it was undisputed that none took place—therefore, the defense was established as a matter of law. (*Id.* at p. 579.) From this set of facts emerged the oft-quoted passage, "that rule 141, subdivision (b)(5) means what it says." (*Id.* at p. 581.)

In a later case, the court of appeal held that the rule does not prescribe a specific "location or manner" for the face-to-face identification, and instead leaves "the location of the identification to the discretion of the peace officer." (*Dept. of Alcoholic Bev.*

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Control v. Alcoholic Bev. Control App. Bd. (*7-Eleven, Inc.*) (2003) 109 Cal.App.4th 1687, 1697 [1 Cal.Rptr.3d 339].) The court therefore found no violation where the face-to-face identification consisted of a so-called "single person show-up" held outside the licensed premises. (*Id*. at p. 1698.) The court observed, "There is nothing in the language of the Regulations section 141, subdivision (b)(5) . . . that suggests the section was written to require any particular kind of identification procedure *except that it be face-to-face*." (*Ibid*., emphasis added.) Thus, while the court permitted the face-to-face identification to be made at a location to be determined by the supervising officer, it did *not* dispense with the requirement that the identification be face-to-face, as required by the rule. (See generally *ibid.*)

Notably, the *7-Eleven* court also rejected the contention that rule 141(b)(5) was intended to prevent misidentification of sellers: "There is no suggestion the section was promulgated to correct identification procedures which resulted in a history of misidentification of sellers. Indeed, there is no suggestion that correct identification of sellers by decoys presented any problem whatsoever." (*Ibid.*)

In *Chun*, the Appeals Board determined that the Department's factual findings "[did] not suggest a face to face identification, but only allude[d] to a pointing out of the seller from somewhere within the premises." (*Chun* (1999) AB-7287, at p. 5.) This Board observed:

> The phrase "face to face" means that the two, 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.

(*Ibid.*) In later cases, this Board has clarified that the decoy need not be the first person to make contact with the clerk, provided the face-to-face identification still takes place:

> *As long as the decoy makes a face-to-face identification of the seller*, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, at pp. 7-8, emphasis added.)

To summarize the law, then, variations in the location of the identification, the number of individuals present, or whether officers first approach the clerk generally do not affect compliance with the rule—provided a face-to-face identification did in fact take place.

In this case, the ALJ made the following relevant findings of fact:

> [The decoy] was escorted back inside the store to conduct a face-to-face identification of the seller. He could not recall which officers took him back inside the store. As they entered the store, [the decoy] pointed to the clerk that sold him the beer. The decoy was about 10 feet away from the clerk at this time. The other female clerk was behind the sales counter, but she was not near the selling clerk. The decoy could not recall specifically if the clerk that sold him the beer was waiting on a customer at the time he identified her to the officers. However, he did testify that it appeared a customer might have just finished a transaction and the clerk was "alone." The law enforcement officials proceeded to the sales counter and identified themselves to the clerk. One of the officers showed the clerk his badge and told her she had sold alcohol to a minor. [The decoy] was standing next to the officers at the time. The clerk "freaked out" a bit and said she was "sorry." The officers escorted the clerk and the decoy to the front door area and took a picture of them standing together.

(Findings of Fact, ¶ C.) According to the only witness—the decoy—the clerk was ten feet away and possibly preoccupied with another patron when he reentered the premises and "identified her to the officers." (*Ibid.*) This may be an identification, but

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there is nothing in these findings to indicate it was face-to-face. Ten feet is a relatively substantial distance; it is certainly not close enough that “the peace officer directing the decoy” could be sure the clerk either knew or ought to have known she was being pointed out as the seller. (See *Chun*, *supra*, at p. 5.)

Nevertheless, the ALJ rejected appellants’ rule 141(b)(5) defense:

> Respondents also contend that the Department failed to prove there was “strict adherence” with Rule 141, subsection (b) (5). They assert the clerk was not aware she was being identified because the identification was made to the officers[,] not the clerk, and there was no conversation between the decoy and the clerk. Further, they contend the photograph of the decoy and the seller was taken after the agents directed them to stand together. Presumably, the Respondents are contending this was too suggestive. These arguments ignore the dispositive facts surrounding the face-to-face identification. The decoy was approximately ten (10) feet away from the clerk when he identified her as the seller. When the officers advised the clerk of the sale to a minor she said she was “sorry.” The clerk then emerged from behind the counter to have her photograph taken with the decoy. The decoy was holding the Coors Light beer she sold to him while they were standing next to one another. (State’s Exhibit 5) There was no evidence the decoy “mis-identified” the selling clerk. The clerk never claimed she did not sell beer to the minor decoy. The clerk had ample opportunity to come “face-to-face” with the decoy. The clerk knew, or ought to have known, she was being identified as the seller. [Citations.]
>
> The Department complied with Rule 141 (b) (5).

