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

AB-9445

File: 20-341268 Reg: 13079471

CHEVRON STATIONS, INC.,
dba Chevron Stations, Inc.
1250 West Wood Street, Willows, CA 95988,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 8, 2015
Sacramento, CA

ISSUED JANUARY 29, 2015

Chevron Stations, Inc., doing business as Chevron Stations, Inc. (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 15 days, all conditionally stayed, because its clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellant Chevron Stations, Inc., through its counsel, Margaret Warner Rose of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, Dean Lueders.

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[1]The decision of the Department, dated May 21, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 26, 1998. On November 6, 2013, the Department filed an accusation charging that appellant's clerk, Della Dicharry-Ramsey (the clerk), sold an alcoholic beverage to 19-year-old Gus Wiezorek on August 10, 2013. Although not noted in the accusation, Wiezorek was working as a minor decoy for law enforcement at the time.

At the administrative hearing held on March 12, 2014, documentary evidence was received, and testimony concerning the sale was presented by Wiezorek (the decoy) and by Joyce Marie Denzer, appellant's business consultant.

Testimony established that on the date of the operation, the decoy entered the licensed premises, retrieved a tall can of Coors Light beer, took the beer to the cash register, and placed it on the counter. The clerk requested the decoy's identification, and the decoy placed his true California identification card on the sales counter. The identification bore the decoy's correct date of birth, along with a red band reading "AGE 21 in 2014." The clerk picked up the identification and looked at it. No evidence was presented that the clerk asked the decoy any age-related questions.

The clerk did not testify.

At the hearing, appellant conceded the fact of the illegal sale, but claimed the decoy's appearance did not comply with rule 141(b)(2). More importantly, appellant argued that the Department, rather than the licensee, bears the burden of proving compliance with rule 141(b)(2). Accordingly, appellant declined to present any evidence on the matter, and requested that the accusation be dismissed on the grounds that the Department had not carried its burden of proof.

Following the hearing, the Department issued its decision, which determined that

the violation charged was proved and no defense was established.

Appellant then filed this appeal repeating its contention that the Department bears the burden of proving compliance with rule 141(b)(2), and that its failure to do so mandates dismissal of the accusation. Also, on the date of the hearing for this appeal, appellant submitted a motion to continue oral argument until such time as all three Board members could be present to hear it.

DISCUSSION

I

Appellant claims that “[t]he origin, purpose, and plain language of Rule 141 make clear that the rule is an affirmative obligation with which law enforcement must comply, rather than a pure defense where the respondent carries the sole burden.” (App.Br. at p. 2.) Appellant acknowledges that this interpretation is at odds with the Board’s interpretation of the rule, as expressed in *7-Eleven, Inc./Lo* (2006) AB-8384. Appellant, however, requests that this Board reverse course and return to the earlier holding in *Southland/R.A.N.* (1998) AB-6967, which placed the burden of proving compliance with rule 141's provisions squarely on the shoulders of the Department, noting in its brief that the appointees of the two Board’s differing decisions were made by different governors. Appellant further requests that the accusation be dismissed in its entirety in light of the fact that the Department failed to carry its burden of proving compliance with rule 141(b)(2).

First, we observe that although members of this Board are appointed by the governor, the Board’s allegiance is solely to state law. All members take an oath to faithfully execute the laws. On several occasions, both appellant and the Department characterize Board decisions based on the composition of the panel and the name of

the appointing governor. Thus, *7-Eleven, Inc./Lo* (2006) AB-8384, which appellant calls "dangerous" and would have this Board reverse, was issued by the "Schwarzenegger Board." (See, e.g., App.Br. at p. 2.) For its part, the Department made reference at oral argument to decisions from the "Davis Board." These politically charged labels are, at best, unhelpful, and at worst, destructive, as they invite us to abandon our obligation to faithfully interpret and apply the law, but instead weigh this Board's previous cases based on some implicit and peculiar partisan allegiances. Accordingly, we reject these labels entirely, and use the term "this Board" when referring to our past decisions without reference to the identity or political loyalties of individual Board members. We urge counsel for the parties to do the same, and expect we will not hear references in the future to the governor who appointed members of the Board as an attempt to "pigeonhole" them and appeal to some supposed ideological currents underlying the decisions rather than the law and reasons stated for them.

