

ISSUED APRIL 26, 2001

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

| | | |
|----------------------------|---|--------------------------|
| THE SOUTHLAND CORPORATION, |) | AB-7603 |
| UJJAL SINGH CHAWLA and |) | |
| SATINDER KAUR |) | File: 20-338866 |
| dba 7-Eleven #2237 25141B |) | Reg: 99045736 |
| 6015 North Blackstone |) | |
| Fresno, CA 93710, |) | Administrative Law Judge |
| Appellant s/Licensees, |) | at the Dept. Hearing: |
| |) | Jeevan S. Ahuja |
| v. |) | |
| |) | Date and Place of the |
| DEPARTMENT OF ALCOHOLIC |) | Appeals Board Hearing: |
| BEVERAGE CONTROL, |) | February 15, 2001 |
| Respondent. |) | San Francisco, CA |
| |) | |

7-Eleven, Inc. (formerly The Southland Corporation), Ujjal Singh Chawla, and Satinder Kaur, doing business as 7-Eleven #2237 25141B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control made pursuant to Government Code §11517, subdivision (c),¹ which suspended their off-sale beer and wine license for 15 days for their clerk, Shannon Shaw, having sold an alcoholic beverage (beer) to Aaron Marathi (“Marathi,” or “the decoy”), a minor

¹The decision of the Department, dated February 17, 2000, and the proposed decision of the Administrative Law Judge, are set forth in the appendix.

then eighteen years of age, the sale 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's 7-Eleven, Inc., Ujjal Singh Chawla, and Satinder Kaur, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 28, 1998. An accusation against them was filed February 23, 1999, charging that an unlawful sale to a minor was made on October 21, 1998.

An administrative hearing was held on July 8, 1999, at which time oral and documentary evidence was received. The evidence at the hearing revealed, among other things, that the sale in question was made to a police decoy who was 6' 4" tall and weighed 250 pounds at the time of the sale. Following the conclusion of that hearing, the Administrative Law Judge (ALJ) issued his proposed decision, which concluded that, although the appearance of the decoy was that of a person under the age of 21,² his large physical stature lulled the clerk into a false sense of security, such that the decoy operation violated the fairness requirement of Rule 141(a) (Special Finding of Fact VI.4).

² The ALJ relied upon the decoy's "overall appearance, including his shy and hesitant demeanor and his manner of speaking" in making the determination that he possessed the appearance of a person under the age of 21.

The Department declined to adopt the proposed decision, instead issuing its own decision pursuant to Government Code §11517, subdivision (c). The Department's decision adopted in large part the findings of the ALJ, including those which rejected appellants' claim that there had been no face to face identification and that Rule 141(b)(3) was violated by the decoy's failure to produce his high school identification card, along with his driver's license, but rejected that part of the ALJ's decision regarding the fairness of the police use of a decoy having the physical stature of Marathi. The Department stated in its decision (Finding of Fact VI):

“Despite Mr. Marathi's large stature, his overall appearance, including his shy and hesitant demeanor and his manner of speaking, were such as could generally be expected of a person under the age of 21 years. The fact that the clerk requested, received and examined the driver's license is some indication that the clerk was not lulled into a false sense of security by the minor's stature. The clerk admitted that she must have been thinking about the legal age to buy cigarettes when she made the sale of alcohol to the minor. This is an indication that the clerk believed she could sell the beer to someone as young as 18 years, not that she believed the minor had the appearance of one 21 years of age or older. There was no violation of the fairness requirement of Rule 141(a).”

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants contend that the police use of the decoy in question violated the fairness requirement of Rule 141, and that his failure to produce his high school identification contributed to the unfairness of the operation.³

³ Appellants also suggest that the identification process was flawed because the police officer identified the clerk and the minor merely reaffirmed the police officer's identification. This claim clearly lacks merit.

DISCUSSION

I

Appellants contend that the decoy operation was conducted in violation of the fairness requirement of Rule 141(a), by the use of a decoy of such size as to lull the clerk into a false sense of security.

The Department, on the other hand, contends that the clerk was not lulled into a false sense of security, citing her explanation of the sale as the result of her mistakenly thinking about cigarettes, where the legal age for purchase by a minor is 18. In addition, the Department points to the ALJ's findings that the decoy, despite his physical stature, exhibited a shy and hesitant demeanor and manner of speaking consistent with that of one possessing the appearance of a person under the age of 21. The Department argues that, once it found that the decoy's appearance complied with Rule 141(b)(2), the issue of fairness under Rule 141(a) was no longer a consideration; according to the Department, the specific requirement of Rule 141(b)(2) regarding appearance controls and takes priority over the general requirement of fairness under Rule 141(a).

