

ISSUED DECEMBER 30, 1998

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

THRIFTY PAYLESS, INC.	)	AB-7050
dba Thrifty Drug	)	
3400 Telegraph Road	)	File: 21-69615
Ventura, California 93003,	)	Reg: 97039650
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	October 7, 1998
	)	Los Angeles, CA
	)	

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Thrifty Payless, Inc., doing business as Thrifty Drug (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> made pursuant to Government Code §11517, subdivision (c), which suspended its license for 15 days for its clerk, Priscilla Hurtado, having sold a 24-ounce can of Budweiser beer to Andrea Tocci, a 19-year-old minor participating in a decoy operation conducted by the Ventura Police Department, such sale 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 Thrifty Payless, Inc., appearing through its counsel, James M. Seff and J. Daniel Davis, and the Department of

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<sup>1</sup>The decision of the Department, dated February 5, 1998, made pursuant to Government Code §11517, subdivision (c), and the proposed decision of the Administrative Law Judge, are set forth in the appendix.

Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

### FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 1, 1993.

On April 24, 1997, the Department filed an accusation which charged that on September 27, 1996, appellant's clerk made an unlawful sale of an alcoholic beverage to a minor. An administrative hearing was held on July 29, 1997, following which the Administrative Law Judge (ALJ) issued a proposed decision dismissing the charge of the accusation, finding that the decoy violated Rule 141 (b)(4) by failing to answer truthfully the clerk's question whether she was 21. Instead of answering "No," the decoy asked the clerk if she would like to see her driver's license. According to the decoy, the clerk answered "Yes, just in case there's cameras." [RT 8]. The decoy then displayed her driver's license to the clerk who, for lack of training, failed to read those portions which stated the driver's birth date and the fact that the person depicted on the license would not be 21 until 1997.

The clerk denied making the statement attributed to her, and claimed that before she was asked whether she would like to see the decoy's driver's license, the decoy answered "yes" to her question whether she was 21.

The ALJ based his proposed order of dismissal on the testimony of the decoy, finding that the invitation to examine the decoy's driver's license was not only unresponsive, but, possibly, an inducement to the clerk to violate §25658, subdivision (a) (Determination of Issues, B and C):

"The issue raised by respondent is not whether the decoy truthfully answered the clerk's question about her age, but rather, whether the decoy answered the question at all. When the clerk asked the decoy her age, there was only one answer which would satisfy the requirement of Rule 141 (4) [sic]: "19". Any other answer would either be untruthful or unresponsive.

The decoy was unresponsive when, in response to the clerk's question about her age, she asked the clerk whether she wanted to see her (the decoy's) driver's license. One can speculate whether the decoy was going out of her way to help the clerk violate Business and Professions Code Section 25658(a)."<sup>2</sup>

The offer by the decoy to produce her driver's license would have complied with Rule 141 (b)(3), concluded the ALJ, but, in his view, compliance with Rule 141(b)(3) is separate and distinct, and does not satisfy the requirement of Rule 141(b)(4).

The Department, acting pursuant to Government Code §11517, subdivision (c), declined to adopt the proposed decision, instead issuing its own decision, sustaining the charge of the accusation. The Department concluded that the offer and production of the decoy's true California driver's license was a "truthful answer" within the meaning of Rule 141.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the decoy's offer to display her driver's license was not a truthful response to the question about her age, thus was violative of Rule 141.

## DISCUSSION

Appellant contends that the decoy failed to answer truthfully when asked her age. Instead of stating her age, the decoy asked if the clerk would like to see her driver's license. Appellant contends that the decoy's response violated Rule 141 (b)(4).

The Department reads Rule 141(b)(4) as not requiring a verbal response. In the Department's view, the fact that the decoy proffered her driver's license was the

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<sup>2</sup> *Indeed, the decoy's responses to the ALJ's question why she did not simply state her age do invite speculation: "Because I thought that if I said I was 21, just a regular person off the street, something bad or worse could have happened to Thrifty or something. ... Because I just thought if I was a regular person, too -- if I was just like anybody in there and buying, like, alcohol, like I know people do, and say that they are 21" [RT 15]. Curiously, in spite of this response to his question, the ALJ made a specific finding (Finding IV) that "at the hearing, the decoy did not offer any explanation why she did not tell the clerk she was 19 years old." Her explanation may have been incomprehensible, but it was a response.*

equivalent of a truthful answer. The Department stresses the fact that had the driver's license been given a careful examination by the clerk, she would have seen the inscription "AGE 21 IN 1997," as well as the decoy's date of birth, both of which disclosed that she was a minor.