(Determination of Issues III.) The ALJ’s reasoning is too similar to the arguments rejected by the court of appeals in *Acapulco Restaurants*. It excuses the Department from strict compliance based on irrelevant facts—the clerk’s apology and failure to object, the photograph, the lack of evidence of a misidentification. Phrased differently, it relies on the “reality of th[e] case” rather than “a rigid and literal” plain-language

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interpretation of the rule—a position soundly rejected in *Acapulco Restaurants.* (*Acapulco Restaurants*, *supra*, at p. 578.)

As the court noted, rule 141(b)(5) "means what it says." (*Id.* at p. 581.) It is not enough that the clerk eventually had face-to-face contact with the decoy *after* the identification took place from ten feet away. According to the plain language of the rule, the *identification itself* must be face-to-face. That did not happen here.

ORDER

The decision of the Department is reversed.[2]

FRED HIESTAND, ACTING CHAIRMAN
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2] This 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.

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18 Cal.App.5th 541
Court of Appeal, Third District, California.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Petitioner,
v.
ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, Respondent;
Garfield Beach CVS, LLC, et al., Real Parties in Interest.

C083619
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Filed 11/17/2017

Synopsis

Background: Department of Alcoholic Beverage Control petitioned for review of decision of Alcoholic Beverage Control Appeals Board, which reversed suspension of store's liquor license.

The Court of Appeal, Raye, P.J., held that minor decoy's identification of store clerk, from whom minor had purchased alcoholic beverage, from approximately ten feet away constituted a "face to face identification" of clerk, supporting suspension of store's liquor license.

Annulled and remanded with directions.

Procedural Posture(s): Review of Administrative Decision.

ORIGINAL PROCEEDING; Petition for writ of review. Annulled and remanded with directions. (Alcoholic Beverage Control Appeals Board No. AB9569)

Attorneys and Law Firms

Kamala D. Harris and Xavier Becerra, Attorneys General, Chris A. Knudsen, Senior Assistant Attorney General, David J. Neill and Lykisha D. Beasley, Deputy Attorneys General, for Petitioner.

No appearance for Respondent.

Solomon, Saltsman & Jamieson, Stephen Warren Solomon, Ralph Barat Saltsman and Jennifer L. Oden, Los Angeles, for Real Parties in Interest.

Opinion

RAYE, P.J.

***542** A CVS clerk sold a can of Coors Light to a minor decoy working for the Department of Alcoholic Beverage Control (the Department). The sole issue in these writ proceedings is whether the minor made a face-to-face identification of the seller as required ****528** by California Code of Regulations, title 4, section 141 (hereafter Rule 141), subdivision (b)(5). The Department suspended Garfield Beach CVS, LLC and Longs Drug Stores California, LLC doing business as CVS Pharmacy Store 9376 (CVS)'s liquor ***543** license for 10 days, but CVS appealed and the Alcoholic Beverage Control Appeals Board (the Appeals Board) reversed, finding that an in-store identification of the clerk to the peace officer from about 10 feet away did not constitute a face-to-face identification. We disagree and annul the decision of the Appeals Board.

FACTS

On May 2, 2015, 18-year-old Christian entered a CVS store in South Lake Tahoe, selected a large can of beer, and took it to a clerk at a cash register. The clerk asked him to provide his date of birth, but did not ask for identification. He answered honestly and told the clerk he was born on November 27, 1996. Christian purchased the beer and then reported to the peace officer who was waiting for his decoy outside of the store.

The peace officer accompanied Christian back inside the store and asked him to identify the clerk. Christian identified the clerk standing behind the counter when he was about 10 feet away from her. He believed the clerk was either helping a customer or just finishing helping a customer. He did not speak to her.