With regard to the burden of proof in a rule 141 defense, some background is necessary. In 1994, the California Supreme Court approved the use of minor decoys. (See *Provigo Corp. v. Alcoholic Bev. Control Appeals Bd.* (1994) 7 Cal.4th 561 [28 Cal.Rptr.2d 638].) In response to the decision, the legislature immediately enacted Business and Professions Code section 25658, subdivision (f). The provision expressed the legislature's approval of minor decoys, and further granted them immunity from prosecution for purchasing or attempting to purchase alcoholic beverages. (*Ibid.*) Additionally, it ordered that "Guidelines with respect to the use of persons under 21 years of age as decoys shall be adopted and published by the department in accordance with the rulemaking portion of the Administrative Procedure Act." (*Ibid.*)

In 1996, the Department followed the legislature's order and adopted rule 141 and its subdivisions, collectively entitled "Minor Decoy Requirements." (See Cal. Code Regs., tit. 4, § 141; Cal. Reg. Notice Register 96, No. 1.) The rule regulates several aspects of minor decoy transactions, employing similar language for each, and in its final provision, creates a defense:

> (a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.
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> (b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleged that a minor decoy has purchased an alcoholic beverage:
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>> (1) At the time of the operation, the decoy shall be less than 20 years of age;
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>> (2) 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;
>>
>> (3) The decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages;
>>
>> (4) A decoy shall answer truthfully any questions about his or her age;
>>
>> (5) 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 make a face to face identification of the alleged seller of the alcoholic beverages.
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> (c) Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658.

(*Ibid.*)

Predictably, litigation based on rule 141 defenses commenced immediately. The question of which party bore the burden of proof was initially resolved by this Board's decision in *Southland Corp./R.A.N., Inc.* (1998) AB-6967. That decision turned largely on the conclusion, advocated by appellant in this case, that repeated use of the word "shall" throughout the rule "serves as both a burden and an obligation on law enforcement to act within the constraints of the Rule." (*Id.* at p. 5.) Thus, this Board placed the burden of proof on the Department to "show conformity to these minimum standards by law enforcement, that is, a prima facia [*sic*] showing that the demands of the Rule have been adhered to." (*Id.* at pp. 5-6.) Only after the Department made a prima facie showing of compliance would the burden shift to the appellant. (*Id.* at p. 6.)

For further support, the *Southland* decision referred in passing to *Acapulco*, an opinion from the court of appeals stating that rule 141 requires "strict adherence." (*Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126].)

From the outset, *Southland* was riddled with interpretive problems. *Acapulco*, for instance, takes absolutely no position on the burden of proof in a 141 defense. (See *ibid.*) Indeed, burden of proof played no role in that case, because it was undisputed that the face-to-face identification required by rule 141(b)(5) did not take place. (*Id.* at pp. 577-578; see also fn. 3 [record suggests officer was unaware rule 141(b)(5) existed].) The *Acapulco* court in fact rejected the conclusion, reached by this Board below, that no face-to-face identification was necessary at all because the officer had witnessed the transaction. It was law enforcement's admitted failure to comply with rule 141(b)(5) that led to *Acapulco*'s oft-quoted "strict adherence" language; it did nothing to

allocate the burden of proof where a rule 141 violation is disputed.

Moreover, *Southland*'s reliance on the word "shall" was entirely perplexing. Many Department rules employ the word "shall" to define a licensee's responsibilities. (See, e.g., Cal. Code Regs., tit. 4, § 139 ["the interior lighting maintained therein shall be sufficient"]; Cal. Code Regs., tit. 4, § 109 ["the applicant shall post on the proposed premises notice of intention"].) Applying the logic in *Southland*, the word "shall" places the burden of proof on the licensee to present a prima facie case of compliance with each of these rules. And yet, that's not the case at all; the Department bears the burden of proving a licensee's violation of a rule, regardless of the word "shall." Simply put, *Southland*'s reliance on the word "shall" was wholly misplaced.[2]

Not surprisingly, cases from this Board soon reversed course and placed the burden of proving a rule 141 violation on the licensee. At first, the change was halfhearted. In *Azzam* (2001) AB-7631, for example, the Board limited the *Southland* holding:

> Appellant relies 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.

