ISSUED JANUARY 6, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION, PARDEEP PANNU, and SUKHSAGAR PANNU dba 7-Eleven #18834 22808 Ventura Boulevard Ventura, CA 91364, Appellants/Licensees,	)	AB-7316
	)	File: 20-247117
	)	Reg: 98043762
	)	Administrative Law Judge at the Dept. Hearing: Sonny Lo
v.	)	
	)	Date and Place of the Appeals Board Hearing: December 2, 1999 Los Angeles, CA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	

The Southland Corporation, Pardeep Pannu, and Sukhsagar Pannu, doing business as 7-Eleven #18834 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk having sold an alcoholic beverage to a minor, 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 The Southland Corporation, Pardeep Pannu, and Sukhsagar Pannu, appearing through their counsel, Jeffrey A. Vinnick, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

[1]The decision of the Department, dated December 24, 1998, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 25, 1990. Thereafter, the Department instituted an accusation charging that, on March 12, 1998, appellants' clerk, Ramesh Kasondra, sold an alcoholic beverage (a six-pack of Budweiser beer) to Christopher Jensen ("Jensen"), a minor. Jensen was participating in a police decoy operation, and was accompanied by Los Angeles police officer Joseph Kalyn ("Kalyn").

An administrative hearing was held on November 19, 1998. Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) Jensen did not possess the appearance which could generally be expected of a person under the age of 21 years, as required by Rule 141(b)(2); (2) there was no compliance with Rule 141(b)(5) in that there was no face to face identification of the seller by Jensen; (3) the Department failed to prove that the alcoholic beverage identified at the hearing was purchased at appellants' store.

DISCUSSION

I

Appellants contend that Jensen did not present the appearance which could generally be expected of a person under the age of 21. They point to his five years as a police explorer, his current leadership role in that program, and his professional bearing and demeanor as evidence of a mature appearance and not that of a person under the age of 21 years.

The decision is flawed, in that it makes no finding one way or another as to whether the decoy presented the appearance required by Rule 141(b)(2).

The decision recites only the following with respect to the decoy's appearance:

> "On July 14, 1998, the decoy was 5'11" tall and weighed approximately 145 pounds. The decoy has attained the rank of captain with the Los Angeles [Police] Explorers program. Captain is the highest rank in that program. The decoy supervises 42 other explorers. He was not nervous while purchasing the beer from Respondent's decoy [sic - clerk]."

The Department defends its decision, stating in its brief (Dept.Br., page 3):

> "In his Proposed Decision the ALJ does not mention anything with regard to the appearance of the minor. The only logical conclusion which can be made is that this argument was so far fetched that it was not worth mentioning."

We do not believe the argument is at all far fetched. If there is to be strict adherence to Rule 141, as mandated by the court of appeal in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], then, when the minor's appearance is at issue, the Department is obligated to make a finding as to that issue.

We do not think that it is consistent with the rule and with the concept of strict adherence to assume, simply because the ALJ finds in favor of the Department that he has found Rule 141 satisfied. We know from what the ALJ did write that the decoy's accomplishments were impressive enough for him to record them in his decision. What we do not know is whether he believed the decoy presented the appearance of a person under the age of 21. It can truly be said that he is the only person who knows what he believed, and he has not told us.

The Board is not the finder of fact, and it is not the Board's prerogative to make its own findings when those of the Department are deficient. While we have viewed the photograph of the minor, and have our own views as to what it tells us, our views are irrelevant. That is why we believe the case must be returned to the Department so that the critical 141(b)(2) findings can be made.

II

Appellant Southland contends there was no face to face identification of the seller by the decoy. It argues that the absence of any reference to identification in Kalyn's report, the testimony of a patron who frequented the store on a daily basis[2] that there was no confrontation, and the absence of any audible confrontation, all combine to show that the rule was not satisfied, despite the photograph (Exhibit 4) of the decoy and the seller standing inches apart.

Southland's argument ignores testimony which specifically addressed this issue.

For example, Jensen testified [RT 12-13] that, at Kalyn's request that he identify the person who sold to him, "I physically pointed and verbally described who sold me the alcohol." This occurred after he and Kalyn had reentered the store.

Kalyn confirmed this in his testimony, stating [RT 41-42]: "I asked him who the clerk was that sold to him. He pointed to and gave me a description of the clerk which was the only clerk in the store at the time." Kalyn also photographed Jensen and the clerk (Exhibit 4). Kalyn attributed the absence of any reference to the identification in the police report to his general practice of not including it in his reports [RT 99-100].

The fact that the patron may not have seen or heard the events constituting the identification of the clerk is not evidence they did not occur.

III

Southland contends that "the Department failed to meet its burden of proof by producing the alcoholic beverage that was tagged as evidence in the subject case. " (Southland Br., page 15.) Southland argues that the product which was sold was a "22-ounce bottle of beer - not a 6-pack," and suggests that the six-pack of Budweiser

[2] The patron, Barry W. Dauer, testified that, for the past three years he has frequented the store on a daily basis, and currently spends four hours each day in the store playing a state lottery game [RT 70].

introduced into evidence could not have been purchased at the store because it was in a plastic bag with the word "K-Mart" printed on it, bags the store does not use.

Aside from the fact that it is of little help to its case to contend that the minor purchased only a large bottle of beer rather than a six-pack, or that when the purchase of an alcoholic beverage is not in issue, the Department must, nevertheless, introduce the beverage at the hearing, there are still other reasons why Southland's argument lacks merit.

The decoy and the police officer both testified that the product which was purchased was a six-pack of Budweiser [RT 11, 42, 46]. Kalyn also identified the bag containing the beer as the one on which he placed an evidence tag [RT 47].

The patron, Dauer, also testified, albeit indirectly, to the fact that it was a six-pack which was purchased by the decoy [RT 77]:

> Q: Now, you indicated in your testimony that you were standing right there when Mr. Jensen walked up to the counter with the six-pack of beer.
>
> A. Uh-huh.
>
> Q. Is that a "yes"?
>
> A. Yes.

The only evidence in support of Southland's contention that a bottle of beer was purchased rather than a six-pack is the statement in a form report (Exhibit G) completed by the clerk which describes what he sold as a "22-ounce bottle."[3] Since this is nothing more than a hearsay assertion of the clerk, the ALJ was not required to give it any weight.

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[3] The report form is entitled "Alleged Violation Fact Sheet," and contains a series of questions to be answered by a clerk cited for selling alcoholic beverages to a minor, the responses to be used by counsel. The clerk printed his responses to the questions in the form. However, the response which refers to the 22-ounce bottle is in handwriting, placed there by appellant Sukhsagar Pannu, as told to him by the clerk.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration of the issue whether the decoy presented the appearance which could be generally expected of a person under 21 years of age, and for such other proceedings as may be appropriate or necessary in light of the comments herein.[4]

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

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[4] 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.