The peace officer informed the clerk she had sold alcohol to a minor. Christian was standing next to the peace officer at the time. According to Christian, she kind of "freaked out" and apologized. The peace officer took Christian's picture with the clerk, beer in Christian's hand. There was no evidence Christian misidentified the clerk and she never claimed she did not sell alcohol to the minor decoy. She did not testify.

The Department charged CVS with selling an alcoholic beverage to a minor, a violation of section 25658, subdivision

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(a) of the Business and Professions Code. Following an evidentiary hearing the administrative law judge (ALJ) found the Department had complied with Rule 141, subdivision (b)(5)'s face-to-face identification requirement because the decoy initially pointed out the seller when he was standing approximately 10 feet away from her. The Appeals Board reversed the ALJ's finding. The Department petitions for a writ of review, contending the Appeals Board acted in excess of its jurisdiction and misinterpreted Rule 141, subdivision (b)(5).

DISCUSSION

I

The administration of the Alcoholic Beverage Control Act (Bus. & Prof. Code, § 23000 et seq.) is initially vested with the Department, although its decisions are subject to administrative review by the Appeals Board, and the Appeals Board decisions are subject to judicial review. (***544** Bus. & Prof. Code, § 23090; *Caressa Camille, Inc. v. Alcoholic Beverage Control Appeals Bd.* (2002) 99 Cal.App.4th 1094, 1099, 121 Cal.Rptr.2d 758; *Walsh v. Kirby* (1974) 13 Cal.3d 95, 102, 118 Cal.Rptr. 1, 529 P.2d 33.) The scope of judicial review is the same as the scope of the Appeals Board review. We must determine whether the Department has proceeded without or in excess of its jurisdiction, whether the Department has proceeded in the manner required by law, whether the decision is supported by the findings, whether the findings are supported by substantial evidence in light of the whole record, and whether there is relevant evidence, which, in the exercise of reasonable diligence, ****529** could not have been produced or which was improperly excluded at the hearing before the Department. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, § 23084; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2002) 100 Cal.App.4th 1066, 1071-1072, 123 Cal.Rptr.2d 278 (*Deleuze*).)

The scope of review is narrow. (*Deleuze, supra*, 100 Cal.App.4th at p. 1071, 123 Cal.Rptr.2d 278.) " 'In considering the sufficiency of the evidence issue[,] the court is governed by the substantial evidence rule.. ; any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged.' " (*Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122, 67 Cal.Rptr. 628.) We may not reweigh the evidence or the credibility of the witnesses. (*Mundell v. Dept. Alcoholic Bev. Control* (1962) 211 Cal.App.2d 231, 233, 27 Cal.Rptr. 62.) In short, the Department's decisions are "subject to review only for insufficiency of the evidence, excess of jurisdiction, errors of law, or abuse of discretion." (*Deleuze, supra*, 100 Cal.App.4th at p. 1072, 123 Cal.Rptr.2d 278.)

II

Business and Professions Code section 25658, subdivision (f) provides: "Persons under 21 years of age may be used by peace officers in the enforcement of this section to apprehend licensees, or employees or agents of licensees, or other persons who sell or furnish alcoholic beverages to minors." The same section directs the Department to promulgate guidelines for the use of minor decoys. Pursuant to this directive, the Department promulgated Rule 141. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2017) 7 Cal.App.5th 628, 635, 213 Cal.Rptr.3d 130 (*Garfield Beach CVS, LLC*).)

Rule 141, subdivision (b)(5) states: "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." The California Supreme Court has upheld the use of minors as decoys in ***545** enforcing the constitutional prohibition of the sale of alcohol to minors. (Cal. Const., art. XX, § 22; *Provigo Corp. v. Alcoholic Beverage Control Appeals Bd.* (1994) 7 Cal.4th 561, 567, 28 Cal.Rptr.2d 638, 869 P.2d 1163.)

The Department contends the Appeals Board abused its discretion by disregarding the plain meaning of the text of Rule 141, subdivision (b)(5) and reading into it physical parameters and specificity in the identification that is not found in the language of the rule. CVS, on the other hand, defends the Appeals Board's decision finding there was no face-to-face identification based on the seminal case, *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 579, 79 Cal.Rptr.2d 126 (*Acapulco*). CVS insists the Department's petition reveals an utter disinterest in adhering to the express language of Rule 141 and the unequivocal mandate of *Acapulco.* CVS is mistaken. *Acapulco* does not support its position.