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[2] Indeed, the only provision of law allocating a burden of proof based on affirmative language was repealed in 1965. (See Cal. Code Civ. Proc. § 1981, repealed by Stats. 1965, ch. 299, § 117.) While it was in effect, the provision was criticized for its logical failings. (See Witkin, Cal. Evidence (1958) § 56, pp. 72-73 ["The 'affirmative of the issue' lacks any substantial objective meaning, and the allocation of the burden actually requires the application of several rules of practice and policy, not entirely consistent and not wholly reliable."]; Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan.L.Rev. 5 (1959) ["That the burden is on the party having the affirmative [or] that a party is not required to prove a negative . . . is no more than a play on words, since practically any proposition may be stated in either affirmative or negative form."].)

> We disagree. Once there is affirmative testimony that the face-to-face identification occurred, the burden shifts to appellants to demonstrate non-compliance, i.e., that the normal procedures of issuing a citation after identification of the clerk, 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 the rule.

(*Id.* at pp. 3-4.) *Azzam* did not wholly repudiate *Southland*; instead, it trod an ill-defined middle road between placing the burden of proof on the Department (which must provide "affirmative testimony" before "the burden shifts") and placing it on the appellant (who cannot succeed by "produc[ing] no evidence whatsoever"). (See *ibid.*)

In *The Vons Companies, Inc.* (2002) AB-7819, this Board inched further from its holding in *Southland*. Citing *Azzam*, *supra*, this Board wrote:

> Appellant asserts that the Department must, at the outset, "demonstrate that there is substantial evidence to conclude that the decoy operation was conducted in a fair manner," before appellant is required to present any evidence that the decoy operation was conducted unfairly. Appellant misunderstands the differing natures of the various burden-of-proof standards. The requirement of "substantial evidence" to support a Department decision is the standard used by this Board, and the appellate courts, when reviewing a decision. The ultimate burden of persuasion at the administrative hearing is the preponderance of the evidence. The Department's initial burden of producing evidence, however, is merely to make a prima facie case, that is, to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence.
>
> [¶ . . . ¶]
>
> We reiterate here that Rule 141 defense requires evidence that there was a violation of the rule.

(*The Vons Companies, Inc.*, *supra*, at pp. 5-6.) As in *Azzam*, the Board required a prima facie showing from the Department, but this time it was far more emphatic in its refusal to allow for a rule 141 defense without some minimal showing from the licensee. (Compare *id.* with *Azzam*, *supra*; see also *7-Eleven, Inc./Veera* (2003) AB-7890; *7-Eleven, Inc./Bal* (2002) AB-7872; *7-Eleven, Inc./Saulat* (2002) AB-7862.)

A string of cases followed that recognized rule 141 as an affirmative defense and placed the burden of proof on the licensee, though none explicitly overruled *Southland*. (See, e.g., *7-Eleven,* Inc*./Singh* (2002) AB-7792, at p. 5 ["Rule 141 is an affirmative defense, and appellants cannot prevail without presenting some evidence that the rule was not complied with."]; *7-Eleven, Inc./C Bar J Ranch, Inc.* (2002) AB-7800, at p. 5; *7-Eleven, Inc./Gonser* (2001) AB-7750, at p. 6 ["If Appellants have no evidence indicating that the decoy [did not carry her own identification], they should not assert a violation of Rule 141, which is an affirmative defense."].) In *7-Eleven, Inc./Mandania* (2002) AB-7828, this Board rejected a rule 141(b)(5) defense outright where pertinent facts surrounding the timing of the face-to-face identification did not appear in the record:

> Rule 141 is an affirmative defense, and the burden of proof is on the licensee. Since the record is silent as to when the citation is issued, appellants have not satisfied their burden. It should be noted that appellants could have resolved this issue by simply asking their witness about the sequence of events.

(*Id.* at p. 5.)

