

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

CHICAGO PIZZA, INC.	)	AB-6874
dba BJ's Chicago Pizzeria)	
600 Brea Mall Drive	)	File: 47-316081
Brea, California 92621,	)	Reg: 96038451
Appellant/Licensee)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	January 7, 1998
	)	Los Angeles, CA

Chicago Pizza, Inc., doing business as BJ's Chicago Pizzeria (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered its on-sale general public eating place license suspended for 10 days, for appellant's bartender having sold an alcoholic beverage (Budweiser beer) to 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 Code §25658, subdivision (a).

¹ The decision of the Department, dated May 22, 1997, is set forth in the appendix.

Appearances on appeal include appellant Chicago Pizza, Inc., appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on March 15, 1996. Thereafter, the Department instituted an accusation against appellant charging that appellant's bartender, Steven Paul Rich, sold a bottle of Budweiser beer to Ryan P. Buttes, an 18-year-old minor participating in a decoy operation being conducted by the Brea Police Department.

An administrative hearing was held on April 3, 1997, at which time oral and documentary evidence was received. At that hearing, Michael F. Owens, a Brea police officer testified that he followed Buttes into the bar and saw the sale take place. Barnes testified that he watched Rich open the beer, place it in front of Buttes, and make change from the \$5 bill given to him by Buttes. Barnes testified further that as soon as the sale was completed, he took possession of the beer and moved Buttes "off to the side" [RT 12]. Barnes then advised Rich that the police were conducting a sting operation, and that Rich had just sold an alcoholic beverage to a minor. Rich had not requested any identification from Buttes. On cross-examination, Barnes testified that he had identified the minor to Rich, but that Buttes did not identify Rich.

Buttes also testified, and his description of what took place was essentially the same as that of the police officer. Buttes was asked whether he had identified

Rich as the person who sold him the beer, and answered in the negative. However, Buttes testified, Rich was standing directly in front of him when the police officer advised Rich he had just made a sale to a minor.

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, subdivision (b)(5) (Cal.Code Regs., title 4, §141 (d)(5)) ("the rule"). The Department adopted the proposed decision, following which appellant filed a timely notice of appeal.

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

DISCUSSION

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

² Appellant's opening brief asserts that "the decision of the Department admits that there was no face to face identification." This is an overstatement. The decision recites that point merely as appellant's contention. The decision then refutes the contention by pointing out that: the officer saw the transaction; there was no question as to the identity of the seller; and, the bartender had an opportunity to see the minor after being told the purchaser was a minor. Only after this recital does the decision say that "under the circumstances of this case, it was not necessary for the minor to actually make a statement to [the officer] identifying the seller." (Finding of Fact IV).

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 (d)(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:

“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.

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.³

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 tends 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

³ Buttes testified that he stood directly next to the officer, with the bartender standing right in front of him RT [22-26].

"Q. ... [W]here was the bartender at that point, right behind the bar?"

A. Standing directly in front of me, behind the bar,"

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.

CONCLUSION

The decision of the Department is affirmed.⁴

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

⁴This 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.