ISSUED JUNE 29, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ACAPULCO RESTAURANTS, INC. dba Acapulco 1109 Glendon Avenue Los Angeles, CA 90024, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6895 File: 47-182069 Reg: 96037110 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: May 6, 1998 Los Angeles, CA

Acapulco Restaurants, Inc., doing business as Acapulco (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its on-sale general public eating place license suspended for 15 days, for appellant's bartender having sold an alcoholic beverage (Budweiser beer) to a 19-year-old minor decoy, 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 Acapulco Restaurants, Inc., appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

[1] The decision of the Department, dated June 19, 1997, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on March 3, 1986. Thereafter, the Department instituted an accusation against appellant charging that appellant's bartender, Diana Sussman, sold a glass of Budweiser beer to Victoria Brown, a 19-year-old minor participating in a decoy operation being conducted by the Los Angeles Police Department.

An administrative hearing was held on May 8, 1997, at which time oral and documentary evidence was received. At that hearing, Victoria Brown, the decoy, testified that she entered appellant's restaurant, seated herself at the bar, and when asked by the bartender whether she would like anything, ordered a glass of Budweiser. The bartender, Diana Sussman, without requesting identification or proof of age, served the glass of beer as requested. The decoy paid for the beer with a pre-marked $5 bill. As the bartender returned with the beer and the change from the $5 bill, Los Angeles police officer Adam Adler, who was already in the restaurant, and saw and overheard the transaction, approached the bar, identified himself as a policeman to the bartender, and advised her she had just sold an alcoholic beverage to a minor. He then showed the bartender Brown's identification, which he obtained from Brown immediately after having identified himself. Adler then directed Brown to leave the restaurant, which she did. Brown was later asked to return to the restaurant to see the manager, and did so. The bartender was present at this encounter, according to both Brown and Adler.

Adler testified further, over appellant's objection, that the bartender told him she normally checks identification, but did not do so in this case because she was in the process of closing the register.

Adler denied on cross-examination that the conversation took place in the lobby of the restaurant, insisting it occurred in the cantina area. He also denied that, when Brown was asked to reenter the premises, the citation had already been issued and another officer was present other than himself. Adler also denied that he had interceded in the transaction before the bartender had even served the beer or returned the change.

Adler acknowledged having received a training memo after this incident which stated that in all police decoy cases it was the policy of the LAPD to make sure there was a face-to-face confrontation between the decoy and the server.

Diana Sussman admitted she had not requested identification, but claimed she still had the beer in her hand when officer Adler confronted her. She testified Adler told her to dump the beer and give him the glass for evidence. Sussman could not recall whether or not she had handled any money, but said she was prepared to ask the decoy for identification before serving the beer, but was prevented from doing so by officer Adler's intervention. Sussman claims the decoy "vanished," and she never saw her again. However, she did agree with Adler's testimony that she, Sussman, was present during his conversation with her manager, and that the conversation took place in the cantina. Sussman was discharged shortly following, and because of, the transaction.

Stacy Franscella, appellant's Director of Human resources, testified concerning the training program appellant provides for its employees who serve alcoholic beverages, and identified certain training documents which are used.

Fred Wolfe, a senior vice-president of appellant, testified that if a two-week suspension were imposed, the restaurant would lose approximately $22,000 in alcohol and approximately $35,000 in gross sales.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision which determined that the charge in the accusation had been established. The ALJ rejected appellant's arguments that the police had failed to comply with Rule 141 (b)(5) (Cal.Code Regs., title 4, §141 subd. (d)(5)) ("the rule"), stating:

> "The transaction was witnessed by a police officer who was seated at a table near the fixed bar. The police officer and the decoy testified consistently and positively regarding the sale of the beer. In light of their testimony, the bartender's testimony that the police officer stopped her before she served the beer to the decoy is found not to be reliable. (Finding V.)
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> "After the transaction was completed, the police officer identified the decoy to the bartender and informed her that she had sold beer to a minor. The officer's actions meet the requirements of the Department's Rule 141(b)(5), 22 Calif. Code of Regulations Section 141(b)(5). (Finding VI.)"

The ALJ also rejected the Department's recommendation that appellant's license be suspended for 45 days, finding that the prior disciplines upon which the Department relied for enhancement were too remote. Instead, he ordered a 15-day suspension. The Department adopted the proposed decision, following which appellant filed a timely notice of appeal.