By 2002, then — only four years after the *Southland* decision — the tide had turned. In 2006, in an attempt to dam the flood of purely speculative rule 141 defenses, this Board explicitly repudiated the *Southland* holding. (See *7-Eleven, Inc./Lo* (2006) AB-8384.) As in this case, the appellants relied on *Southland*, and argued that they were "entitled to a complete defense to the accusation because the Department did not make a prima facie showing of compliance" with a subdivision of rule 141. (*Id.* at pp. 8-9.) This Board responded:

> Appellants are attempting to resurrect a long-dead notion, and it appears that much of the impetus for their attempt comes from their

> reading of *The Southland Corporation/R.A.N.*, *supra*. We have struggled with the anomaly of that appeal for a number of years and have attempted to bring the troublesome language of the opinion into line with the rest of the Board's opinions. It has become obvious to us that this approach requires the Appeals Board to address and reject, over and over again, contentions such as appellants make here. This promotes neither fairness nor justice. Therefore, to the extent that *The Southland Corporation/R.A.N.* is seen as imposing on the Department an initial burden of proof with regard to the affirmative defense of rule 141 before an appellant has presented any evidence of a violation of that rule, it is overruled.

(*Id.* at p. 11.)

Alas, it appears this Board's decision in *7-Eleven, Inc./Lo* has sprung a leak, as we are yet again faced with a wholly speculative rule 141 defense. We could issue yet another summary rejection of the *Southland* decision, but we suspect it would do little good — what's to stop an identical appeal a few years down the road? Instead, we will outline the numerous legal justifications for placing the burden of proving a rule 141 defense on the licensee, and strongly encourage appellant to seek a writ of appeal if it finds our reasoning flawed.

We begin with the plain language of the statute. Rule 141(c) explicitly creates a defense where law enforcement fails to abide by rule 141: "Failure to comply with this rule *shall be a defense* to any action brought pursuant to Business and Professions Code Section 25658." (Cal. Code Regs., tit. 4, § 141(c), emphasis added.)

The term "defense" by itself, however, tells us little about the burden of proof. Case law instructs that burden of proof is a question of state law. (*People v. Neidinger* (2006) 40 Cal.4th 67, 73 [51 Cal.Rptr.3d 45]; *Moss v. Superior Court* [(1998) 17 Cal.4th 396, 425 [71 Cal.Rptr.2d 215], citing *Martin v. Ohio* [(1987) 480 U.S. 228, 232 [107 S.Ct. 1098] & *Patterson v. New York* (1977) 432 U.S. 197 [97 S.Ct. 2319]; see also

Dixon v. United States (2006) 548 U.S. 1, 7-8 [126 S.Ct. 2437].) Here, California statutory and case law strongly support the conclusion reached in *7-Eleven, Inc./Lo*, that the burden of proving a violation of rule 141 lies with the appellant.

First, section 500 of the Evidence Code plainly states, “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” In the criminal context, courts have interpreted this to mean that where a defendant produces no evidence in support of his defense, the jury may be instructed to assume nonexistence of the fact. (See *People v. Harmon* (1948) 89 Cal.App.2d 55, 58-59 [200 P.2d 32] [observing, however, that existence of evidence relevant to defense was peculiarly within defendant’s knowledge].)

Second, section 664 of the Evidence Code provides: “It is presumed that official duty has been regularly performed.” We agree with appellant that rule 141 creates a series of obligations for law enforcement. (See App.Br. at p. 7.) However, section 664 mandates that we grant law enforcement the presumption that they have performed their duties regularly — that is, in the absence of evidence to the contrary, we must assume they have complied with the rule. (See *People v. Mai* (2013) 57 Cal.4th 986, 1039 [161 Cal.Rptr.3d 1] [presumption applicable to police officers except in the case of a warrantless arrest]; *Davenport v. Dept. of Motor Vehicles* (1992) 6 Cal.App.4th 133, 141 [7 Cal.Rptr.2d 818] [presumption supplies sufficient indicia of trustworthiness of blood-alcohol test results, subject to showing by licensee that test was not performed in compliance with law].) Moreover, section 660 of the Evidence Code mandates that “The presumptions established by this article, and all other rebuttable presumptions established by law that fall within the criteria of Section 605, are presumptions affecting

the burden of proof." If we properly apply section 664 of the Evidence Code, a licensee must overcome the initial rebuttable presumption that the minor decoy operation complied with rule 141 — that is, they bear the initial burden of proof.

Third, as the Department points out, courts will ordinarily defer to the Department's interpretation of its own rules. In *Schieffelin*, the court interpreted another Department rule, and observed:

> [W]e defer to the Department's interpretation of its own rules, "'since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.'" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 [78 Cal.Rptr.2d 1, 960 P.2d 1021] (*Yamaha Corp.*).) Courts generally will not depart from the Department's contemporaneous construction of a rule enforced by the Department unless such interpretation is clearly erroneous or unauthorized. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1696 [1 Cal.Rptr.3d 339] (*7-Eleven, Inc.*).)

