ISSUED MARCH 22, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION and MICHAEL J. ARTHUR dba 7-Eleven #13797 2145 East Ball Road Anaheim, CA 92806, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7518 File: 20-214597 Reg: 99046442 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: November 3, 2000 Los Angeles, CA

The Southland Corporation and Michael J. Arthur, doing business as 7-Eleven #13797 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale beer and wine license for 20 days, for their clerk, Montri Sunpanich, having sold an alcoholic beverage (beer) to Robert Treichler, a minor, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a

[1]The decision of the Department, dated September 30, 1999, is set forth in the appendix.

violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants The Southland Corporation and Michael J. Arthur, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele Wong.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 24, 1983. Thereafter, the Department instituted an accusation against them charging a violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on July 30, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Randy West, an Anaheim police officer;[2] by Robert Treichler, the minor, who was acting as a decoy for the Anaheim Police Department; and by Robert M. Jenkins, manager of the store where the sale occurred. The evidence showed that Treichler selected a six-pack of Budweiser beer from the cooler, took it to the counter, displayed identification when requested to do so by the clerk, paid for the beer, and left the store. He then returned and identified the clerk who sold him the beer.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and ordered the 20-day suspension.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the decoy operation was conducted

[2] West also testified as a rebuttal witness on behalf of appellants.

during appellants' busiest day of the week, at the busiest time, in violation of the requirement of Rule 141(a) that it be conducted in a manner which promotes fairness; (2) Rule141(b)(2) was violated by the police use of a decoy who did not present the appearance which could generally be expected of a person under the age of 21; (3) Rule 141(b)(3) was violated because the decoy displayed his identification at belt level; (4) Rule 141(b)(5) was violated because it was not established that the identification was conducted prior to the issuance of a citation; and (5) appellants' discovery rights were violated.

DISCUSSION

I

Appellants contend that the decoy operation was conducted unfairly, in that it was carried out during "rush hour."

Appellants offered testimony to the effect that Fridays and Saturdays were the busiest days of the week for the store; that the time of the evening when the decoy operation took place was the busiest time of the evening; and that the fact that the day in question was the day before Halloween would have been even busier than usual, highlighted by the ALJ's finding that a surveillance video showed "a steady stream of customers at or near the time of the sale of beer to the decoy."

There is no evidence that the number of customers which may have been in line at the register played any part in the transaction between the clerk and the decoy. The clerk did not testify.

According to officer West, there was at least one person ahead of Treichler at the counter, and two additional customers between Treichler and West himself

when the sale took place [RT 9]. Treichler recalled that there were five or six customers in the store [RT 29], one or two of whom may have been ahead of him.

The Administrative Law Judge (ALJ) viewed the video tape, and was obviously not persuaded by it that the store was so busy, or the clerk so distracted, as to render the operation unfair.

The Board has said in other cases that the real question is whether something happened which so disrupted the attention of the clerk as to cause him to make a sale he would not otherwise have made. The record here simply does not meet that test.[3]

II

Appellants assert that the decoy, a 6' 2" police cadet weighing between 175 and 180 pounds, with supervisory authority over 50 Explorer Scouts, was "tall, strong, self-assured, a veteran of police-related activities," all of which gave him the appearance of a person over the age of 21." Thus, say appellants, Rule 141(b)(2) was violated.

The Administrative Law Judge made an express finding that "the decoy displayed the appearance and demeanor of a person which could generally be expected of a person under 21 years of age." He made this finding after having observed the decoy as he testified, and having been made aware of the matters

[3] If all that must be shown is a "steady stream of customers," or that Friday and Saturday are "particularly busy" days of the week, then Southland and its many franchisees would be virtually immune to a decoy operation on those days, which, coincidentally, are what one might think would be the days most opportune for underage high school and college students to attempt to explore the temptation of alcoholic beverages, and when sellers should be all the more vigilant.

relied upon by appellants.

The Board has only appellants' assessment of the decoy's appearance and a photograph of the decoy upon which to base a judgment as to his appearance. Under such circumstances, and where the ALJ's findings indicate compliance with the rule as written, the Board is not in a position to substitute its judgment for that of the trier of fact.

III

Appellants contend that the decoy, when asked for identification, displayed his driver's license by holding it at belt level. They say that this may constitute substantial compliance with Rule 141(b)(3), which requires that a decoy display identification when asked to do so, but does not comply with the "strict adherence" standard laid down in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126].

