**ISSUED APRIL 16, 1999**

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

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| THE SOUTHLAND CORPORATION<br>and AMARJIT S. DANDONA and<br>RAJESH DANDONA<br>dba 7-Eleven Store # 2211-14131A<br>1670 Silverado Road<br>Napa, California 94558,<br>Appellants/Licensees,<br><br>v.<br><br><br>DEPARTMENT OF ALCOHOLIC<br>BEVERAGE CONTROL,<br>Respondent. | ) | AB-7099<br><br>File: 20-276449<br>Reg: 97041594<br><br>Administrative Law Judge<br>at the Dept. Hearing:<br>Jeevan S. Ahuja<br><br>Date and Place of the<br>Appeals Board Hearing:<br>March 4, 1999<br>Sacramento, CA |

The Southland Corporation, Amarjit S. Dandona and Rajesh Dandona, doing business as 7-Eleven Store #2211-14131A (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days, with 5 days thereof stayed for a probationary period of one year, for their clerk, Maria Vargas, on August 15, 1997, having sold an alcoholic beverage (beer) to Vanissa Witek, a minor who was then nineteen years of age and a participant in a decoy operation being conducted by the Napa Police Department, such sale being found 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).

[1] *The decision of the Department, dated April 2, 1998, is set forth in the appendix.*

Appearances on appeal include appellants The Southland Corporation, Amarjit S. Dandona and Rajesh Dandona, appearing through their counsel, John A. Hinman and Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 25, 1992. Thereafter, the Department instituted an accusation against appellants charging an unlawful sale to a minor. An administrative hearing was held on March 2, 1998, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Vanessa Witek, the minor decoy, and Brian Campagna, the Napa police officer who conducted the decoy operation. Amarjit S. Dandona, one of the appellants, testified on behalf of all appellants.

Subsequent to the hearing, the Department issued its decision which determined that the charges of the accusation had been established.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the decoy operation was not conducted in a manner which would promote fairness, as required by Rule 141; (2) the decoy failed to respond to a question about her age, in violation of Rule 141(b)(4); and (3) the decoy failed to identify the clerk, in violation of Rule 141(b)(5). Issues 1 and 2 are interrelated, and will be discussed together.

DISCUSSION

I

Appellants contend that the decoy operation was conducted unfairly, arguing that the decoy was not trained to be fair and acted unfairly.

Rule 141(a) provides that a law enforcement agency may only use a person under the age of 21 to attempt to purchase alcoholic beverages "in a fashion that promotes fairness." Paragraph (b) of the rule sets forth five minimum standards which are deemed to apply to all actions filed pursuant to Business and Professions Code §25658 alleging that a minor decoy has purchased alcoholic beverages. Two of these minimum standards are implicated by appellants' appeal; those contained in paragraphs (b)(4) and (b)(5).

Paragraph (b)(4) of the rule provides that "a decoy shall answer truthfully any questions about his or her age."

Citing this Board's definition of fairness as set forth in The Southland Corporation and R.A.N., Inc. (1998) AB-6967 and the Board's ruling in Thrifty Payless (1998) AB-7050, that a decoy's tender of identification in lieu of an answer to a question about his age did not comply with Rule 141, appellants contend those decisions control on the facts of this case.

Vanessa Witek, the decoy, testified that she took a six-pack of Coors beer from the cooler and went to the counter, where there were two customers in front of her. When her turn came, the clerk requested, and was given, Witek's identification, a California driver's license. The license (Exhibit 3) showed her birth date to be February 4, 1979, and contained a blue stripe with the words "Provisional until age 18 in 1997", and a red stripe with the words "Age 21 in 2000" [RT 13]. After looking at the license, the clerk, Mrs. Vargas, uttered, in what Witek

characterized as a statement rather than a question, the words "1978. You're 21," and then rang up the sale. Witek, who made no response to the clerk's remark, left the store. She then returned with Napa police officer Al Bahn. Witek and Bahn went to the side of the counter, and identified themselves to Vargas, who was about two feet away [RT 15-17]. At this time, Witek identified Vargas as the person who sold to her [RT 44-45].

Witek prepared a written report of the event, but did not mention the statement by the clerk. She was later asked by Officer Bahn to write a supplemental report, and in this report, the only subject covered was the statement by the clerk.

Witek initially stated, during direct examination, that she had been instructed that if asked a question about her age, she could answer and was to state she was not 21 [RT 9]. Her testimony on cross-examination changed significantly. She testified she was instructed by the Napa police officers "don't talk to [the clerks], don't say anything" [RT 19], and not to make any conversation [RT 20]. Then, explaining that after she "did a couple of stores," the initial confusion about her training cleared up, and she understood that "when she [the clerk] asked -- if she asked a question, that I wasn't supposed to speak. I was told not to speak" [RT 25].

In response to hypothetical questions from Department counsel, Witek said [RT 26-27] she probably would have answered a question about her age:

> "Q. Okay. When this clerk said to you, "You are 21," can you remember if this clerk was making a statement or asking a question?
>
> A. She was making a statement.

Q. What if she was asking a question? What if she had said “you are 21" with the inflection --

[Counsel’s objection overruled.}

A. What would I do?

Q. Yes

A. I probably would say that I was not 21. That if I was -- I would say that I was not 21 and if she asked in a question manner and if I really believed that it was a question and not a statement.

Q. And if you were uncertain about what the training said about that, why do you think you would have answered her question about the age?

A. Because it’s a question. And if I didn’t speak then she’d probably think I was lying or something. But I was not asked to speak. So even if she asked a question, she would see my I.D.”

