ISSUED JUNE 29, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

BREA STEAKHOUSE LIMITED PARTNERSHIP dba Outback Steakhouse 402 North Pointe Drive Brea, California 92621, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6898 File: 47-316096 Reg: 96038511 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: May 6, 1998 Los Angeles, CA

Brea Steakhouse Limited Partnership, doing business as Outback Steakhouse (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 seven days, for appellant's bartender having sold an alcoholic beverage (Budweiser beer) to Timothy Fitzgerald, an 18-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

[1] The decision of the Department, dated June 5, 1997, is set forth in the appendix.

Code §25658, subdivision (a).

Appearances on appeal include appellant Brea Steakhouse Limited Partnership, appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on April 18, 1996. Thereafter, the Department instituted an accusation against appellant charging that on August 29, 1996, appellant's bartender, Robyn Patricia Reclusado, sold a bottle of Budweiser beer to Timothy Fitzgerald, a minor participating in a decoy operation being conducted by the Brea Police Department.

An administrative hearing was held on April 1, 1997, at which time oral and documentary evidence was received.

Brea police detective Austin Phillips testified that he sat approximately three or four bar stools away from the minor decoy and witnessed the entire transaction. Fitzgerald requested and was served a bottle of Budweiser beer and was not asked for identification. Displaying his badge and identification, Phillips advised the bartender she had just sold to a minor. Phillips then had the bartender summon the manager, and he explained to the manager what had occurred. On cross-examination, Phillips testified that the minor was still seated at the bar when he showed the bartender his badge and identification. He requested the bartender to produce her driver's license, and at that point told the minor to leave [RT 33]:

"Q. And when she produced her driver's license, you had the minor depart

the scene, is that right?

A. Yes, sir.

Q. Not necessary for him to be there?

A. Correct.

Q. And if I understand your testimony correctly, the minor never actually identified the bartender as the person who sold to him; is that correct?

A. That's correct.

Q. Did she ever ask to see the minor, whoever it was you were talking about?

A. No, sir."

The minor's testimony was slightly different concerning what occurred after he had been served the beer [RT 43-44, 49] :

"Q. ... Did Detective Phillips come over to you?

A. I believe so, yes.

Q. Did you see him identify himself to the bartender?

A. Yes, I did,

Q. Do you remember what he said to her at all?

A. He said "you just sold alcohol to an undercover decoy."

Q. Did he indicate in any manner that you were the decoy?

A. Yes, he did.

Q. How did he do that?

A. He was standing right next to me. And he said "This is an undercover decoy."

Q. And at that time, how far away from you was the bartender?

A. She was right on the other side of the bar.

Q. And Detective Phillips was standing next to you?

A. Correct.

...

Q. And then you went outside. Did you reenter the premises after that?

A. No, I did not.

...

Q. After you ordered the Bud, did you say anything to anyone until after you left the bar counter?

A. No I did not.

Q. Did you point to anybody?

A. No, I did not.

Q. Exactly what did you do.

A. I looked at Detective McCarroll. And I believe he told me to wait outside. And I got up and went outside."

In response to questioning by the Administrative Law Judge, the minor further testified as follows:

"The Court: When Phillips identified himself to the bartender as a police officer, you said he didn't say anything more, correct?

The witness: As I recall.

The Court: Did he do anything in conjunction with making that statement to the bartender?

The witness: I don't believe so. I don't recall.

The Court: Well, you also said that somebody earlier identified you as being the decoy, correct?

The witness: I believe he did, yes, sir.

The Court: How was that done?

The witness: He said that "You sold to an undercover decoy. He told that to the bartender as I was sitting there.

The Court: Okay. But that could have been anyone, correct?

The witness: It could have been.

The Court: So it wasn't you who were identified in particular as being the decoy?

The witness: I guess so. I guess not."

Administrative Law Judge McCarthy rejected the contention that Rule 141 required dismissal. The relevant finding (III-C) and determination (IV) state:

"C. During the decoy operation, Fitzgerald [the decoy] was under the surveillance of Brea Police Detective Austin Phillips. Phillips, who entered the premises separately and after Fitzgerald, observed the transaction from about 10 or 15 feet away. He heard the conversation and saw the actions of bartender Robyn Reclusado. Phillips took custody of the bottle of beer at the time he identified himself to Ms. Reclusado and informed her she had sold beer to Fitzgerald who was just 18 years of age. While Phillips did this, Fitzgerald was present next to Phillips and Reclusado was behind the bar only 3-4 feet away. Phillips indicated Fitzgerald as the 18 year-old when he confronted Reclusado, who was given a citation for an illegal sale to an underage purchaser."

"IV. ...

Respondent asks that the accusation be dismissed because the investigation did not comply with Rule 141(b)(5). Respondent suggests that the intent of this requirement is neither specified nor relevant to a determination of whether the police operation complied with the rule. This contention is rejected. The language of the Rule quoted above is not ambiguous. Its plain meaning is that the minor is to make a face to face identification of the alleged seller. The

requirement is clearly intended to prevent a mistaken description in those cases where the directing peace officer did not observe the transaction.

> "In a case such as this, where Detective Phillips observed the transaction from a position so close as to hear the conversation between the bartender and the minor decoy, and where there was absolutely no doubt as to who the seller was, it would be absurd to require the decoy to also make a verbal identification of the seller. In this case, when Phillips confronted Reclusado, he identified himself, advised her of the alleged violation, all in the presence of the minor. As the maxims of jurisprudence suggest, the law does not requires [sic] idle acts. (California Civil Code §3532.) Nothing more is required under the Rule."

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 detective Phillips 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. 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.

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).
>
> "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.
>
> (6) Failure to comply with this rule shall be a defense to any action brought pursuant to Section 25658.'
>
> "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.
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> "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.

> "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 alreadywithin 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.

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.[2] 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 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.[3]

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]:

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[2] 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.

[3] 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.

> "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. While the various proposed decisions written by administrative law judges which we have seen 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 to 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 through a door or window, or 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 implicity by the administrative law judges who have written proposed decisions on the issue and seen them adopted by the Department. 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.[4]

CONCLUSION

The decision of the Department is affirmed.[5]

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

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[4] 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.

[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 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.