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Schieffelin*) (2005) 128 Cal.App.4th 1195, 1205 [27 Cal.Rptr.3d 766].) The Department, for its part, insists the burden of proving a rule 141 violation lies with the licensee. (See Dept.Br. at p. 4.) This interpretation aligns with both section 664 of the Evidence Code, *supra*, as well as over a decade of Appeals Board cases. We see no injustice in deferring to the Department's interpretation of its own rule.

We could safely end our discussion there. However, general case law and public policy also weigh in favor of assigning the burden of proving a rule 141 violation to the licensee. In *People v. Neidinger*, for instance, the California Supreme Court addressed a case in which a non-custodial father removed his children from the custody of their mother, in violation of Penal Code section 278.5. The father, however, argued that he feared for the children's safety, and that the exception provided in Penal

Code 278.7(a) therefore applied. The court wrote:

> We must decide how section 278.7(a)'s belief defense interacts with section 278.5. Specifically, we must decide who has the burden of proof regarding this belief, and what that burden is. Within limits, this is a question of state law. "[D]efining the elements of an offense and the procedures, including the burdens of producing evidence and of persuasion, are matters committed to the state." [Citations.] There are, of course, limits on what the state may do in this regard. "[T]he state may not label as an affirmative defense a traditional element of an offense and thereby make a defendant presumptively guilty of that offense unless the defendant disproves the existence of that element." (*Moss v. Superior Court*, *supra*, at p. 426.) "Due process does not require that the state prove the nonexistence of a constitutionally permissible affirmative defense, however." (*Ibid.*)

(*Neidinger*, *supra*, 40 Cal.4th at p. 73.)

Appellant would, in essence, have us redefine rule 141 and its subdivisions as necessary elements of any section 25658 offense emerging from a minor decoy operation. If that were true, of course, then the Department would have no justification for placing the burden of proving a rule 141 violation on the licensee. Section 25658, however, is a statutory offense, and rule 141 is merely a Department rule governing administrative adjudication with respect to alcoholic beverage licenses. It would defy logic to read a regulation — one with a limited, specific application — as an element of a statutory offense. This conclusion finds support in the fact that, even where a minor decoy operation admittedly violated a provision of rule 141, the violation provides no defense against criminal liability for the clerk. (See *People v. Figueroa* (1999) 68 Cal.App.4th 1409 [81 Cal.Rptr.2d 216].) Simply put, this is not an instance where the administrative body has recast an element of an offense as an affirmative defense in order to shift the burden of proof. Rule 141 creates a constitutionally permitted affirmative defense, and due process does not require the Department to disprove the existence of that defense. (See *Neidinger*, *supra*, at p. 73.)

It is important to observe, however, that the *Neidinger* court

> relied primarily on the "so-called rule of convenience and necessity," which "declares that, unless it is 'unduly harsh or unfair,' the 'burden of proving an exonerating fact may be imposed on a defendant if its existence is "peculiarly" within his personal knowledge and proof of its nonexistence by the prosecution would be relatively difficult or inconvenience.'" (*Mower*, *supra*, 28 Cal.4th at p. 477.)

(*Id.* at p. 74.) The court found that the reasons for removing the children from their mother's care were peculiarly within the defendant's knowledge, and that it would be difficult or inconvenient for the prosecution to disprove their existence. (*Ibid.*) It was therefore fair to place the burden of proof on the defendant. (*Ibid.*)

Here, while less decisive, the "so-called convenience and necessity" test yields a similar outcome. In a typical case, only the parties directly participating in the transaction — the decoy and the clerk — are aware of the extent to which the decoy complied with any particular subdivision of rule 141. In fact, with regard to subdivision (b)(2), the clerk is often the *only* percipient witness to the decoy's appearance and conduct at the time of the actual transaction — the decoy, after all, cannot perceive her own appearance.[3] Anyone else, including the Department, is forced to make inferences based on photographs or the decoy's appearance at some other point in time. With regard to rule 141 as a whole, it does not put the licensee in an "unduly harsh or unfair" position to produce evidence peculiar to an alcoholic beverage transaction that took place within its own premises with the oversight of its own employees. Indeed, with

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[3]We are aware of the objection, raised in other cases, that the clerk must be terminated in order to show mitigation, and therefore cannot testify. Unfortunately, the decision to terminate the clerk is a strategic one: the licensee may reap one benefit while sacrificing another. Moreover, it is disingenuous for a licensee to characterize a minor decoy operation as unfair and argue that the clerk was deceived, and yet terminate the clerk for succumbing to the alleged deceit.

regard to subdivision (b)(2) specifically, the licensee's clerk holds the best evidence available.