In its appeal, appellant raises a single issue, asserting that the failure of the police officer to comply with Rule 141 affords it a complete defense.

DISCUSSION

Appellant contends that officer Adler failed to comply with the identification requirements of Rule 141, and that his failure to do so affords it a complete defense to the charges of the accusation.[2] The Department argues, in accordance with the findings of its decision, that there was sufficient compliance with the rule, rendering the defense inapplicable.

The decision of the Board in Kviatkosky (AB-6856), issued in January of this year, and the decisions in Chicago Pizza, Inc. (AB-6874) and Rajab Ali and Azad A. Virani (AB-6873), following the January 1998 hearing, all involved similar Rule 141 issues, and in each the Board voted to affirm the Department. Appellant's briefs cite Kviatkosky as support for its position, relying on the paragraph stressing the

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[2] Appellant contends in its brief (App.Br. 5) that Brown was not present when the police officer showed the bartender Brown's identification. This is incorrect. While Brown did testify, at the point in the transcript cited by appellant, that she did not believe she was present at that moment, she later testified as follows [RT 27]:

> "Q. And you did not stay there during any conversations with the bartender person because you testified earlier that you gave your identification to the officer and he showed it. You weren't there when that took place?
>
> "A. I was standing right there when he handed it to her, and then I went outside ... ."

importance of compliance with Rule 141. Other than that admonition to the Department, the decision offers little support to appellant.

In Kviatkosky, the Board sustained the Department where the "face to face identification" consisted of the police officer pointing out the two minors to the bartender and having them remove their identification so he could show the bartender the two were both minors. The two minors were sitting on stools directly across from the bartender.

The Board said, in Kviatkosky:

> "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.
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> "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."[1]
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> "[1] 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."

In Virani (AB-6873), the police officers were apparently outside the store when the sale took place. However, when they entered the store, the minor returned with them, and, according to the testimony of the minor, "that's when they confronted the clerk." The rationale of the decision is that since the minor was present when the officers confronted the clerk, and the clerk had to have been identified in order to be confronted, and since the minor was then present, there was sufficient evidence to support a reasonable inference that the minor made the requisite identification.

In Chicago Pizza, Inc. (AB-6874), the minor was standing directly next to the police officer; the bartender was directly opposite them. The Board's decision addressed the interpretation of the rule in such circumstances:

> "Rule 141 became operative in February 1996, and cases involving its application are just now beginning to ripen into appeals. Thus far, the focus has, for the most part, been on the alleged absence of compliance with the identification provisions of the rule in subdivision (b)(5).
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> "Given the nature of the evidence on the compliance issue in this case, it is useful to look at the relevant text of the rule, against which the evidence must be measured:
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> "'Rule 141. Minor Decoy Requirements
> ...
> (5) Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.
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> (6) Failure to comply with this rule shall be a defense to any action brought pursuant to Section 25658.'
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> "The classic pointing of a finger, accompanied with the spoken declaration "That's the man," is not present in this case. The Department,

however, contends that what occurred was the equivalent of a face-to-face identification, and, accordingly, there was compliance with both the rule and the purpose of the rule.

"Appellant argues for a stricter application of the rule, asserting that it demands nothing less than a clear-cut determination that the minor, by word and/or gesture, so singled out the seller as to label him or her the transgressor. In this case, the minor stood next to the police officer, said nothing, and did not affirmatively identify the bartender.

"The Department, in turn, argues for an interpretation of the rule that permits it to be satisfied by circumstances where there can be no doubt from the evidence that the person who is being cited is the person who sold the alcoholic beverage to the minor. In this case, the Department points to the fact that the police officer observed the sale, and that there was no question as to the identity of the seller. (Footnote omitted.)

"In other cases before the Appeals Board, appellants have argued that one of the purposes of the rule was to afford the seller an opportunity to confront the minor, presumably to be able to challenge in some manner the conduct of the minor that induced the seller to make the sale.

"The Department routinely argues that the purpose of the rule is to protect the seller against a mistaken accusation in those situations where the police officer was outside the premises, or otherwise not in a position to observe the transaction take place.

"Certain portions of the language of the rule tend to support the Department's argument. The rule requires the officer, before a citation is issued, to "make a reasonable attempt to enter the licensed premises and have the minor decoy make a face to face identification ... ." Thus, the rule does contemplate possible situations where the officer who may intend to issue a citation was outside the premises, and not in a position to see for himself what actually took place. In such a circumstance, the minor's identification could be critical.

