

ISSUED JANUARY 14, 1998

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

YOSSEI KVIATKOSKY, DAVID HOUSTON	)	AB-6856
and AVI FATTAL)	
dba Q's	)	File: 47-231532
11835-37 Wilshire Boulevard	)	Reg: 96037987
Los Angeles, California 90025,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Ronald M. Gruen
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	November 5, 1997
	)	Los Angeles, CA

Yossi Kviatkosky, David Houston and Avi Fattal, doing business as Q's (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which ordered their on-sale general public eating place license suspended for their bartender having served alcoholic beverages (beer) to two 19-year-old minor decoys, 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

¹ The decision of the Department dated April 10, 1997, is set forth in the appendix.

Professions Code §25658, subdivision (a).

Appearances on appeal include appellants Yossi Kviatkosky, David Houston and Avi Fattal, appearing through their counsel, Ralph B. Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on May 25, 1989. Thereafter, the Department instituted an accusation alleging that on August 1, 1996, appellants' bartender, Jorge Antonio Palomarez, sold alcoholic beverages (Budweiser beer) to Victoria Brown and Maggie Angulo, minor decoys working with officers of the Los Angeles Police Department.

An administrative hearing was held on March 3, 1997, at which time oral and documentary evidence was received regarding the charges of the accusation. Los Angeles police officer Adam Adler testified that he observed the transaction when appellants' bartender sold a glass of beer to each of the minors. The minors also testified. Appellants presented the testimony of a patron and of their bar manager, as well as that of the bartender charged with having made the sale.

Subsequent to the hearing, the Department issued its decision which sustained the charges of the accusation. Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the police officer's failure to comply with Rule 141 (Cal. Code Regs., Title 4, div. 1, §141) is a defense to the

charge; and (2) substantial compliance does not constitute compliance with the rule. Because of their obvious interrelationship, the two issues will be addressed as one.

DISCUSSION

Appellants contend that the failure of the police to comply with that portion of Rule 141 which requires that the decoys make a face to face identification of the person who sold the alcoholic beverage is a complete defense to the charge of selling to a minor participating in a decoy program. The Department concluded, and argues here, that there was substantial compliance with the rule. Without conceding that there was substantial compliance with the rule, appellants urge that what must be demonstrated is strict compliance.

Appellants argue that the language of the rule (Rule 141, subdivision (b)(5)) is clear and unambiguous in its requirement that there be a face-to-face identification of the seller by the minor who purchased the alcoholic beverage. Police departments should not disobey the rules governing their conduct, appellants argue, and, they continue, if Rule 141 is to have any meaning at all, police departments must be instructed that they must obey it.

Appellants' policy argument for a strict interpretation of Rule 141 ignores the obviousness of what occurred in this case. According to the testimony [at RT 10-11], candidly set forth in appellants' brief (at p.4), the two decoys were seated on the stools directly in front of the police officer, who was facing the bar. Appellants'

bartender was on the other side of the bar, looking at the police officer, who was about four feet away. The police officer pointed out the two minors to the bartender, and had each of them remove their identification so that he could show the bartender the two were both minors. Only then did he ask the bartender to go upstairs so that he could issue him a citation.

The inferences to be drawn from this scenario would seem obvious. As indicated, the four actors in the event were situated so that the opposing interests were facing each other. In the presence of the minors, the police officer demonstrated to the bartender he should not have sold them an alcoholic beverage, and the minors were participating in the demonstration by exhibiting their identification for the bartender to examine. All of the actors were proceeding on the unspoken but ineluctable premise that they, and no one else, were the persons involved in the incident. In such circumstances, the only thing lacking was the physical act of pointing fingers.

There is an ancient legal maxim that the law neither does nor requires idle acts. Our reference to this maxim is not intended to suggest that the Appeals Board does not consider the identification requirement of Rule 141 important. To the contrary, its purpose, which is to ensure that it is the person who made the sale of the alcoholic beverage who is the person charged, and not an innocent employee who happens to be a bystander, is not to be demeaned. But where, as here, the line between substantial

compliance, as the Department found, and strict compliance, which appellants demand, is so thin as to be virtually invisible, justice would not be served

by a reversal of the Department's decision.²

CONCLUSION

The decision of the Department is affirmed.³

BEN DAVIDIAN, CHAIRMAN
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD⁴

² Indeed, now that Rule 141 has become effective and identification of the seller by the minors is mandatory, the Department would be well-advised to again remind law enforcement authorities of the importance that there be reliable evidence of compliance with Rule 141.

³This 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 decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.

⁴ Ray T. Blair, Jr., Member, did not participate in the oral argument or decision in this matter.