ISSUED MARCH 22, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

COLIN McCABE dba McCabe's Bar & Grille 2455 Santa Monica Boulevard Santa Monica, CA 90404, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7363 File: 47-335290 Reg: 98044168 Administrative Law Judge at the Dept. Hearing: E. Manders Date and Place of the Appeals Board Hearing: January 20, 2000 Los Angeles, CA

Colin McCabe, doing business as McCabe's Bar & Grille (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 15 days, with 5 days thereof stayed for a two year probationary period, for appellant's employee selling an alcoholic beverage to a person under the age of 21, being contrary to the universal and generic public welfare and morals

[1]The decision of the Department, dated February 4, 1999, is set forth in the appendix.

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 Colin McCabe and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on February 26, 1998. Thereafter, the Department instituted an accusation against appellant charging that, on May 29, 1998, appellant's bartender sold beer to Christina Holmes, who was then 19 years old. Holmes was working as a decoy for the Santa Monica Police Department (SMPD) at the time.

An administrative hearing was held on November 5, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by officer Hunske of the SMPD; by Christina Holmes ("the decoy"); by Seamus Fitzpatrick, the bartender involved; and by appellant.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged in the Accusation.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issue: the decoy operation conducted by the SMPD was not conducted fairly.

DISCUSSION

Appellant contends the decoy operation violated Rule 141 because it was not conducted in a manner to promote fairness. Specifically, he argues that the Santa Monica Police Department unfairly targeted his premises, the decoy was improper

because she was the daughter of a police officer, and the decoy wore make-up and a ring on her left hand.

The fact that appellant's premises was visited two times within two weeks shortly after the premises opened appears to be unusual, especially because no problems were observed by the police on their first visit, but it does not prove that he was investigated unfairly. Certainly, there is no proof of any official misconduct in this regard such that a defense would be warranted under Rule 141.

Neither is there any inherent unfairness in using a decoy who is closely related to a police officer. Appellant makes vague statements about the decoy's inability to be impartial since she is the daughter of an officer, but cites no specific instances of bias on the part of the decoy which might affect the veracity of her testimony.

The appearance of the 19-year-old decoy is another matter. Although the ALJ found the decoy was not wearing make-up other than brown eyeshadow, the decoy was wearing a ring on the fourth finger of her left hand. The bartender testified that he believed the decoy was over 21 because of the ring on her left hand, which led him to believe she was married, and because she entered the premises by herself and sat by herself at the bar, actions that he did not feel were usual with underage drinkers.

The ALJ apparently discounted all these things, and instead found simply that the decoy "is a five foot, six inches tall female person whose *physical appearance* is such as to be reasonably considered as being under 21 years of age." (Finding III.1.) (Emphasis added.)

The ALJ appears to have considered only the physical appearance of the decoy, ignoring all other indicia of age. This is particularly inappropriate in this instance, since the ring and the decoy's apparent composure could well have misled the bartender.[2]

This case has the same defect in analysis that this Board has found to be a basis for reversal in numerous previous cases. (See, e.g., Circle K Stores, Inc. (1999) AB-7080; AB-7112; AB-7122; Ralph E. Larson (1999) AB-7200.) The ALJ only considered the decoy's physical appearance and apparently ignored other important indicia of age, such as demeanor and behavior. Without some indication that the ALJ used the standard required by Rule 141(b)(2), we are forced to conclude that the standard has not been met.

In Circle K Stores, Inc. (1999) AB-7080, the Board stated:

> "Nonetheless, while an argument might be made that when the ALJ uses the term "physical appearance," he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what he did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.
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> "It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating

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[2]Exhibit 2, the "Decoy Fact Sheet," shows that this decoy was served in two out of the three on-sale premises she visited that night. It also states that she was "viewed" by a Department investigator that night, and officer Hunske of the SMPD testified that, with regard to the minor decoys, "ABC makes the final determination of who we're going to use" [RT 41].

> enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.
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> "Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department's concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).