"Under the Department's view, the purpose of the identification is for the assistance of the officer so that he can cite the person who ought properly to be cited, and for the protection of other clerks or employees against being falsely accused. Thus, where the officer has observed the transaction, and would, in a non-decoy context, be able to cite the seller without more, the need for the face- to-face identification has been satisfied by the circumstances surrounding the transaction, and the interests protected of all the persons for whom the rule exists.

> "From a strict legal standpoint, on the facts of this case, the rule has effectively been satisfied. There is nothing in the record that suggests unfairness in the citation having been issued, or in the Department's disciplinary proceeding having been brought. On the other hand, with an obvious violation committed in the presence of the police officer, and no doubt that the transaction took place exactly as described by the witnesses, it would be unfair to apply the restrictive interpretation urged by appellant.
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> "Appellant argues that, if allowed to stand, the decision will stand for the proposition that law enforcement agencies need not follow Department rules. On the facts of this case, that argument is unpersuasive. This is not a case where the minor is whisked out the door, or where the officer issuing the citation is not the officer who observed the transaction, or some other scenario that, measured against the mandate of the rule, might warrant reversal. Such a case might well serve as a message from the Appeals Board to the law enforcement community that Rule 141 has teeth. This is not such a case."

Nor is this such a case. Here, there is only a technical non-compliance with the most rigid and literal interpretation of Rule 141. It is clear that neither the Board, the Department, or the administrative law judges have thus far seen any merit or wisdom in dismissing cases for a failure to comply with Rule 141 when the police officer has observed the entire transaction while sitting or standing only a few feet away, where there was no question that the violation occurred, and where there was no claim of mis-identification.

There is something to be said for an interpretation of a statute or rule which takes into account reality. And the reality of this case, illustrative of the cases the Board is being asked to review, is that there is no need for the requirement of identification when the peace officer is already within the premises and is an eyewitness to the transaction. In that sense, the interaction between the minor and the seller is itself a face-to- face identification.

This interpretation does no violence to the rule, and eliminates the need for a purposeless exercise that assumes the peace officer did not see what had just taken place before his eyes.

Thus, we are persuaded that we should adopt an interpretation of the rule in accord with that asserted by Administrative Law Judge Lo, to be applied where the officer has witnessed the transaction while inside the premises. Any claim of mis-identification, albeit infrequent, then becomes a straight-forward factual issue for the trier of fact.

There is nothing profound in reading Rule 141 to apply only where the police officer is outside the premises or has otherwise been unable to see (and, in most cases, hear) the transaction in real time.[3] Indeed, such an interpretation injects common sense into the rule without distorting or ignoring its literal text.

The Department and appellants have both argued in support of their respective positions that the rule is unambiguous. In fact, it is ambiguous on the critical element in issue. Does the phrase "the peace officer directing the decoy shall make a reasonable attempt to enter" meaningfully apply to a peace officer who is already inside the premises? Does it not make more sense for the rule to be understood to apply only where the officer is outside the premises and not in a position to observe the transaction, so that identification of the seller is necessary?

The rule's requirement that identification occur before a citation is issued is

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[3] Of course, a peace officer who witnesses the transaction while inside the premises, but is unable to hear the conversation between the minor and the seller, is still a competent witness with respect to the identification of the seller.

consistent with the notion that it is the object of the rule to prevent a mistaken accusation. As stated earlier, when the peace officer watches the transaction while inside the premises and is able to see clearly what has transpired, it is as if a face-to=face identification, by both word and gesture, has taken place before his eyes. He should then be free to issue a citation, if one is otherwise warranted.

Appellants make much of the language in subdivision (a) of the rule which provides that the use of decoys must be "in a fashion that promotes fairness." They argue that it is unfair to omit the identification ritual even though the peace officer has witnessed the transaction, but the only thing they point to as constituting unfairness is the omission of the minor's affirmative identification of the person who sold him or her the alcoholic beverage.

We do not think it can be said that the police are engaged in some sort of scheme to circumvent Rule 141 by placing themselves inside the store. In all probability, what is happening is simply the result of a police belief that the decoy program will operate more successfully, and more safely, if the officer is inside the premises, in a position to view and, if necessary, to protect the minor while he or she attempts to make a purchase. Indeed, appellants' theory, pursued to its logical end, would almost require the peace officer to remain outside the premises while the minor attempts the purchase, and await the minor's exit from the store or bar before taking any enforcement action.[4]

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[4] It may very well be that in some communities, the peace officers necessarily may remain outside because their identities are known to the licensees. In those circumstances, their entry into the premises in advance of the minor would doom the decoy operation to failure at the outset.

