ISSUED DECEMBER 27, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

LONGS DRUG STORES CALIFORNIA, INC. dba Longs Drug Stores #363 2035 Novato Boulevard Novato, CA 94947, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7356 File: 21-290438 Reg: 98044399 Administrative Law Judge at the Dept. Hearing: Arnold Greenberg Date and Place of the Appeals Board Hearing: November 18, 1999 San Francisco, CA

Longs Drug Stores California, Inc., doing business as Longs Drug Stores #363 (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 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 appellant Longs Drug Stores California, Inc., appearing through its counsel, John Hinman and Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

[1]The decision of the Department, dated February 11, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 28, 1994. Thereafter, the Department instituted an accusation against appellant charging that, on July 2, 1998, appellant's clerk, Sarah Soo Hupp ("Hupp") sold a bottle of Marin Pale Ale, an alcoholic beverage, to Nicole Watkins ("Watkins"), a 16-year-old decoy working with the Novato Police Department.

An administrative hearing was held on November 13, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Watkins, the decoy; Novato police officer Marco Innocenti; store manager Melissa Clark; and Hupp, the clerk.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as charged in the accusation and that no defense had been established under either Business and Professions Code §25660 or Rule 141 (4 Cal. Code Regs. §141).

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department did not properly apply Rule 141(b)(2) in evaluating the appearance of the decoy, and (2) the Department did not establish compliance with Rule 141(b)(5).

DISCUSSION

I

Appellant contends the Department did not apply the correct standard under Rule 141(b)(2) in evaluating the appearance of the decoy. Finding III(C), after recounting how the minor was dressed and her size at the time of the sale, states: "Her

physical appearance is such as to reasonably be considered to be under the age of 21." Appellant argues that this standard is not that required by the rule because it considers only the decoy's physical appearance, ignoring other relevant indicia of age, and it concludes that it was "reasonable" to consider the decoy to be under 21 rather than concluding that the decoy's appearance was that "which could generally be expected" of one under 21.

As appellant points out, the finding in question is the same as those in many of the previous Rule 141(b)(2) cases the Board has considered, such as the appeals of Circle K Stores, Inc., AB-7080, AB-7112, AB-7122, and AB-7108, all issued on April 14, 1999.

In the present case, the ALJ goes into great detail to describe how the decoy was dressed, what jewelry and make-up she was wearing, how tall she was, and how long her hair was. All this detail, however, refers only to the decoy's physical appearance, so it does not take this case out of the line of the Circle K cases, *supra*.

The previous cases using this type of finding have been consistently reversed by the Board. On the basis of those cases, this appeal should also be reversed.

The use of the "reasonable" standard instead of the "generally to be expected" standard of the statute is also wrong. It could be "reasonable" to conclude that a person was under 21 even if that person's appearance was not that which would "generally be expected" of people under the age of 21. It is certainly conceivable that a decoy who could reasonably be considered to be under 21 might also be reasonably considered to look over the age of 21, and might display an appearance that was not at all that which could generally be expected of a person under the age of 21.

We conclude that the Department decision must be reversed on the basis of failure to properly apply the standard of Rule 141(b)(2) in evaluating the decoy's appearance.

II

Appellant contends the Department did not establish compliance with Rule 141(b)(5), which requires that the decoy make a face-to-face identification of the seller. Finding III(E) states, in part: "[Watkins] returned with those officers and identified Ms. Hupp as the person who sold the alcoholic beverage to her." The decision does not otherwise specifically address Rule 141(b)(5), although, appellant states, it was raised as a defense and there was "extensive testimony" regarding this issue. Appellant asserts that "[t]he obvious conclusion to be drawn is that after hearing all of the testimony concerning the identification, the ALJ was unable to conclude, or state, that the identification was made 'face to face' with the clerk."

Appellant quotes from the Board's decision in Southland Corporation and R.A.N., Inc. (1998) AB-6967:

> "[T]he Department must show conformity to these minimum standards by law enforcement, that is, a prima facie showing that the demands of the rule have been adhered to. If law enforcement fails to adhere to the rule, then such failure becomes a defense to the accusation. Thus the burden is on the Department to show conformity to its own rule."

It is unfortunate that the ALJ did not make a more specific finding regarding the identification of the seller by the decoy. The inference that appellant wishes the Board to make is not an entirely unreasonable one on its face. The ALJ was fully aware that subdivision (b)(5) was being raised as a defense. There was extensive questioning on this issue and the ALJ several times viewed the videotape which recorded the transaction, trying to ascertain who was doing what when.

The ALJ did make a general finding (Finding IV) that no defense had been established "pursuant to Business and Professions Code Section 25660, or pursuant to Department of Alcoholic Beverage Control Rule 141 (2) or under the Department's Decoy Program Guidelines." It is not clear whether the ALJ was referring to all or a particular part of Rule 141 in this finding, since there is no subdivision (2) of that rule.

In spite of the questions raised by the decision, the Board must draw all inferences in favor of the Department, and the record certainly supports the Department's position. It is undisputed that the identification took place: Watkins clearly re-entered the premises for a few seconds and pointed out the clerk. The testimony is fairly clear that Hupp, although talking to one of the officers and obviously upset and crying, glanced over and knew that Watkins was there. This is enough, we think, to allow us to conclude that the requirement of the rule was met.

ORDER

The decision of the Department is reversed on the basis of the Department's failure to properly apply the standard of Rule 141(b)(2) in evaluating the decoy's appearance.[2]

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

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[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.