Rule 141(b)(3) requires a decoy to "present" his or her identification to a seller. Does the display of identification at "belt level" satisfy this requirement?

Were the Board to consult Webster's Third New International Dictionary (Unabridged), it would find a wide variety of definitions for the word "present." These include such choices as "to bring or introduce into the presence of someone"; "to lay or put before a person for acceptance" or "to hand or pass over, usually in a ceremonial way."

The purpose of the rule is to provide the seller a fair opportunity to protect himself or herself against the possibility of selling to a person who is not of legal drinking age. A seller gains this protection by asking for identification or by asking

the prospective buyer his or her age. In either case, if the prospective buyer is a decoy, the seller is, or at least ought to be, made aware of that fact if there has been compliance with the rule.

When the seller asks for identification, and identification is tendered, a fair interpretation of the rule is that it is satisfied once the seller is satisfied with what he or she has been shown.

The evidence in this case is that identification was requested, and was displayed. Whether the identification was displayed belt high, or at eye level, the seller was in a position to find the answer to any question he might have regarding the age of the decoy. There is nothing in the record that would indicate that the decoy refused to permit a close inspection of his identification, or that the clerk was unsatisfied with the response which was made to his request. Treichler testified that the clerk put his finger on the identification, and said "okay."

The obvious inference is that the clerk was satisfied with what had been shown him. No more is required under the rule.

IV

Appellants contend that Rule 141(b)(5) requires affirmative evidence, absent here, that the identification process preceded the issuance of a citation. They contend that, where, as here, the record is silent on the sequence of events,[4] the rule is violated and the case must be reversed.

---

[4] According to appellants' counsel (RT 58-59), while surveillance cameras recorded the transaction itself, they were not located in position to record the decoy's return to the store when he identified the clerk as the seller.

The Department contends that it is much more likely that the identification process preceded the issuance of the citation, since it would be nonsensical for the officer to go through the identification process if he had already issued a citation to the alleged seller. In addition, the Department points out that two officers, West and a second officer participated in the writing of the citation, and that the identification would have been conducted so that the second officer knew who the seller was.

The procedure that appears to be followed routinely in decoy matters which have come to this Board is for the officer involved in the operation, or one of the officers if there is more than one officer involved, to bring the decoy back into the store and have him identify the seller, after which a citation is issued. If the Board has heard an appeal where the citation preceded the identification, we are unable to recall it.

But strange and unusual things can occur. Whether they did in this case is another story.

The testimony indicates that nothing unusual happened following the sale. The "buy" money was successfully recovered [RT 13-14], which is sometimes not the case if other transactions occur between the time of the sale and the arrival of the police.

Officer West testified that there were three reasons for the decoy to return to the store - to return the change to the clerk, i.e., to recover the "buy" money; to again show his identification to the clerk; and to identify the clerk as the seller. Given that these three related things all happened, the identification process one of

them, it simply defies reason to believe that the citation, prepared by two police officers, somehow inserted itself ahead of the tasks for which the minor was returned to the store.

Appellants rely on The Southland Corporation/R.A.N. (1998) AB-6967 for its assertion that the Department has failed to satisfy its burden of presenting a prima facie case of compliance with Rule 141. They contend that, despite straightforward testimony by the officer and the decoy that a face to face identification occurred, more is required.

We disagree. In our view, once there has been affirmative testimony that the face to face identification occurred, the burden shifts to appellants to demonstrate why it did not comply with the rule, i.e., that the normal procedure, for the issuance of a citation following the identification of the accused, was not followed. We are unwilling to read our decision in The Southland Corporation/R.A.N. as expanding the affirmative defense created by Rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule.

V

Appellants contend that the Department improperly refused to identify, in response to their discovery request, other licensees who sold to the decoy in this case at any time during the 30 days preceding and following the night of the sale in this case, and improperly refused to provide a transcript of the hearing on their motion to compel discovery.

The Board has addressed these issues on numerous occasion. It has

uniformly ruled that the Department must produce such information, but only for the day that the sale in question took place. It has also uniformly ruled that the Department was not obligated to provide a transcript of the hearing on the discovery motion.

ORDER

The decision of the Department is affirmed as to all issues other than the issue involving discovery. As to that issue alone, the case is reversed and remanded to the Department for such further proceedings as may be appropriate.[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.