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CVS attempts to divorce the facts of *Acapulco* from the harsh language it extracts from the holding. But the facts, of course, are determinative. First and foremost, CVS ignores the dispositive fact that in *Acapulco* the decoy minor did not identify the clerk who sold him the beer. (*Acapulco, supra*, 67 Cal.App.4th at p. 579, 79 Cal.Rptr.2d 126.) The question was not, as ****530** it is here, whether the identification was face-to-face because there was no identification at all. Instead, the police officer sat in a booth near the bar where the minor decoy ordered, and was served, alcohol. (*Id*. at pp. 577-578, 79 Cal.Rptr.2d 126.) The police officer observed the sale and went up to the bar and told the bartender she had sold beer to a minor. (*Ibid*.) The minor, however, did not identify the bartender who sold him the alcohol. (*Ibid*.)

Thus, on these facts, the court stated, "Since it is undisputed that the required face-to-face identification by the decoy was not made in this case, it follows ineluctably that Acapulco's defense was established as a matter of law. As Acapulco puts it, when a rule requires certain affirmative acts by law enforcement, law enforcement must comply." (*Acapulco, supra*, 67 Cal.App.4th at p. 579, 79 Cal.Rptr.2d 126.) The court rejected the Appeal Board's "common-sense interpretation" of Rule 141, which would require ignoring the plain language of the rule. (*Acapulco*, at p. 579, 79 Cal.Rptr.2d 126.) To the contrary, "The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public and the decoys themselves." (*Id*. at p. 581, 79 Cal.Rptr.2d 126.) Thus the court held "that rule 141, subdivision (b)(5) means what it says." (*Acapulco*, at p. 581, 79 Cal.Rptr.2d 126.) Because it was undisputed there was no face-to-face identification and that Rule 141, subdivision (b)(5) provides a defense when there is a failure to comply, Acapulco's suspension could not stand. (*Acapulco*, at p. 582, 79 Cal.Rptr.2d 126.)

CVS, ostensibly applying *Acapulco*, insists that the rule "means what it says" and it plainly says the minor decoy must make a face-to-face identification of the person who sells the minor the alcohol. We do not disagree with ***546** the holding in *Acapulco*, based, as it is, on the dispositive and indisputable fact that the minor decoy did not identify the seller as plainly required by Rule 141. Our disagreement is not with *Acapulco*, but with CVS's application of the case to the facts presented here. Indeed, the court in *Acapulco* acknowledged the limited scope of its holding. The court explicitly stated, "The concession in this case that no attempt was made to comply with rule 141, subdivision (b)(5), makes it unnecessary to decide what would constitute a sufficient effort to reenter or what would constitute a face-to-face identification by the decoy." (*Acapulco, supra*, 67 Cal.App.4th, at p. 582, fn. 8, 79 Cal.Rptr.2d 126.)

Of far more help is *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1695, 1 Cal.Rptr.3d 339 (*7-Eleven*). In *7-Eleven*, the court confronted the issue not addressed in *Acapulco*—what constitutes the face-to-face identification required by Rule 141, subdivision (b)(5). A police officer was aware of the face-to-face requirement and intended to comply with it. Thus, after the minor decoy purchased a six-pack of beer, the police officer, who had witnessed the sale, told the clerk he had sold beer to a minor. In order not to disrupt the operation of the store, the police officer asked the clerk to step outside where the decoy made the identification from approximately five feet away. (*7-Eleven,* at pp. 1689-1690, 1 Cal.Rptr.3d 339.)

Citing *Acapulco*, "the Appeals Board held the requirements of [Rule] 141, subdivision (b)(5), must be strictly followed and, citing [Rule] 141, subdivision (c), a failure by the officer to reenter the premises with the decoy to conduct the face-to-face identification was a complete defense to the accusation." (*7-Eleven, supra*, 109 Cal.App.4th at p. 1690, 1 Cal.Rptr.3d 339, fn. ****531** omitted.) The Court of Appeal disagreed. "[Rule] 141, subdivision (b)(5), ensures —admittedly not as artfully as it might—that the seller will be given the opportunity, soon after the sale, to come 'face-to-face' with the decoy. For reasons left to the sound discretion of the peace officer alone, or in conjunction with the business owner, [Rule] 141, subdivision (b)(5), does not require the identification be done on the premises where the sale occurred. The officer in this case complied with the face-to-face confrontation requirements of [Rule] 141, subdivision (b)(5)." (*7-Eleven*, at p. 1698, 1 Cal.Rptr.3d 339.)