The Department distinguishes Assaedi (1999) AB-7144, upon which the ALJ had relied, on the principal ground that there was evidence in that case of the Department's decoy program guidelines, which discouraged the use of decoys large in stature or having a beard or mustache, while in the present case there was no such evidence. The Department further argues that the Board may not assume that the same guidelines were in effect at the time of the present violation.

The Department is authorized by the California Constitution to exercise its

discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.⁴

The Board has on a number of occasions expressed its concern over the use by police of decoys of such large stature as by size alone to suggest to a seller that they might be of legal drinking age, at times referring to the Department's own guidelines in support of its position. However, the concept that the use of a decoy of large physical stature as unfair under Rule 141(a) is not dependent upon the Department's decoy guidelines. Rather, the Department's decoy guidelines merely acknowledge the fact that there is a point where the physical size of the decoy may be such as to mislead a seller into thinking the decoy is of legal drinking age.

⁴ California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

The Department's argument that Rule 141(b)(2) is the exclusive standard of appearance is based on the rule of statutory construction that a specific statute controls and takes priority over a general statute encompassing the same subject. As a general proposition, we do not quarrel with the Department's statement of the rule. But Rule 141 is not the ordinary statute. Rule 141(b)(2) is one of the five minimum standards delineated in the rule, their purpose being to promote the overall goal of the rule, which is to ensure that decoy operations are conducted in such manner as to insure fairness.

It is the ALJ who, in the first instance, must make the determination whether the decoy has the appearance of a person under the age of 21, and, except in rare instances, and assuming the standard in Rule 141(b)(2) has been adhered to, his determination will be sustained on appeal. The ALJ has the opportunity, which the Board does not have, to observe and hear the decoy as he or she testifies, and assess the decoy's demeanor.

But where, as here, the physical stature of the decoy is a great deal larger than the norm, other considerations come into play. The very fact that the Department has in the past (if no longer) discouraged the use of decoys large in stature suggests that even it recognizes the potential unfairness in such a situation. The ALJ in this case also recognized that potential unfairness. Indeed, there is a certain inconsistency between his finding that the decoy satisfied the requirement of Rule 141(b)(2) that he display the appearance which could generally be expected of a person under 21 years of age, and yet, because of his physical stature, lulled the clerk into a belief he was 21 years of age or older.

Additionally, we think that, in the unusual circumstances of this case, some weight must be given to the fact that the decoy successfully purchased an alcoholic beverage at five different locations on the night in question, and was unsuccessful eight times. While the Board has no statistical data with which such a "success" rate could be compared, our impression is that it is considerably above the norm.

It is true that the clerk's statement, as related by officer Meyers, could be construed to indicate that, rather than having been lulled into a false sense of security, she was instead confused as to how old the decoy needed to be to make the kind of purchase he was making, and mistakenly thought that age was 18, the legal age for the purchase of cigarettes. Seen in that light, it would appear that the decoy's physical stature played no role in her decision to make the sale. On the other hand, we are confronted with the reality that the ALJ was sufficiently impressed by the decoy's large stature to project that the clerk might have been misled.

All of this leads us to conclude that the decision of the Department must be reversed. Ordinarily we would accept an ALJ's determination that there has been compliance with the standard contained in Rule 141 (b)(2), because he was in a position to observe the decoy and we were not. We are unwilling to do so in this case. Instead, we are persuaded that the ALJ's own concern over the appearance of the decoy reflects an element of possible unfairness, enough so that we are unwilling to sanction the use of the decoy in question in a decoy operation governed by Rule 141.

II

Appellants contend that the decoy, when asked for identification should have produced his high school identification card in addition to his California driver's license. It is appellants' position that, had identification been displayed which showed that the decoy was still in high school, any false impression created by his physical size would have been dissipated. The failure to produce such identification, they contend, violated Rule 141(b)(3).

The record does not reflect precisely what the clerk said to the decoy when requesting his identification.

Rule 141(b)(3) provides that a decoy "shall 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."

According to the decoy, the high school identification did not contain his age or date of birth. It must be assumed, in the absence of record evidence to the contrary, that when requesting identification, the clerk was asking for a document which contained information regarding the decoy's age and date of birth, the same items about which she questioned him. There was no obligation under the rule that he produce other identification from which the clerk could draw inferences that he was below the required age for the purchase being made, and we do not believe his failure to volunteer that information violated the rule, any more than his not affirmatively warning the clerk that she should not sell to him.

ORDER

For the reasons stated in part I, supra, the decision of the Department is reversed.⁵

TED HUNT, CHAIRMAN
E. LYNN BROWN, 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 final decision as provided by §23090.7 of said code.

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