In its decision, the Department cites Provigo Corporation v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561 [28 Cal.Rptr.2d 638], and states what is probably beyond dispute, that a seller's greatest protection against unlawful sales to minors is to routinely check identification. It should be noted, however, that Provigo, while permitting the use of minor decoys, rested on the Court's holding that such use was measured against the general standards of entrapment and due process.

Following the Provigo decision, the Legislature added what is now subdivision (e) to §25658 of the statute, and the Department promulgated Rule 141 pursuant thereto.

Ordinarily, the Department's interpretation of one of its own rules is entitled to great weight, and a decision based upon such interpretation may not be set aside unless clearly erroneous. (See, e.g., Pacific Legal Foundation v. California Unemployment Insurance Appeals Board (1981) 29 Cal.3d 101 [172 Cal.Rptr. 194].) Further, we have little doubt that there may well be circumstances where a non-verbal response may be deemed to be a truthful answer to a question about the decoy's age. Thus, we are inclined to agree with the Department's basic position that Rule 141(b)(4) does not necessarily demand an affirmatively spoken response. But where the non-verbal response is laden with ambiguity, it is incumbent upon the Department and this Board to examine more carefully the application of the rule to the facts of the case.

Here, we think, the Department has focused too narrowly on what it deems compliance with the subsection of the rule and in the process ignored the overall

requirement of the rule that the use of the decoy be “in a fashion that promotes fairness.” A clerk’s question to a decoy concerning his or her age is not offered merely for the purpose of making conversation.

In this case, the decoy’s response, illuminated by her hearing testimony, was borderline misleading. Even though she denied that she was trying to avoid telling the clerk she was 19 years old, her explanation for her non-responsive offer of her driver’s license suggests that her objective was not to test whether the clerk would sell to a minor, but, instead, actually to make a purchase of an alcoholic beverage. Thus, her offer of a driver’s license could well have falsely assured the clerk that the decoy was 21 or older, or else why would she volunteer a document which would prove otherwise.

Appellant suggests that the decoy’s initial thought was to lie, and say she was 21. While this is only speculation, we must admit our own curiosity why, when the decoy’s instructions were to answer truthfully, she elected to do something other than answer orally because of her apparent concern over the possible consequences to Thrifty if she were to say that she was 21.

The Department relies heavily upon selective dictionary definitions for the words “truthful” and “answer” in both its decision and in its brief on this appeal. While we have no particular quarrel with the Department’s exercise in semantics, we do think that, in its assessment of the facts in this case, the Department has taken a shortsighted view of the overall purpose of the requirement that a decoy answer truthfully a question concerning his or her age.<sup>3</sup>

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<sup>3</sup> We note that the Webster’s definition of “answer” relied upon by the Department connects action rather than words in a situation where action would be expected. The first listed definition given for the word “answer” in that same authority is “to speak or write in reply to something said or written by another.”

Similarly, Webster’s offers this definition of truthful: “telling or disposed to tell the truth; accurate and sincere in describing reality.” Under this

A decoy's objective is not simply to make a purchase. His or her objective is to test whether a seller is willing to sell an alcoholic beverage in circumstances where a reasonably prudent seller should question whether the purchaser was of legal age. If a decoy acts in a misleading manner, and the seller is misled, then the test can be said to be unfair.

The offer of a driver's license instead of an answer to the question which was asked had the potential of creating a distraction. The clerk could well have thought, as appellant contends, that she was being told, in substance, "of course I'm old enough to purchase liquor; go ahead and check my identification." By analogy, a person attempting to cash a check who tenders a driver's license which would show he is not the payee must believe he will fool the merchant to whom the check is presented. Not that he or she will necessarily succeed, but certainly the possibility of confusion or distraction has been created.

The experienced ALJ saw this as a case of first impression, and we do also. For that reason, and because of the views we have expressed in the text preceding, we invite the Department to reassess its approach to what will satisfy the Rule's requirement regarding what is a truthful answer. In this case, we think the decoy's response fell short, invited confusion, and led to unfairness.

## ORDER

The decision of the Department is reversed.<sup>4</sup>

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*choice of definition, it might be said that the decoy's response fell far short of being "truthful."*

*<sup>4</sup> 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*

RAY T. BLAIR, JR., CHAIRMAN  
BEN DAVIDIAN, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

JOHN B. TSU, MEMBER, did not participate in the oral argument or decision in this matter.

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*a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.*