

ISSUED SEPTEMBER 26, 1997

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

FINE'S FOOD COMPANY	)	AB-6772
dba Fine's Market)	
2765 East Olympic Boulevard	)	File: 21-010154
Los Angeles, CA 90023,	)	Reg: 96036193
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	August 6, 1997
	)	Los Angeles, CA
)	

Fine's Food Company, doing business as Fine's Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered its off-sale general license suspended for 15 days for its clerk having sold a four-pack of wine coolers to an 18-year-old minor, 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).

¹ The decision of the Department dated November 7, 1996, is set forth in the appendix.

Appearances on appeal include appellant Fine's Food Company, appearing through its counsel, Ralph B. Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 2, 1973. Thereafter, the Department instituted an accusation alleging that on March 8, 1996, appellant's clerk sold a four-pack of Seagram's wine coolers, an alcoholic beverage, to Gabrielle Carrasco, who was then 18 years of age, participating in a decoy program being conducted by the Los Angeles Police Department.

An administrative hearing was held on September 30, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the events connected with the sale, consisting of the testimony of Ms. Carrasco, the minor who made the purchase; Francisco Vega, the police officer who witnessed the purchase; Victoria Silva, the clerk who made the sale; and Miguel Sandoval, who was working as a box boy at the time of the sale.

Gabrielle Carrasco testified that she selected a four-pack of wine coolers, set them on the counter, was asked her age by the clerk, and replied that she was 18 [RT 8]. According to Ms. Carrasco, the clerk said "something like 'we can't sell alcohol to minors,'" but then handed her change and asked a man standing behind her if he would take the wine out of the store for her, telling her she could not be seen taking the wine

from the store [RT 9-10]. Ms. Carrasco said she was told to wait, and after the clerk rang up the man's purchase, the two of them left the store [RT 11]. Once outside the store, the man gave her the coolers, and then went his separate way [RT 11].

Although she knew officer Vega was present at the time of the sale, Ms. Carrasco did not know where in the store he was [RT 15].

Officer Vega testified that he entered the premises before Ms. Carrasco [RT 19], and was standing behind a magazine or newspaper rack two or three feet away from Carrasco at the time of the purchase [RT 25]. He saw her give the clerk a \$20 bill, and get back some change [RT 19]. Vega heard the cashier ask Carrasco's age, and Carrasco's reply that she was 18 [RT 20]. The clerk then continued with the sale, but would not let Carrasco take the plastic bag containing the coolers from the store. Instead, the clerk asked an adult male standing in line behind Carrasco to carry the package from the store [RT 20]. Vega followed Carrasco from the premises, observed the bag being handed to her outside the store, and recovered the coolers from her [RT 21]. The two then returned to the store, after she had given him the change from the purchase [RT 16].

Victoria Silva testified that Carrasco was with another man when she came to the counter. When she told Carrasco she could not sell her the coolers because Carrasco was a minor, the man told her they were for him, and she should charge him [RT 33]. Silva said the man then pushed the \$20 bill toward her, she took it, made

change, and handed the change and the receipt to the man [RT 34].

Miguel Sandoval testified that he was working in the store at the time, and saw Carrasco in front of the check stand, accompanied by an older man [RT 43]. It seemed to him the two were together [RT 44]. He testified further that he saw the clerk return the \$20 bill to the counter after being told by Carrasco she was 18, and heard the man tell the clerk to charge the coolers to him [RT 47].

Carrasco, recalled as a witness, said that the clerk gave her the change from the \$20 bill [RT 61], and that it was the clerk who suggested the man carry the coolers from the store for her [RT 61].

Subsequent to the hearing, the Department issued its decision which determined that appellant's clerk had made the sale in question, in violation of Business and Professions Code §25658, subdivision (a). Thereafter, appellant filed its timely notice of appeal, and raises the following issues: (1) the police officer failed to comply with the requirement of rule 141, subdivision (b) (5) [4 Cal.Code Regs., §141, subd. (b) (5)], which requires that the minor be returned to the store to confront the seller; and (2) the Department failed to present evidence that the product purchased was an alcoholic beverage within the meaning of the statute.

DISCUSSION

I

Appellant contends that the arresting officer failed to comply with rule 141,

subdivision (b) (5), by not returning the minor to the store to confront the seller.²

Rule 141 became operative February 1, 1996. The challenged transaction occurred on March 8, 1996. This appears to be the first case to reach the Appeals Board where the rule was squarely implicated, and which raises the question of the extent of the defense to which failure to comply with a portion of the rule entitles a licensee. However, because of our view of the facts, this issue need not be reached.