This Board has repeatedly told the Department that, in its consideration of a Rule 141(b)(2) defense asserted by a licensee, the administrative law judge must explain why he is satisfied that the decoy presents the appearance which could generally be expected of a person under the age of 21 years. We made it clear that we did not expect an exhaustive discussion of every possible consideration, but simply enough to satisfy this Board that the correct legal standard had been applied and that sufficient indicia of age or in addition to physical characteristics were considered in order to show that, in reaching a conclusion as to the decoy's appearance, the whole person had been considered. We cited such obvious considerations as poise, demeanor, maturity and mannerisms, but made it clear there were other aspects of appearance that could be relevant as well.

We feel several observations are in order. First, the requirements of Rule 141 are specific. Second, we have been admonished by a court of appeal that the rule's requirements are to be complied with strictly. Third, where a Department

decision deviates from the language of the rule, it conveys the idea that the specific requirements of the rule as written have not been, or cannot be, met.

It follows that, to allow a reviewing tribunal to conclude that the law enforcement agency complied with the requirements of the rule as to the apparent age of the minor decoy, the Department and its ALJ's must set forth the reasons (read "findings") they believe justify the conclusion that the decoy presented an appearance, at the time of the transaction, which could generally be expected of a person under the age of 21 years.[3] It is these findings which provide the Board the necessary bridge between the evidence presented and the conclusions reached by the trier of fact, and permit this Board, and the courts, to ascertain whether there actually was adherence to the terms of the rule.

The Department has sometimes argued that we are "stretching" the rule to include not only how law enforcement does its job, but how the ALJ must word his opinion. The Department is correct in its assertion that we are telling the ALJ's they need to consider certain things and to include necessary elements in their

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[3] We are well aware that the rule requires the ALJ to undertake the difficult task of assessing that appearance many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date. A specific finding by the ALJ to the effect that the minor's appearance was substantially the same at both times shows that the ALJ was aware of, and took into consideration, the rule's requirement that the minor's apparent age must be judged as of the time, and under the actual circumstances, of the alleged sale.

decisions. What the Department does not seem to understand is that we cannot justifiably conclude that the ALJ's determination that subdivision (b)(2) was complied with was sound unless we know that the right standard was used and it was applied properly. When the ALJ indicates by the words he uses that he applied the wrong standard, we cannot sustain the decision. It is the same as if the ALJ had used the standard of "beyond a reasonable doubt" to judge whether a party had met its burden of proof, instead of using the proper "preponderance of the evidence" standard. We also need to know what facts caused the ALJ to reach his or her conclusion that the rule was complied with. Without that, we are left to guess at what evidence led to the conclusion and, therefore, cannot know whether substantial evidence supports the finding.

The court in Topanga Assn. For a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836], discussed the importance of administrative findings which are supported by the agency's analysis of the relevant facts:

> "Our ruling in this regard finds support in persuasive policy considerations. ... [T]he requirement that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law, and is 'remarkably uniform in both federal and state courts.' As stated by the United States Supreme Court, the 'accepted ideal . . . is that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." (S.E.C. v. Chenery Corp. (1943 318 U.S. 80, 94.)'
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> "Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to

> conclusions. In addition,[4] findings enable the reviewing court to trace and examine the agency's mode of analysis.
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> "Absent such road signs, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable."

[Internal citations and footnotes have been omitted.]

It is disingenuous of the Department to contend that Rule 141 "was never intended to serve as guidance on how an Administrative opinion is worded." ***Every*** relevant statute and regulation is intended to serve as guidance on how an adjudicatory opinion is worded. The particular words used in a statute or regulation are assumed to be chosen to convey a certain meaning. Other words cannot be indiscriminately substituted for the statutory terms without the great risk of meaning something other than what the statute was designed to mean.

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[4] In footnote 14 of the Topanga decision, the court cited the words of Mr. Justice Cardozo: "We must know what [an administrative] decision means ... before the duty becomes ours to say whether it is right or wrong."

ORDER

The decision of the Department is reversed.[5]

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

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