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

AB-7718

NORTH STATE GROCERY, INC. dba Holiday Quality Foods
9350 Deschutes Road, Palo Cedro, CA 96073,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
File: 21-259829 Reg: 00048266

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: August 3, 2001
San Francisco, CA

ISSUED SEPTEMBER 27, 2001

North State Grocery, Inc., doing business as Holiday Quality Foods (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for appellant's 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 appellant North State Grocery, Inc., appearing through its counsel, Rick Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated October 26, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 6, 1991. Thereafter, the Department instituted an accusation against appellant charging that, on December 10, 1999, appellant's clerk, Jillian Young ("the clerk"), sold an alcoholic beverage, a six-pack of beer, to 17-year-old David Gilman. Gilman was a minor decoy for the Shasta County Sheriff's Department at the time of the sale.

An administrative hearing was held on July 6, 2000, at which time documentary evidence was received and testimony was presented by Gilman ("the decoy"), Sheriff's Deputy Jeff Foster, Young, Sandra Curtiss (a manager or supervisor at the premises), and Richard Morgan, Jr., appellant's president. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged in the accusation, and no defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Rule 141(b)(5) was violated; (2) the decoy's appearance violated Rule 141(b)(2) and Rule 141(a); and (3) the prior violation may not be used to aggravate the penalty.

DISCUSSION

I

Appellant contends the decoy's identification of the seller following the sale was not face to face as required by California Code of Regulations, title 4, §141, subdivision (b)(5) (Rule 141(b)(5)). It argues that the clerk was facing away from the decoy and the officer, waiting on a customer, when the decoy made the identification, and therefore, the clerk did not have "a fair opportunity" to observe the decoy identifying her.

Rule 141(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 to make a face to face identification of the alleged seller of the alcoholic beverages."

In Chun (1999) AB-7287, this Board defined "face to face":

"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."

The Appeals Board explained further in Greer (May 4, 2000) AB-7403, that "[t]he minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to be actually aware that the identification is taking place."

The Administrative Law Judge (ALJ) made the following findings with regard to the identification:

Finding V-

"The decoy re-entered the store accompanied by Deputy Jeff Foster of the Shasta County Sheriff's Department and Department investigator Katie Lenihan. . . . They approached the clerk and stood at the end of the cash register aisle in the area where groceries are usually bagged. The clerk who sold the decoy the beer was helping a customer. As she became aware of some persons standing at the end of the cash register aisle, she looked at Deputy Foster and the decoy, but continued to help the customer. Deputy Foster asked the decoy if that was the person who sold him the beer; the clerk was continuing to help the customer. The decoy nodded his head, said, 'This is her,' and pointed at the clerk. As the decoy was saying, 'This is her,' Ms. Young had finished helping the customer and was turning to look in their direction, and when he finished making the statement and pointing at Ms. Young, Ms. Young was looking at them – Deputy Foster and the decoy. Deputy Foster then identified himself and suggested they go to the back so as not to embarrass Ms. Young. Subsequently, they went into an office in the back where Ms. Young was photographed with the decoy and the beer. The clerk was then issued a citation for violation of Section 25658(a)."

Finding VII-

"Ms. Young testified that after she looked in the direction of Deputy Foster and the decoy, standing at the end of the cash register aisle, she did not observe the decoy make any gesture or say anything; in other words, he did not identify her after she turned to look at Deputy Foster and the decoy. This testimony was not found to be credible. Ms. Young testified that she was very upset after the incident; Ms. Sandra Curtiss, [appellant's] employee who was responsible for closing the store, testified that Ms. Young was crying. Ms. Young admitted that she did not prepare any written notes after the incident. She also agreed that certain aspects of her testimony may not be accurate but may have occurred differently. Although Ms. Young testified that she was hard of hearing and did not hear Deputy Foster ask the decoy the question about who sold him the beer, it is difficult to believe that she was not aware of, and did not look in the direction of a rather large person, Deputy Foster, as well as the decoy standing just a short distance away at the end of the cash register aisle. On the other hand, Deputy Foster prepared a report following the incident; moreover, the testimony of Deputy Foster and the decoy was consistent. Accordingly, it is found that the testimony of Deputy Foster and the decoy are more credible and it is found that Ms. Young was looking in the direction of Deputy Foster and the decoy about the time the decoy was pointing in Ms. Young's direction and was finished saying, 'This is her.' "

Finding VIII-

"A. [Appellant] has argued that the Department did not comply with the requirements of subdivision (b)(5) of Section 141, Title 4, California Code of Regulations (hereinafter 'Rule 141'). In Greer, AB-7403 (May 4, 2000), the Appeals Board stated that,

> 'The minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to be actually aware that the identification is taking place'. AB-7403, at pg. 4.