Appellant cites the testimony of the clerk that she (the clerk) did not hear the minor say anything to the police officers when they entered the store, and that the minor was "looking down," and "not doing anything" [RT 34-35]. Appellant also cites the testimony [at RT 49-50] of Sandoval, another store employee, who stated that he saw the transaction, and later saw the minor standing at the foot of the stairs near the front door, but not pointing out anyone. However, the transcript suggests that appellant is mistaken on the issue of confrontation.

The following colloquy during the direct examination of the minor [at RT 12]

² Subdivision (b) (5) of the rule provides: "Following any completed sale, but not later than the time a citation, if any, is issued, the police 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."

Subdivision (b) (6) states that "failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Section 25658."

indicates there was the confrontation required by the rule:

“Q. After you left the store, did you have an opportunity to go back in the store?

A. Yes.

Q. Why was it that you went back in the store?

A. So the officer -- so I could get the lady so she could tell them.

Q. So you went back inside the store then with the officers right after leaving the store following the purchase.

A. Yes.”

Appellant’s contention also ignores the testimony of the police officer [at RT 21-22]:

“Q. After you entered the premises, what happened?

A. We confronted the cashier. We advised her of the violation, and we proceeded to cite her.

Q. Did you confront her with Ms. Carrasco?

A. Yes.

Q. And you explained to her the nature of the violation?

A. Yes.”

The requirement of confrontation is to insure that the person who made the sale is brought to account, and not an innocent clerk or owner who may also be working at the time. Thus, we interpret the ‘face to face’ language of the rule to require only that the decoy be in sufficient proximity to the seller so that there can be no mistake on the

part of the officer as to the person identified by the decoy as the seller. There is no suggestion that the clerk who was cited was not the clerk who made the sale, or that the identification was faulty; instead, it appears to be appellant's contention that the decoy was simply too far from the clerk for a face-to-face identification.³

Thus, appellant's contention lacks merit. What is involved is simply a conflict in the testimony, with appellant seeking to have the Board accept appellant's version of the facts.

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (substantial evidence supported both the Department's and the license-applicant's position); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The ALJ, guided by the factors set forth in Evidence Code §780, resolved the

³ We would note that it is often the case that the person making the sale becomes angry over what happened. Prudence suggests that the officer involved in the decoy operation take appropriate steps to safeguard the minor from any kind of retaliation. One such way is to ensure that a safe distance remains between the two, that distance depending in large part upon the judgment of the officer at the scene.

evidentiary conflicts in favor of the testimony given by the police officer and the minor. Since there is evidence which, if believed, supports his finding that there was a face - to-face identification within our understanding of Rule 141, appellant's contention that the rule was not complied with must be rejected.

II

Appellant contends that the record is devoid of any evidence establishing that the product purchased was an alcoholic beverage within the meaning of the Business and Professions Code. Appellant asserts that "the wine coolers in question" were lost,⁴ were never chemically analyzed, and "we don't even know what the label says [App.Br., 11].

Appellant cites the definition of the term "alcoholic beverage" in Business and Professions Code §23004, emphasizing its requirement that the beverage contain more than one-half of one percent of alcoholic content, and contends that the alcoholic content of Seagram's wine coolers was not established by the evidence. At the administrative hearing, counsel for appellant suggested that a statement on the product label that it was an "alcohol" beverage was insufficient to merit the presumption as to alcoholic content.

The Department relies on the presumption stated in Mercurio v. Department of

⁴ According to the police officer who testified, they were in the custody of the court [RT 23].

Alcoholic Beverage Control (1956) 144 Cal.App.2d 626, 634 [301 P.2d 474], that the containers contained what they purported to contain. We are inclined to agree with the Department's arguments that, for the purpose of putting the public on notice of the fact that a product is an alcoholic beverage, there is no difference in common usage between the terms "alcohol beverage" and "alcoholic beverage," despite the fact that one term has been defined by statute and the other not. The containers in question purported to contain "wine coolers," a product commonly known to be an alcoholic beverage, and one explicitly recognized by the clerk as being an alcoholic beverage. Were it not so, the clerk would have had no reason to ask the minor her age, and then decline, initially, to make the sale.

Counsel for appellant acknowledged in his cross-examination of the arresting officer [at RT 23], as well as in his direct examination of the clerk [at RT 31] that "we're talking about a four-pack of Seagram's Wine Coolers; is that right?"

The minor testified she selected "wine coolers" from the cooler [RT 8]. The clerk, upon learning the minor was underage, said, according to the minor, "something like, 'oh, we can't sell alcohol to minors'" [RT 8]. This is an admission that what was involved in the transaction was an alcoholic beverage of the type not to be sold to minors, and, therefore, evidence of an alcoholic beverage subject to the strictures of the Business and Professions Code.

We are satisfied that there was sufficient evidence to support the Department's

determination that the product sold was, in fact, an alcoholic beverage.

CONCLUSION

The decision of the Department is affirmed.⁵

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

⁵ This final decision is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said Code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.