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

THE SOUTHLAND CORPORATION and MARLENE ANTHONY
dba 7-Eleven #2237-16970
2397 South Chestnut, Fresno, CA 93725,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7292

File: 20-214242 Reg: 98043743

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

Appeals Board Hearing: September 22, 2000
San Francisco, CA

ISSUED NOVEMBER 14, 2000

The Southland Corporation and Marlene Anthony, doing business as 7-Eleven #2237-16970 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a person under the age of 21, 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 The Southland Corporation and Marlene Anthony, appearing through their counsel, Ralph B. Saltsman and Stephen W.

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[1]The decision of the Department, dated December 3, 1998, is set forth in the appendix.

Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 7, 1988. Thereafter, the Department instituted an accusation against appellants charging that, on March 31, 1998, appellants' clerk, Sherry LeFlore ("the clerk"), sold an alcoholic beverage to Todd Maciel, who was then 19 years old. Maciel was acting as a police decoy at the time.

An administrative hearing was held on September 25, 1998, at which time documentary evidence was received, and testimony was presented by Maciel ("the decoy"); Fresno police officer John Meyers; Sandra Krideil, a customer in appellants' store at the time of the decoy operation; the clerk; and Marla Allen, the store manager.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged in the accusation and no defense had been established pursuant to Business and Professions Code §25660.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(2) was violated, and (2) Rule 141(b)(5) was violated.

DISCUSSION

I

Appellants contend the ALJ did not comply with Rule 141(b)(2) when he limited his evaluation of the decoy's apparent age to the decoy's physical appearance alone. He further erred, appellants argue, in refusing to consider factors such as the decoy's lack of nervousness and in finding Rule 141(b)(2) to be inapplicable when the clerk

asked for and was shown the minor's identification.

Finding of Fact III-1 states that "Todd Maciel is a male person whose physical appearance is such as to be considered under twenty-one years of age." This finding, relying solely on physical appearance, uses an erroneous standard and constitutes a basis for reversing the Department's decision.

The ALJ, in his Special Findings of Fact and Legal Argument (Finding IV), states:

> "A. [Appellants] argue that the Accusation must be dismissed because the Fresno Police Department did not comply with Section 141(b)(2) of Title 4, California Code of Regulations (hereinafter 'Section 141(b)(2)'). Section 141(b)(2) essentially provides that 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 the alcoholic beverages. [Appellants'] argument is rejected. It is found that the minor presented the appearance of a person under 21 years of age.
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> "In any event, once the seller of alcoholic beverages asks the minor for identification, Section 141(b)(2) has no further application. The interests of fairness have been served and the seller of alcoholic beverages has the best evidence of the minor's age in his or her hands – documentary evidence of identity and age. The decision to sell alcoholic beverages to that decoy must then be based on this documentary evidence of age and identity. [Appellants'] focus on factors such as the fact that he was not nervous, that he was pretty comfortable being a decoy, and therefore did not display the appearance of a person under 21 years of age is rejected."

This Board has previously addressed contentions that Rule 141(b)(2) becomes inapplicable when a clerk requests and views a decoy's identification. In The Southland Corporation and Atwal (January 5, 2000) AB-7113a, the Board said:

> "The ALJ apparently considered that the clerk's failure to carefully check the decoy's ID made the decoy's appearance, and Rule 141(b)(2), irrelevant. The ALJ had it backwards. If Rule 141 is violated by law enforcement's use of a mature-looking decoy, the clerk's failure to request identification, or to look at it carefully when shown, is irrelevant and cannot somehow 'correct' the use of an inappropriate decoy. The defense provided by Rule 141 is 'a defense to any action brought pursuant to Business and Professions Code Section 25658,' regardless of the actions of the licensee or

his agents."

The Board responded in a similar fashion to the Department's argument in Hennessey's Tavern, Inc. (January 5, 2000) AB-7291:

> "The Department's brief also suggests, at least by implication, that if the true age of the decoy could have been determined by simply asking the decoy, who, under Rule 141(b)(4), must answer truthfully, his or her age, or by observing the age warnings on a valid identification which would have to be produced upon request, pursuant to Rule 141(b)(3), then the appearance of the decoy is irrelevant. But, if that were the case, then there would be no reason for Rule 141(b)(2) to be part of the rule."

The Department argues that the specific finding in the Special Findings section of the decision – "It is found that the minor presented the appearance of a person under 21 years of age." – satisfies Rule 141(b)(2) and controls over the "general finding" in Finding III-1. The Department points out that the ALJ was clearly aware of the Rule 141(b)(2) requirements, since he preceded his special finding with a recitation of them.

If the ALJ had stopped after the first paragraph of his Special Findings, the decision might have been salvaged. However, he continued on and in the second paragraph, makes it clear that, while he can recite what is called for by 141(b)(2), he does not believe that he needs to engage in an evaluation of the decoy's appearance at all in this instance. Even if he did do an evaluation, he also makes it clear that he did not consider other aspects of age indicia, such as demeanor and nervousness or the lack of it. Under these circumstances, there is no basis for concluding that the ALJ applied the proper standard under Rule 141(b)(2), and the decision must be reversed.

II

Appellants contend that the identification required by Rule 141(b)(5) did not take place. They argue that the identification was not "face-to-face" because the decoy made the identification when he was standing just inside the doorway, 8 to 10 feet away from the counter behind which the clerk was standing; he did not point to the clerk, but merely responded affirmatively to the officer's inquiry; and the clerk did not know she was being identified.

California Code of Regulations, title 4, §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."

Appellants argue that the identification here did not comply with the definition of "face-to-face" stated by this Board in Chun (1999) AB-7287:

> "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 8- to 10-foot distance of the decoy from the seller at the time of the identification does not mean that the identification was not face-to-face. The Board found that about 10 feet between the decoy and the clerk during identification was sufficient proximity to make the identification face-to-face in both Circle K Stores, Inc., (2000) AB-7337 and in Prestige Stations, Inc. (2000) AB-7437.

Appellants argue that the decoy did not point to the clerk to identify her, but merely answered "Yes" when the officer asked him if the clerk was the one who

sold the alcoholic beverage to him. The rule does not specify any particular method that must be used to identify the seller. Appellants appear to be saying that the failure to point would prevent the clerk from becoming aware she was being identified. However, the officer testified that he was standing across the counter from the clerk when he asked the decoy if the clerk was the person who sold to him [RT 45]. The decoy was apparently still near the door. Since the decoy responded verbally to the officer's question, he must have heard the question even though he was 8 to 10 feet away. The clerk, who was standing just across the counter from the officer, must also have heard both the question and the answer. It is difficult to believe, under the circumstances, that the clerk did not know she was being identified.

The clerk's testimony that she did not recall being identified by the decoy does not negate the conclusion that a face-to-face identification occurred. Both the decoy and the officer were certain that an identification was made; they only differed as to the decoy's distance from the clerk at the time. The clerk testified that when the officer came up and identified himself and told her she had sold to a minor, she noticed the decoy had come back inside and was standing near the door [RT 66, 70]. She confirmed that she had no doubt to whom the officer was referring when he told her she had sold to a minor [RT 67].

We conclude that the identification required by the rule was made. 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 (see 5. above). 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.

ORDER

The decision of the Department is affirmed with respect to the issue of face-to-face identification, but reversed on the issue of the decoy's appearance.[2]

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

[2]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.