"In the present matter, evidence established that the clerk was looking towards the decoy and Officer Foster just as the decoy finished his statement, 'This is her,' pointing at the clerk. Thus, in this matter the clerk was aware that she had been pointed out. But even if the clerk was not aware, it does not affect the validity of the face-to-face identification. (See, Greer, supra.) Accordingly, [appellant's] argument is rejected."

The ALJ concluded that the clerk was actually aware of the decoy's identification of her. He apparently based this conclusion on his earlier finding that the clerk was looking toward the decoy as he finished identifying her by pointing at her and saying "This is her." The ALJ mentioned the decoy's pointing several times in his findings. He specifically found that the decoy pointed at the clerk when identifying her (Finding V),

and that the clerk was looking at the decoy and the officer "about the time the decoy was pointing in Ms. Young's direction and was finishing saying, 'This is her.'" (Finding VII; see also Finding VIII-A.) Clearly, the pointing was a significant factor in the ALJ's conclusion that the clerk was actually aware.

The decoy initially testified that he pointed while identifying the clerk, but then, when asked more specifically about his pointing, said that he did not point, but nodded his head while identifying the clerk. [RT 24-25.][2] The decoy was questioned several times subsequently about his identification of the seller, but never again said that he had pointed while identifying her. Deputy Foster did not mention the decoy pointing while identifying the seller.

The evidence does not support the finding that the decoy was pointing at the clerk, and thus the major part of the support for the ALJ's conclusion must be diregarded. Appellant argues that since the decoy did not point, the clerk had no way of knowing that he was identifying her. It is clear to us that without the decoy pointing, the ALJ's finding that the clerk was actually aware, at the exact moment of identification, that she was being identified, is so questionable as to be erroneous.

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[2]This testimony occurred during direct examination by Department counsel:
"A. [by decoy] As I remember, it was – I pointed to her, and I said, 'That's her,' and then they asked me am I sure. I said, 'Yes.'
"Q. Okay. You pointed to her meaning the clerk?
"A. Yes.
"Q. And did you point with your finger, extending your finger out?
"A. No. I just – they asked me. I said, 'That is her.' And, 'This is the clerk?' I went, 'Yes.' And there was only one clerk at the check stand at that moment.
"Q. Okay. Now, you were just nodding your head as if you were kind of indicating with your head. Did you do that as well?
"A. Yes."

Even if the clerk were facing the decoy and the officer, there was little for her to see since the only gesture the decoy made was a nod of his head. Since the clerk is hard of hearing and did not have her hearing aid that day, it is unlikely she would have heard the brief question and briefer answer that constituted the identification.

While it cannot be said in the present case that the clerk was actually aware of the decoy's identification of her, the identification is still considered to be face to face if the clerk reasonably *should* have been aware. (Chun, supra.)

The decoy made his identification of the seller in the present case from "the end of the cash register aisle in the area where groceries are usually bagged," a distance which the decoy estimated as two to three feet [RT 25], well within the range this Board has found to be reasonable. (See, e.g., Southland & Meng (1/4/00) AB-7158a [5-8']; Southland & Anthony (11/14/00) AB-7292 [8-10']; Circle K Stores, Inc. (4/26/01) AB-7641 [8-9'].) Although, as discussed above, the decoy did not point at the clerk while identifying her, the rule does not specify how the identification is to be done and this Board has rejected the contention that a decoy's failure to point to the seller would, in every case, prevent the clerk from becoming aware he or she was being identified. (Southland & Anthony (11/14/00) AB-7292; see also Southland & Meng (1/4/00) AB-7158a.)

