ISSUED NOVEMBER 3, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GRILL CONCEPTS, INC. dba Daily Grill 11677 San Vicente Blvd., #200 Los Angeles, CA 90049, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7206 File: 47-314109 Reg: 97041284 Administrative Law Judge at the Dept. Hearing: George S. Avila Date and Place of the Appeals Board Hearing: August 12, 1999 Los Angeles, CA

Grill Concepts, Inc., doing business as Daily Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for five days for appellant's bartender furnishing an alcoholic beverage, Miller Lite beer, to an 18-year-old police decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article

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

XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Grill Concepts, Inc., appearing through its counsel, Ralph Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on January 30, 1996. Thereafter, the Department instituted an accusation against appellant charging sale of an alcoholic beverage to a person under the age of 21.

An administrative hearing was held on May 28, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the minor decoy, Suzanne Lowry; the Los Angeles Police Department (LAPD) officer accompanying her during the decoy operation, Steven Stein; appellant's bartender, Linsae Patterson; and Edward Ritvo, M.D.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation was proven as alleged.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the decoy did not display the appearance generally to be expected by a person under the age of 21 as required by Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)).

DISCUSSION

We first consider appellant's argument that the ALJ should not have ignored the expert testimony it proffered. Appellant called as a witness Edward Ritvo, M.D., a psychiatrist, to give his opinion as to the apparent age of the decoy. The ALJ, in Determination of Issues VI, stated:

> "[Dr. Ritvo's] opinion is not entitled to any legal weight on the question of the minor decoy's age. Rule 141 makes no statement or inference that expert opinion is to be used in determining the approximate age of the minor decoy. . . . The determination of a person's age on first impression does not require expert testimony. Such proffered evidence will only confuse, mislead and cloud the issue of age. The trier of fact is not aided or assisted in his role as the fact finder by the testimony of Dr. Ritvo."

Evidence Code §801 states that an expert may testify as to his or her opinion if the opinion is on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." We agree with the Department that the determination of a person's apparent age is not a matter "beyond common experience." In addition, the ALJ stated that he was not aided by the expert opinion. The ALJ appropriately rejected Dr. Ritvo's opinion as to the apparent age of the minor decoy.

Appellant also contends that the ALJ created and used an erroneous test to determine if the decoy's appearance complied with Rule 141(b)(2).

Rule 141(b)(2) states:

> "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;

Subdivision (c) of Rule 141 provides that failure to comply with the rule is a defense to any sale-to-minor violation.

The ALJ's finding regarding the appearance of the minor (Finding III) states:

> "Suzanne Lowry (hereinafter 'minor') appeared at the hearing, and her appearance then was similar to her appearance at the time of the sale on the early evening of May 29, 1997, such that a reasonable person would, before selling an alcoholic beverage to her, ask her age, proof of identification and proof of majority age."

In Determination of Issues VI, the ALJ said:

> "The standard referred to in Rule 141(b)(2) requires the minor decoy's appearance to be less than 21 to the seller. The test is: Would a reasonable person working as a bartender under similar circumstances consider the minor decoy to be less than 21 ? . . . As set forth in Findings of Fact III, the minor decoy's appearance required a reasonable person to ask for proof of age. This was confirmed by the bartender Linsae Patterson, requesting to see the minor's ID before she would serve alcohol to the minor decoy. Ms. Patterson asked for the ID because she had a reasonable doubt about the minor's age. . . ." (Emphasis in original.)

In determining whether there has been a violation of Rule 141, it is imperative that the ALJ use the appropriate legal standard, i.e., the one set forth in the rule. The Department argues that the words used by the ALJ may be somewhat different, but they mean the same thing. While the exact words of the rule may, perhaps, be varied and still constitute the same test, the ALJ here used different words that constituted a different standard.

The fundamental problem in this decision arises from the ALJ's use of this erroneous standard: the ALJ makes no finding at all that the decoy displayed the appearance of a person under the age of 21. To say that a reasonable person would require ID and proof of age before selling an alcoholic beverage to the decoy is not necessarily the same as saying that the decoy looked under 21. Given the

"three-strikes" provision for sales to minors, a reasonable person might well card anyone who didn't look over 40 or even 50. Frequently the rule at licensed establishments, such as the premises in this case, is to card anyone who looks under 30.[2] Certainly a reasonable person would card someone who looked 21 or 22 because the difference of a few months or even years often does not make a difference in age readily apparent.