Similarly, Rule 141, subdivision (b)(5) does not require the identification to be done within a certain distance. Simply put, face-to-face is not defined in the rule. In *7-Eleven*, the distance, albeit outside rather than inside the store, was five feet. Here, the identification was made within the store but the distance between the minor decoy when he made the identification and the clerk was approximately 10 feet. The Department made a factual finding that the identification constituted a face-to-face identification. We conclude there is substantial evidence to support the factual finding. Moreover, we find ***547** nothing in the language of the statute to

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preclude the Department's finding as a matter of law and everything about the identification that is consistent with the purpose of a face-to face identification.

At oral argument, CVS conceded that a face-to-face identification could be made from a distance of 10 feet. Distance, CVS argues, is not the defect here. Rather it is the fact that the decoy made the identification to the officer, not to the clerk, and therefore she was not aware she was being identified at the exact time the decoy identified her. In CVS's view, it was not until the clerk and decoy were brought together at the front of the store that she became aware she had been identified. CVS insists the gap in time, not distance, violates Rule 141, subdivision (b)(5) and the strict compliance with the face-to-face identification requirement as compelled by *Acapulco*. We disagree.

Here there is no violation of Rule 141, as explained above, because the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. The rule requires identification, not confrontation. The identification here meets the letter and the spirit of Rule 141.

"The core rationale for the creation of binding sections concerning the conduct of buy operations was to allow such buys in a manner fair to sellers." (*7-Eleven, supra*, 109 Cal.App.4th at p. 1698, 1 Cal.Rptr.3d 339.) There is nothing in the record to suggest the identification was unfair. The minor decoy made the identification in the clerk's presence. He then accompanied the officer who informed the clerk she had just sold beer to the minor who was standing right next to the officer. The clerk did not deny the sale or dispute the identification. To the contrary, she said she was sorry and kind of, as the minor decoy described it, "freaked out." She had ample opportunity to raise an objection or to dispute the identification or the sale. She did neither. And then she stood next to the minor decoy while the decoy was holding the beer, and they were photographed together. Thus, by all accounts, the identification was fair.

It is true that *Acapulco* demands strict compliance with the requirements of the ****532** rule, even if the identification is otherwise fair. The Department found, and we agree, that the identification strictly complied with Rule 141, subdivision (b)(5) because, under the totality of the circumstances, the minor decoy made a face-to-face identification of the clerk who sold him the beer. In the absence of a more descriptive definition of face-to-face, we conclude that the identification made in her physical presence followed by a confirming implied identification at even closer range satisfied the rule. There is simply no language in the rule and no facts in the actual identification that dictate a contrary result.

***548** CVS points us to a nonbinding, but in its view, helpful decision by the Appeals Board in *Chun v. Department of Alcoholic Beverage Control* (Dec. 29, 1999) AB-7287. We need not concern ourselves with the fact we are not bound by Appeals Board decisions (*Garfield Beach CVS, LLC, supra*, 7 Cal.App.5th at p. 639, 213 Cal.Rptr.3d 130), because we find *Chun* factually inapposite. The minor decoy never approached the clerk at all and was outside while the officers "went into the store and did their thing." (*Chun*, at p. 5.)

The Appeals Board made the imminently reasonable observation that to comply with Rule 141, subdivision (b)(5) the clerk and the decoy must be in reasonable proximity to each other to assure that the seller knows or reasonably ought to know that he or she is being identified as the seller by the decoy. We agree with the Department that is precisely what occurred in this case.

The clerk and the minor decoy were in reasonable proximity when the decoy made his identification. CVS insists that we must divorce the precise moment of the identification from the entire identification procedure, which included not only the moment when Christian pointed out the clerk to the police, but the followup when he accompanied the police officer to the counter, the officer informed the clerk she had sold beer to the minor at his side, and the two of them were photographed together. The clerk in these circumstances certainly knew or reasonably ought to have known that she was being identified. Every aspect of the identification was done face-to-face and the Appeals Board erred in finding to the contrary.

