

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

AB-9271

File: 21-478716 Reg: 10073913

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 6772
4987 North Fresno Street, Fresno, CA 93710,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: July 11, 2013
Sacramento, CA

ISSUED JULY 30, 2013

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 6772 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, appearing through their counsel, Ralph Barat Saltzman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

¹The decision of the Department, dated May 16, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 13, 2009. On December 10, 2010, the Department filed an accusation against appellants charging that, on June 29, 2010, appellants' clerk sold an alcoholic beverage to 18-year-old Nolan Hunt. Although not noted in the accusation, Hunt was working as a minor decoy for the Fresno Police Department at the time.

At the administrative hearing held on February 28, 2012, documentary evidence was received and testimony concerning the sale was presented by Hunt (the decoy). Appellant presented no witnesses.

Testimony established that on June 29, 2010, the decoy entered the licensed premises and selected a six-pack of Bud Light beer which he took to the counter. The clerk asked for his identification, and he produced his California driver's license. The clerk remarked "I know you are over 21 and this only for the cameras," as he waved to the camera. (Findings of Fact ¶ II.B.) The decoy did not reply, and the clerk did not ask him how old he was. The sale was completed, and the clerk was later cited.

The Department's decision determined that the violation charged was proven and that no defense had been established.

Appellants then filed a timely appeal contending: (1) Rule 141(b)(4)² was violated, because the decoy had a duty to correct the clerk's mistaken statement about his age; and (2) rule 141(b)(2) was violated, because the decoy did not display the appearance of an individual under the age of 21.

²References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

DISCUSSION

I

Appellants contend that the decoy had an affirmative duty to correct the clerk when he said “I know you are over the age of 21,” and that the failure to do so violates rule 141(b)(4).³

The ALJ made the following observations about appellants’ argument (in Determination of Issues III), and came to the conclusion that questions about age require a response from a decoy but that statements about age do not:

Rule 141(b)(4) means what it says; “A decoy shall answer truthfully any *questions* about his or her age.” Respondent’s [*sic*] do not dispute the clerk’s remark was a statement rather than a question. Instead, Respondent argues the decoy had an obligation to rectify the seller’s error in determining the decoy’s correct age. The Respondent is urging the court to ignore the plain meaning of Rule 141(b)(4).

The rule could not be clearer. Decoys shall answer truthfully any *questions* about their age. Rule 141(b)(4) does not suggest or require that decoys remedy selling clerk’s miscalculations about a customer’s age. If the Legislature or the appropriate rulemaking body wanted decoys to fix erroneous calculations made by sellers, and their subsequent statements regarding same, then Rule 1412 [*sic*] (b)(4) would say so. It does not. Respondent is requesting an interpretation of Rule 141(b)(4) that is inconsistent with its unambiguous meaning. . . .

Case law on this issue, however, is less rigid on this point than the ALJ’s opinion in this matter. For example, in *Equilon Enterprises* (2002) AB-7845, cited by appellants, the Board decided a very similar case, and came to the opposite conclusion from the ALJ in his proposed decision.

The argument here is similar to *Equilon*, in that appellants in both cases argued that it is unfair for a decoy to remain silent in the face of a statement about his or her

³Rule 141(b)(4) dictates: “A decoy shall answer truthfully any questions about his or her age.”

age. Appellants contend that since rule 141 requires a decoy to respond truthfully to questions about his or her age, the fairness concept of the rule requires a decoy to respond truthfully as well to statements that may indicate a belief on the part of the seller that he or she is old enough legally to purchase an alcoholic beverage.

The *Equilon* case made an analogy to the concept of an adoptive admission by silence, citing *Southers v. Savage* (1961) 191 Cal.App.2d 100 [12 Cal.Rptr. 470] for the proposition that a reasonable person would speak out to clarify or correct the statement of another were it untrue. *Southers v. Savage* arose from an automobile collision. Southers, a passenger, sat silently immediately following the collision while Savage, the driver, gave a version of the accident completely contrary to the version Southers later put forth at the trial. The court ruled that the jury was entitled to consider whether Southers' silence at the time meant agreement. While it is the judge's duty first to determine whether the doctrine of adoptive admission by silence should apply, the court held, the ultimate determination of the question, where the evidence is conflicting, is for the jury.

While we do not believe the doctrine of adoptive admission by silence has a role in the operation of a decoy program, the decoy's silence may be significant in light of rule 141(b)(2). Rule 141 requires that a decoy shall answer truthfully questions about his or her age. There is nothing in the rule that requires a decoy to volunteer information about his or her age, or to clear up what may be a misconception about age where a seller is silent and simply goes ahead with the sale either without having requested proof of age or, upon request, having been provided identification. Since a decoy is engaged in a law enforcement process to determine the extent to which sellers are complying with the law regarding sales of alcoholic beverages to minors, it would

seem unreasonable to expect that process to function if the decoy was obligated to clear up what might be a mistake or misconception on the part of the seller.

For example, many transactions involve a seller who requested identification, was furnished identification which showed the decoy to be a minor, yet proceeded with the sale. It could reasonably be assumed the seller was careless, or unable to interpret the information provided. It might also be assumed the seller really did not care, although this is undoubtedly much less frequent.

However, where there has been a verbalization of the seller's thought processes such as that in this case, a decoy may be expected to respond. Rule 141 says that a decoy is required to respond to a question. As the Board said in an earlier case, there may be a thin line between what is a statement and what is a question. And when that line blurs, and the verbalization borders on the ambiguous, it may well be that a response is required.

We said, in *Lucky Stores, Inc., Delaware* (1999) AB-7227 [after a clerk misread the date of birth on the decoy's license, and stated that based on that year of birth, the decoy had just turned 21]:

Our concern is that it is asking too much of a decoy to leave it to him or to her to make that critical judgment whether a remark about age is intended to elicit from them either a confirmation or a correction, or is simply conversation. If fairness of the decoy operation is an important goal, as the rule proclaims, then, in its implementation, it ought to be the case that where the clerk's remark about age is such that an honest clarification from the decoy may prevent a sale from occurring, the decoy has the obligation to offer such clarification by saying "No, I am not 21," or words to that effect.

We think the facts of this case are sufficiently close to those in *Lucky Stores, supra*, that the same result should follow. Where, as here, there is a verbalization by a clerk or employee, expressing the mistaken notion that the decoy is over the age of 21, we

believe the decoy has a duty to respond, in the interest of fairness. We re-affirm our holding in *Lucky Stores, supra*.

II

Appellants contend that the decoy's appearance did not comply with rule 141(b)(2) which provides: "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." At 6 feet 2 inches tall, and weighing 200 pounds, appellants maintain that this decoy presented the appearance of someone over the age of 21, and this is why the clerk assumed that the decoy was over 21.

This Board has repeatedly declined to substitute its judgment for that of the ALJ on this question of fact. Minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule, or that size necessarily makes one appear older.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirement of rule 141 that he possessed 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

ORDER

The decision of the Department is reversed for the reasons stated in Part I.⁴

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.