The finding with respect to the decoy's appearance is very similar to findings in other cases recently before the Board in which the Board concluded such findings did not comply with the requirements of Rule 141(b)(2). In these decisions, the findings read essentially as follows (with variations to account for gender and occasional additional remarks about the height or weight of the decoy):

> "[The decoy] is a youthful looking female, whose physical appearance is such as to reasonably be considered as being under 21 years of age and who would reasonably be asked for identification to verify that she could legally purchase alcoholic beverages. The [decoy's] appearance at the time of her testimony was substantially the same as her appearance on the night of the sale ... ."

In those decisions, the Board reversed because the findings referred only to the decoy's "physical appearance" and did not show that the ALJ had considered

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[2]The decision recites the bartender's request for the minor's ID as support for the statement that the minor's appearance required a reasonable person to ask for proof of age. (Det. of Issues VI.) Since the bartender checked the ID of anyone who looked under 30 [RT 47-48], and the bartender thought the minor was over 21 but less than 30 (Finding III.C.), the request for ID does not show that the bartender believed the minor was under 21. As we have said before, "Such precautionary activity should not deprive a licensee of a valid Rule 141 defense if otherwise justified." (R.L. Dillman, Inc. (1999) AB-7166.)

"the sum total of present sense impressions he experienced when he viewed the decoys during their testimony." (See, e.g., Circle K Stores, Inc., AB-7080 (1999).)

In this case, as in the cases the Board has heard on earlier occasions, the ALJ made no factual findings that might provide a basis to conclude that the decoy appeared to be under the age of 21. The Board has said that it does not expect the Department to articulate every possible characteristic which led it to believe that the decoy presented the appearance which could generally be expected of a person under the age of 21. However, the Department is expected to articulate in its decisions enough of the many characteristics of appearance which could be considered, such as, without limitation, dress, poise, demeanor, and the like, to allow this Board or a reviewing court to conclude that an appropriate assessment of the decoy's appearance has been made.

The Department's decision in the present matter has no finding that the decoy appeared to be a person under the age of 21. There is not even the barest description of the decoy to supplement the insufficient and equivocal statement of the ALJ in Finding III. There is nothing in this decision to assure us that the ALJ appropriately considered the decoy's appearance and reached a conclusion that the decoy displayed “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,” as required by Rule 141(b)(2).

The Department argues that, since this Board has ruled that "appearance"

includes demeanor and behavior (Dept. Br. at 5), we should find that "minor decoys who show their valid identification must be found to appear to be under 21 --they cannot appear to be anything else." (Emphasis in original.) Such a finding would be an "end run" around the defense provided by Rule 141 which we emphatically reject.

ORDER

The decision of the Department is reversed.[3]

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

Dissent of John B. Tsu, Member, follows.

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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.

DISSENT OF JOHN B. TSU

I respectfully dissent from the decision of my colleagues in this appeal.

Rule 141(b)(2) requires a decoy to "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; . . ." In the instant case, the decoy, Susan Lowry, was 18 years old. To the bartender, the decoy appeared to be over the age of 21.

This is not a case where the bartender assumed that the decoy was over 21 and sold beer to the decoy without asking for identification. In that situation, I believe the defense of Rule 141(b)(2) would appropriately apply, since the appearance of the decoy would have clearly mislead the bartender.

The circumstances of this appeal are completely different. When the decoy ordered the beer, the bartender asked the decoy for her ID, which the decoy produced and handed to the bartender. The ID shows the date of birth as March 9, 1979. In addition, below the date of birth were the following statements in highlighted bold letters: "PROVISIONAL UNTIL AGE 18 IN 1997; AGE 21 IN 2000." After momentarily examining the ID, the bartender returned it to the decoy, opened a bottle of Miller Lite beer, and placed it in front of the minor. Officer Stein of the LAPD, who had followed the decoy into the premises and observed the transaction, then issued a citation to the bartender.

Since the bartender examined the decoy's ID, she can have no excuse for serving an alcoholic beverage to the decoy. The bartender also testified that she

had received training about age identification and that the licensee's policy was that identification be required for anyone who appeared to be under the age of 30. I do not believe that Rule 141(b)(2) should apply to preclude the imposition of discipline in this case.

In the instant case, the bartender did ask for ID and the ID shows very clearly that the decoy will be 21 in the year 2000. Nevertheless, the bartender did sell the beer to the decoy. Even though the bartender may not have looked at the ID carefully, that is not an excuse, because the licensee and its agents are charged with a duty to maintain a lawful premises and must carefully examine identification presented to them. The bartender was negligent in not doing so, and this negligence is imputed to the licensee.

For these reasons, I believe the Department's decision should be affirmed.