Finally, there is the general rule, reiterated in Judson Steel Corp. v. Workers' Comp. Appeals Board (1978) 22 Cal.3d 658, 668-669 [150 Cal.Rptr. 250]:

> "While the ultimate interpretation of a statute is an exercise of the judicial power (Whitcomb Hotel, Inc. v. Cal. Emp. Com. (1944) 24 Cal.2d 753, 757 [151 P.2d 233 ...), when an administrative agency is charged with enforcing a particular statute, its interpretation of the statute will be accorded great respect by the courts 'and will be followed if not clearly erroneous. [Citations.]' (Bodinson Mfg. Co. v. California E. Com. (1941) 17 Cal.2d 321, 325-326 [109 P.2d 935].)"

:In George v. Department of Alcoholic Beverage Control (1957) 149 Cal.App.2d 702 [308 P.2d 773, 779], the court, citing Coca-Cola Co. v. State Board of Equalization (1945) 25 Cal.2d 918 [156 P.2d 1, 2-3]), ruled similarly:

> "[W]here a statute needs construction, or implementation by rule or regulation, or where a valid rule requires interpretation, an administrative agency charged with its enforcement may reasonably furnish such construction or interpretation in aid of the purpose of the law, and that contemporaneous administrative construction is entitled to great weight and courts generally will not depart from it unless it is clearly erroneous or unauthorized."

The Department's interpretation of Rule 141 is manifested in the uniformity in which it has held the rule not to preclude a finding of a violation of the statute prohibiting a sale of an alcoholic beverage to a minor in the context of a decoy operation where the peace officer was inside the premises and situated in a position to see, and sometimes even hear, the entire transaction.[5] While the various proposed decisions written by administrative law judges which we have seen

[5] Of course, a peace officer who witnesses the transaction while inside the premises, but is unable to hear the conversation between the minor and the seller, is still a competent witness with respect to the identification of the seller.

reflect minor differences in approach, they are all consistent in their unwillingness to read Rule 141 to require a result they consider absurd.

The preamble to Rule 141, in subdivision (a) of the rule, admonishes the police: "A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages ... in a fashion that promotes fairness." We find nothing unfair in a decoy operation where the peace officer enters the premises and observes the transaction as it takes place. Nor do we find anything unfair in dispensing with a meaningless identification ritual when, in any realistic assessment, the peace officer was already a participant, so to speak, in the transaction - albeit in the role of an observer.

The requirement that the " peace officer directing the decoy shall make a reasonable attempt to enter ..." is posited by Rule 141 as a "minimum standard." The objective is eliminate the officer's reliance only on a description given to him by the minor after a sale is made and reported to the officer upon the minor's exit from the licensed premises, or, in some instances, as overheard via a concealed radio transmitter.

"It is elementary that, if possible, statutes will be so construed as to avoid absurd applications and to uphold their validity." (In re Cregler (1961) 56 C.2d 308 [14 Cal.Rptr. 289, 291].)

A practical reading of the rule, rather than a technical one, results in wise policy and avoids mischief or absurdity. The object sought to be accomplished by the rule, the risk of false or mistaken accusation, is eliminated. The evil to be

remedied, the sale of alcoholic beverages to minors, is addressed, Perhaps the best proof of the validity of the position urged by the Department is that neither in this nor in any of the other cases presently before the Board is there any claim of mistaken identification.

It seems clear from the uniformity of the Department's rulings that its interpretation of Rule 141 is essentially as articulated explicitly or implicitly by the other administrative law judges who have written proposed decisions on the issue. In our considered view, this interpretation is not unreasonable, is consistent with the overall objective of Rule 141 and Business and Professions Code §25658, subdivision (a), avoids results which, viewed objectively, would seem absurd, and is not unfair to either the Department or the licensee.[6]

CONCLUSION

The decision of the Department is affirmed.[7]

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

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[6] The parties have debated the question whether the defense created in Rule 141 (b)(5) is an absolute defense or something less. We do not need to reach that issue where, as here, the peace officer witnessed the entire transaction from a vantage point within the licensed premises and we find that no defense is available.

[7]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 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.