Moreover, placing the burden of proof on the Department would run afoul of public policy. First, it would hamstring the Department's ability to rely on minor decoy operations for enforcement of section 25658. Litigation would increase drastically; any and all licensees faced with a minor decoy sale could — and no doubt would — pursue litigation based on every single provision of rule 141, regardless of the existence of any evidence in support of the defense. The additional cost to the Department, and in turn, to the state's taxpayers, would be overwhelming, if not fully prohibitive.[4] Second, it would contradict the blessing granted to minor decoy operations by both the legislature, in section 25658(f), and the supreme court in *Provigo*, *supra*. We cannot imagine that either governmental body intended its wishes to be undermined by an affirmative defense contained in a limited regulation created by an administrative agency.

As noted above, the burden of proof is defined by state law. Statutory law, case law, and the Department's own interpretation of its rule mandate that the burden of proving a rule 141 violation falls on the licensee claiming the defense. We merely reinforce over a decade of Appeals Board decisions when we state, unequivocally, that the holding in *Southland* is dead. If appellant disagrees, let it bring its case to a higher

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[4]Appellant also argues cost, and claims that placing the burden of proof on licensees "would render Rule 141's protection meaningless for licensees that cannot afford counsel or gather the means to attend a hearing." (App.Br. at p. 9.) We fail to see how a rule 141 defense requires counsel, however. Whether represented or not, licensees are required to understand and abide by alcoholic beverage law; it is not unduly onerous to ask that they also understand the availability and limits of an affirmative defense. Moreover, regardless of allocation of the burden of proof, licensees who dispute a Department accusation still must incur the cost of attending a hearing.

court, and relieve us from the burden of enduring this argument again.

Appellant failed to present any evidence in support of its rule 141(b)(2) defense. The defense therefore fails. We affirm the decision below.

II

In its motion for a continuance, appellant contends that, because Article XX of the California Constitution states that the Alcoholic Beverage Control Appeals Board shall consist of three members, oral argument on this matter should be continued until such time as all three Board members would be present. The Board explained to appellant's counsel that it would proceed to hear the matter, as the presence of two members constituted a quorum, but if in the deliberations there was a difference of opinion between the members present as to the proper disposition of the case, we would reset it for reconsideration and hearing (unless waived) when all members could be present. Accordingly, we denied the motion, but, to avoid a party making future motions on this same reasoning, further clarify our reasons and authority for denying it.

There is nothing in the language of the California Constitution creating the Appeals Board or in the legislation implementing its provisions that addresses the question of whether the Board may hear and decide an appeal when it does not have a full complement of members. Similarly, there is no general statutory provision applicable to the Board or other administrative agencies, and our research has not disclosed any California case law addressing the subject. While some California administrative agencies are governed by a statute as to what constitutes a quorum for conducting business, (see, e.g., Bus. & Prof. Code § 5524 [California Architects Board]; Bus. & Prof. Code § 8524 [Structural Pest Control Board]), the Appeals Board is not one of them.

However, authorities from courts of other jurisdictions, relying on common law, support the Board's long-standing practice of deciding cases when a simple majority of the three-member Board is present for oral argument. (See, e.g., *Fed. Trade Comm. v. Flotill Prods., Inc.* (1967) 389 U.S. 179, 183-184 [88 S.Ct. 401] ["[I]n the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to that common-law rule."]; see also *Ho Chong Tsao v. Immigration & Naturalization Service* (5th Cir. 1976) 538 F.2d 667, 669.) Until such time as an appellant provides us with persuasive law to the contrary, or a reviewing court or the California Legislature holds otherwise, our position stands.

ORDER

The decision of the Department is affirmed.[5]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]This 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.