DISPOSITION

The decision of the Appeals Board is annulled. The matter is remanded to the Appeals Board for further proceedings consistent with this opinion reinstating the license suspension.

MAURO, J.

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RENNER, J., concurred.

All Citations

18 Cal.App.5th 541, 226 Cal.Rptr.3d 527, 17 Cal. Daily Op. Serv. 11,998, 2017 Daily Journal D.A.R. 11,879

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TAB E

INFORMATIONAL ITEM: Legal training: AB-9912 In re Bogle Vineyards, Inc.

Issue: Did Bogle Vineyards, Inc. (respondent) violate tied-house restrictions in the Alcoholic Beverage Control Act (Act) which prohibits furnishing, giving, or lending a "thing of value" in connection with the sale of alcoholic beverages, when respondent, a wine grower, provided a nonoperational pizza oven to a grocery store as part of a promotional display to advertise its wines?

Holding: No. The pizza oven that the distributor temporarily placed in a grocery store as part of a promotional display was not a "thing of value" under the Act.

Facts: A Department of Alcoholic Beverage Control (the Department) agent entered a Raley's grocery store and saw a display that prominently featured a Bogle-branded pizza oven and multiple layers of open and unopened cases of Bogle wine. Raleys received the oven from its wine distributor, who received it from Bogle to put inside the Raleys.

The display was part of a promotion highlighting "pizza month" The oven was prepared by the wine distributor for display but was not fully assembled. The wine distributor did not attach the propane regulator parts, and as a result, the oven was inoperative when placed on display. After the promotion ended, the oven was removed.

Analysis: The California Third District Court of Appeal (the Court) engaged in statutory construction since the plain language of the statute ("a thing of value") was open to competing interpretations. The Court looked at the tied-house provisions to ascertain legislative intent. Since these provisions were enacted after the repeal of the Eighteenth Amendment, the Court determined that the Legislature was concerned with large manufacturers and wholesalers dominating local markets or gaining influence over retailers through economic means (e.g. obtaining favorable treatment for their products).

The Court examined two prior cases which involved suppliers giving money in exchange for favorable marketing or promotional treatment. The Court differentiated money paid from the temporary and inoperable pizza oven. The Court determined there was no evidence that Raley's received any benefit from the pizza oven.

Disposition: The Department's decision was reversed; the ABCAB's decision was affirmed. Appeal published as *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2022) 82 Cal.App.5th 337.

ABC APPEALS BOARD 2027
TENTATIVE HEARING SCHEDULE
(for discussion only)

JANUARY 8	FRIDAY	**Sacramento/Teleconference**
FEBRUARY 12	FRIDAY	**Sacramento/Teleconference**
MARCH 12	FRIDAY	**Sacramento/Teleconference**
APRIL 9	FRIDAY	**Sacramento/Teleconference**
MAY 14	FRIDAY	**Sacramento/Teleconference**
JUNE 11	FRIDAY	**Sacramento/Teleconference**
JULY 9	FRIDAY	**Sacramento/Teleconference**
AUGUST 13	FRIDAY	**Sacramento/Teleconference**
SEPTEMBER 10	FRIDAY	**Sacramento/Teleconference**
OCTOBER 8	FRIDAY	**Sacramento/Teleconference**
NOVEMBER 5	FRIDAY	**Sacramento/Teleconference**
DECEMBER 10	FRIDAY	**Sacramento/Teleconference**

ABCAB APPELLATE SUMMARY

JUNE 26, 2026

CASE SUMMARY

- BARRELL & HOPS, INC., ET.AL. V. ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
- FILED JANUARY 23, 2026
- ATTORNEYS:
- GILLIAN KAY GARRET FOR APPELLANT
- MATTHEW S. BEASLEY FOR RESPONDENT