However, when questioned by the Administrative Law Judge (ALJ), Witek retreated to her original position. If asked, she “would have said something, [b]ut we’re not supposed to. I said I would probably do that, but we‘re not supposed to.” [RT 29].

Finally, when pressed once again by appellants’ counsel, Witek’s retreat was full-blown RT 41-42]:

Q. I just want to go back and clarify one other point, and that is your understanding of this training you received from the police department was that you were basically to have no conversation with the clerks, correct?

A. Yes.

Q. And even if asked you [sic] a question about your age, you understood that your instructions were you present them with your true driver’s license, and that’s sufficient, correct?

A. Yes.

Q. You didn’t need to answer the question about your age once you presented your driver’s license, correct?

A. Yes.

It is clear from Witek's testimony that she did not understand clearly her obligations as a decoy. Whether she was given erroneous instructions or simply did not understand what she was told, in either case the result is a muddled transaction and a decision that should not stand.

The ALJ found that the remark "You are twenty-one" was a statement rather than a question. He concluded (Special Finding of Fact V-B):

> "Moreover, immediately after the statement, Mrs. Vargas proceeded with the sale to the minor; she was not waiting for a response from Ms. Witek. Under these circumstances, it was not necessary for Ms. Witek to respond and her failure to do so did not violate the dictates of Rule 141."

Appellants cite Walsh v. Department of Alcoholic Beverage Control (1963) 59 Cal.2d 757 [31 Cal.Rptr. 297], for the proposition that Rule 141, because it regulates legislatively mandated standards for the application of Business and Professions Code §25658 to police decoy operations, must be construed so as to give licensees the benefit of every reasonable doubt, whether it arises out of question of fact, or as to the true interpretation of words. This is simply another way of saying the Department has to prove its case. And, in this case, we are satisfied that we have considerable doubt that the clerk's statements about the decoy's age can be dismissed as irrelevant simply because the decoy insists she heard them as a statement and not as a question.

When a clerk makes a sale to a minor after having seen a driver's license that shows the minor's true age, the sale could either have been intentional, or the result of a mistake. In either case, the sale violates the law, and the minor has no obligation to interrogate the clerk as to which it was. But here, where, at least for all that appears,

the clerk was misreading the driver's license and looking to the decoy for assistance or confirmation, it was the duty of the decoy to respond, and truthfully. But for the erroneous advice she said was given to her when she was trained to be a decoy, Witek might very well have responded that she was not 21, and the sale might not have occurred. Her failure to respond, in the unique circumstances of this case, fell short of that requirement of Rule 141, and resulted in unfairness.

With all due respect to the ALJ, we believe he gave inadequate consideration to Rule 141's requirement of fairness. It is clear from the testimony of the decoy that it would have meant little to her whether Mrs. Vargas' remark was a question or a statement. Witek was of the belief she was to remain silent; it was enough, she believed, for her to proffer her identification. Consequently, to accept her after-the-fact characterization of the clerk's remark as a mere statement is too charitable. There can be a very fine line between a remark that is a mere statement and a remark that is really a question. Delegating that determination to one who believed she should not have answered in either case tacitly ignores the requirement of fairness.

We do agree with the ALJ that it was not unfair to conduct the decoy operation on a Friday evening. Under appellants' theory, a busy establishment would be immune to a decoy operation during most of its operating hours - appellants claim that all of Friday evening, from 5:30 to 10:30 p.m., would be off limits. We do not believe the mere fact that there were two people in line ahead of the decoy demonstrates unfairness.

For these reasons, we believe that appellants' fairness contention has merit insofar as it relates to the non-responsiveness of the decoy, but not as to the time the decoy operation was conducted.

II

Appellants also contend there was no compliance with the requirement of Rule 141(b)(5) that the minor make a face to face identification of the seller of the alcoholic beverage. This issue was not raised at the hearing, so was not addressed by the ALJ. In our view, the argument is clearly without merit.

Appellants say that "there is no evidence that the decoy pointed out the clerk to Officer Campagna or that the clerk was facing the decoy when she identified her to Officer Campagna." This both misstates and distorts the record.

Oddly, appellants concede in their very contention that the decoy identified the seller to the police officer - "or that the clerk was facing the decoy when she identified her." Appellants require actual finger pointing, as well as some acknowledgement by the clerk that she has been identified. They ask too much.

This Board is indeed mindful of the District Court of Appeal decision in Acapulco Restaurants, Inc. v. Alcoholic Beverage Contrtol Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], cited by appellants, and of its teachings. With those teachings in mind, we believe the identification requirement of Rule 141 has been satisfied in this case. While we do not read the Acapulco decision as requiring an acknowledgement from the clerk that she is aware she has been identified, we are, nonetheless, satisfied from all the testimony in this case that the clerk could not have been unaware of that fact.

The decoy testified that, after the sale, she returned to the store with one of the police officers [RT 15-17]: "I went in the store and told her [the clerk] who I was. ... She was right off the counter helping a customer, and then we said who we were, and she walked back."

"Q. Was the same person there who had sold you the beer?

A. Yes.

Q. Can you estimate how far away you were from her?

A. About two feet. It wasn't that far. It was really close."

Questioning by appellants' counsel also demonstrates that the decoy performed her duty of identifying the seller:

"Q. And was -- when you were back in the store, you came back into the store after you purchased this beer, right?

A. Mm-hmm.

Q. And you were with both Officer Bahn and was Officer Campagna also present?

A. Yes. He showed his badge.

Q. All right. And when you came back in the store, you identified the clerk who sold you the beer, right?

A. Mm-hmm.

Q. And just say "yes" or "no."

A. Yes."

ORDER

The decision of the Department is reversed.[2]

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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.*

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

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*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.*