In the present case, the clerk was engaged in a transaction with another customer, and only glanced at the officer and decoy as they approached the check stand. As she finished the transaction, however, she turned her attention to them just as the decoy was finishing saying "This is her" in response to the officer's inquiry. The officer identified himself to the clerk immediately thereafter and told her that she had

sold to a minor. The officer testified that the clerk's expression changed from a smile to a somber look as he identified himself as a police officer [RT 57, 59-60] and the clerk testified that, upon seeing the officer's badge and noticing the decoy with him, "it just clicked in my head that I had just sold alcohol to a minor" [RT 109].

In Tang & Tran (10/19/00) AB-7454, the appellants argued that the clerk could not reasonably have been aware that he was being identified as the seller because the identification was made while the clerk was attending to another customer, and before the officer had identified himself as a law enforcement officer. While appellants were accurate in their statement of the facts, they were not complete. The ALJ found (Finding III-D):

> ". . . . The two walked up to where clerk Choi was working. They did not get in a line, if there was one, but walked up and stood next to the person who was being served. Once there, decoy Hernandez told deputy Wyche that Choi is the one who sold her the beer. As she did so, she pointed at Choi with her left hand and Choi was looking in her direction from just across the counter."

Within seconds after the decoy made the identification, the officer identified himself and told the clerk that he had sold to a minor. The Board found that the identification process was proper because "the combination of circumstances gave [the clerk] all he could reasonably expect in the way of knowing he had been accused and by whom."

In Southland & Anthony AB-7292, supra, appellants argued that the decoy did not point at the seller while identifying her and the clerk was unaware she was being identified. The Board found that the lack of pointing did not invalidate the identification process, in light of all the circumstances:

> "The decoy identified the seller to the police officer while the decoy was looking at the seller. The seller's face was visible to the decoy and the police officer, and the seller was within a reasonable distance from the decoy at the time of the identification. The seller was aware, or should reasonably have been aware, that an identification process was occurring, by reason of the officer's question to the decoy and the decoy's answer . . . . Even if, for whatever reason, the clerk did not hear the question and answer, she was fully aware of the decoy's presence when the officer told her she had sold to a minor and could not have failed to understand that the decoy was identifying her as the seller."

In the present case, there is no question that the decoy actually made the identification in a reasonable manner while within reasonable proximity to the clerk. It is also clear that the clerk realized, within seconds after the decoy made the identification, that she had made an unlawful sale to a minor and that she recognized the person standing at her checkout lane with the officer as the minor she sold to. Given these circumstances, the clerk reasonably should have known that the decoy identified her as the seller of alcoholic beverages. Although her realization was not exactly contemporaneous with the moment the decoy actually made the identification, this does not violate any of the requirements for a face-to-face identification under Rule 141(b)(5) and this Board's decisions.

II

Appellant contends the decoy violated Rule 141(b)(2) because he did not display the appearance generally to be expected of a person under the age of 21, and his appearance made the decoy operation unfair, in violation of Rule 141(a). Appellant asserts that the decoy, who was 6'2" tall, weighed 190 pounds, shaved every day, was not nervous during the transaction, and made eye contact with the clerk, appeared to be in his mid-20's. In addition, appellant notes, the decoy had already made 27 decoy

stops that day, and appeared calm and matter-of-fact to the clerk.

Appellant relies on the testimony of the clerk and her supervisor, who both said they thought the decoy looked as if he were in his mid-20's. The ALJ, however, found:

> "VI. A. On the date of the decoy operation, December 10, 1999, the decoy was 6 feet 2 inches tall and weighed 190 pounds. He was wearing a gray sweatshirt and jeans. He was not wearing any jewelry. State's Exhibit No. 4 depicts the minor as he appeared on the date of the sale of beer to him. It is noted that on the date of the hearing, the decoy was dressed in the uniform of a cadet for the Shasta County Sheriff's Department. Nevertheless, viewing the decoy on the date of the hearing, and in the photograph, State's Exhibit No. 4, it is found that on the date of the sale of beer to him, he displayed the physical appearance which could generally be expected of a person under twenty-one years old.
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> "B. On the date of the hearing, the decoy initially appeared nervous, but became more comfortable as the hearing progressed. Although he testified that he was nervous when he was in [appellant's] premises purchasing the beer, it was the last of 28 premises visited on that date, and he could not, specifically, recall being nervous. He testified that he was ill and was losing his voice, but the evidence is not clear that this nervousness or illness manifested itself while he was purchasing the beer from Ms. Young.
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> "C. Having observed [the decoy's] overall appearance, and noting his physical appearance, including the clothing he was wearing at the time of the sale of beer to him, his demeanor and maturity, his poise and his initial nervousness, it is found that he displayed the appearance generally expected of a person under 21 years old. There is no evidence that the decoy presented a substantially or significantly different appearance in front of [the clerk] on December 10, 1999."
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> "VIII. B. 1. [Appellant's] argument that the decoy operation was not conducted in a manner that promoted fairness as required by subdivision (a) of Rule 141 is rejected. Although the decoy is 6'2" tall and weighed 192 pounds, his size did not result in a violation of the fairness requirement of Rule 141. It is noted that the decoy was eighteen years old at the time of the hearing, but was only seventeen years old at the time of the sale of beer to him; despite his size, his face reflected his young age."