BEFORE THE BOARD

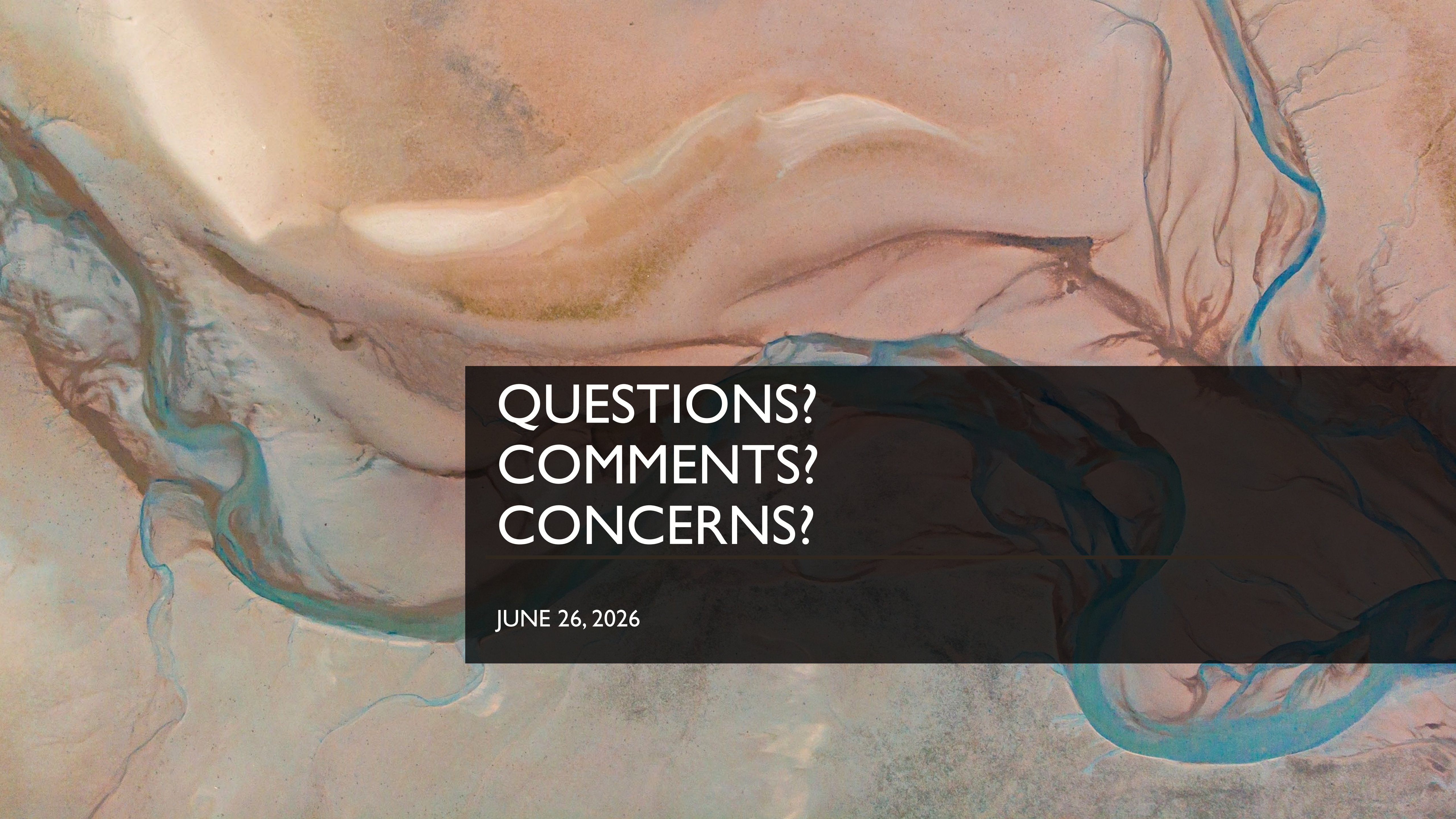
- Appellant's (Barrel & Hops) license was suspended for selling ciders with a beer only License
- Appellant argued that the Department erred in considering cider as a wine, not a beer
- The Board affirmed the Department's decision because the plain language of the operative statutes defines beer as an alcoholic beverage made from barley, malt, hops (or other similar product.) The evidence in the record was that cider was not made from barley, malt, or hops, but rather, fruit, which is not similar to barley, malt, or hops.

SUMMARY OF ACTION SINCE LAST UPDATE

- Opening brief filed July 13, 2026
- Reply brief filed August 3, 2026

FUTURE STEPS

- Oral Argument set and heard (4+ Months from Briefs)
- Opinion Filed (30+ days from Oral Argument)
- Additional appeals?
- Publication?
- Case completion



QUESTIONS? COMMENTS? CONCERNS?

JUNE 26, 2026