The ALJ made an express finding that "the decoy displayed the appearance generally expected of a person under 21 years old." He made this finding after having observed the decoy as he testified, and having been made aware of the matters relied

upon by appellant. The Board has only appellant's assessment of the decoy's appearance and a photograph of the decoy upon which to base a different judgment as to his appearance. Under such circumstances, and where the ALJ's findings indicate compliance with Rule 141(b)(2), the Board is not in a position to substitute its judgment for that of the trier of fact.

With regard to the general fairness requirement of Rule 141(a), the Board's agreement with the ALJ's finding that the decoy displayed the appearance that could generally be expected of a person under the age of 21, precludes this Board from saying, as appellant requests, that "by his size and demeanor he reasonably appeared so mature that he lulled the clerk into a false sense of security and a lack of alertness."

III

Appellant contends it was a violation of due process for the Department to use a prior violation to aggravate the penalty because the Stipulation and Waiver in the prior matter was signed by appellant's president based upon an excusable mistake of fact. It argues that in signing, he relied on the alleged representation by a local Department employee that the Department would drop any proceedings with regard to that violation because the premises had a good reputation and no other violations.

Appellant states that "when one is induced to enter into an agreement [such as a stipulation and waiver] in reasonable, albeit mistaken, reliance on the promise of the other party, the other party may not enforce the agreement in a fashion contrary to what it promised."

Appellant's contention fails for a number of reasons:

1. Appellant did not raise this issue at the hearing when it should have been

raised so the ALJ could address it, and it is not necessary for the Board to address it on appeal. At the hearing, appellant only asserted that the documents evidencing the prior (Exhibit 2) were hearsay, lacked foundation, and did not demonstrate that Rule 141 was complied with in the prior matter.

2. Even if the Board were to consider this contention, there are not sufficient facts to support it. A vague statement that a Department employee left appellant's president with the impression that the matter was just going to be waived is not enough to establish a mistake of fact that would make a contract unenforceable.

3. Appellant cites no authority for its contention that "when one is induced to enter into an agreement in reasonable, albeit mistaken, reliance on the promise of the other party, the other party may not enforce the agreement in a fashion contrary to what it promised." Ordinarily, mistake of fact makes a contract void or voidable, not enforceable in accordance with some "promise" relied upon by the mistaken party. (See 1 Witkin Sum. Cal. Law (9th ed.) Contracts §365 et seq.)

4. The validity of the prior violation is established based on the accusation and the final decision of the Department, not the Stipulation and Waiver. The Stipulation and Waiver could be missing and it would not affect the validity of the decision in the prior matter. It is not the Stipulation and Waiver in the prior matter that is used to enhance the penalty, but the prior decision finding a violation.

5. If the Stipulation and Waiver is a contract, as asserted by appellant, the parol

evidence rule generally prevents the introduction of extrinsic evidence to vary or add to the terms of an integrated written instrument. (See 2 Witkin Cal. Evid. §960.)

6. Even if all happened as alleged and there was some sort of promise that the proceedings would be "waived" or "dropped," it was not established what would constitute waiving or dropping the proceedings. Appellant's president testified that no suspension was served nor fine paid with regard to the prior matter, and it may be that this absence of actual penalty was what the Department employee meant by waiver of the proceedings. There is no basis for asserting that waiving the proceedings meant that the violation would be expunged entirely from appellant's record for all purposes.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]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.