

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

SOUTHLAND CORPORATION and	)	AB-6967
R.A.N., INC.)	
dba 7-Eleven	)	File: 20-214509
21220 Homestead Rd.	)	Reg: 97039699
Cupertino, CA 95014,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Jeevan S. Ahuja
)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	December 2, 1998
Respondent.	)	Sacramento, CA
)	

Southland Corporation and R.A.N., Inc., doing business as 7-Eleven (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 25 days for permitting a clerk to sell an alcoholic beverage, a six-pack of beer, to a person under the age of 21 years, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising

¹The decision of the Department, dated November 6, 1997, is set forth in the appendix.

from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants Southland Corporation and R.A.N., Inc., appearing through their counsel, John A. Hinman, Richard D. Warren, and Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

FACTS AND PROCEDURAL HISTORY-

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging the sale to a person under the age of 21 years.

An administrative hearing was held on August 28, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the sale.

Christa Schreiber, a police decoy and age 19 years at the time of the sale, entered the premises with a friend who was 18 years of age [RT 15-16, 22-23]. The decoy obtained a six-pack of beer, and went to the counter where Narinder Bains, the clerk, asked for the decoy's driver's license, which was shown to the clerk. The sale was thereafter made [RT 17-18]. A stipulation was entered into that the clerk thought the decoy was 24 or 25 years of age, and the clerk made a mistake in reading the driver's license of the decoy [Finding IV]. Additionally, it was stipulated that the Department would waive hearsay objections to the testimony of Richard Newmark (president of co-licensee R.A.N., Inc.) and Cerres Alexander (the manager clerk at the premises), concerning their conversations with

Mr. Bains, the clerk [RT 104].

Subsequent to the hearing, the Department issued its decision which determined that the statute had been violated and no defenses proven.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Administrative Law Judge (ALJ) erred when he found that Rule 141(b)(2) was not applicable in these circumstances where the seller asked for and viewed valid identification of the minor; and (2) there is no substantial evidence supporting the finding that the minor displayed the appearance generally expected of a person under the age of 21 years, arguing that the appearance and demeanor of the minor was not that as depicted in the Department's licensees' training program's criteria as to the appearance and mannerisms expected of a minor.

DISCUSSION-

I-

Appellants contend that the ALJ committed error when he found that Rule 141(b)(2) was not applicable in these circumstances where the seller asked for and viewed valid identification of the minor.

Schreiber (the decoy) testified that she, at the request of the clerk, produced her driver's license which showed her true age of 19 years. The clerk "looked at it and looked at it for a while ..." [RT 17]. [See also RT 17-18, 27, 72, as to production of the identification by the decoy.]

The ALJ, considering the import of the production of the I.D., stated in

Finding VI-A, second paragraph:

“It would indeed be unfair for a decoy [the purchasing minor in the present appeal] to present to a seller of alcoholic beverages an appearance of someone over 21 years old. However, once the seller of alcoholic beverages, prompted by the decoy’s general appearance and behavior, asks the minor for identification, Section 141(b)(2) has no further application. The interests of fairness have been served and the seller of alcoholic beverages has the best evidence of the minor’s age in his or her hands -- documentary evidence of identity and age. The decision to sell alcoholic beverages to that decoy must then be based on this documentary evidence of age and identity”

In this, the ALJ erred. The impact of the production of identification and the possible defense under Business and Professions Code §25660, is different than, and not connected to, any defenses arising under Rule 141. Additionally, the ALJ’s Finding that “prompted by the decoy’s general appearance and behavior,” Rule 141 has no further applicability, assumes that the appearance of the decoy was the reason the clerk asked to see the decoy’s identification. There could have been other considerations, such as the premises’ policy of asking for identification for customers appearing 30 years or younger [RT 71, 95]. These considerations negate the ALJ’s apparent assumption.

Section 25660 provides a defense to the sale of an alcoholic beverage to an underage person if the clerk requests and views what is called “bona fide” identification issued according to the provisions of the statute. It would appear that the rationale of the statute is that a seller is protected from an illegal sale if the sale was made upon reasonable reliance on such bona fide identification, even if the identification is later shown to be fraudulent. In such instances, it is clearly up to the seller to satisfy the specific language of the statute, in order to be entitled to the

defense -- hence the burden of proof, initially and finally, is placed upon the seller.

Rule 141 is of a different nature. The rule prescribes specific conduct by law enforcement personnel. Failure to satisfy the mandates of the Rule by law enforcement personnel creates a defense. The court in Acapulco v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 2d 126], outlined the history of the use of decoys and, quoting Business and Professions Code §25658, subdivision (e), added that: "Guidelines with respect to the use of persons under the age of 21 years as decoys shall be adopted and published [by the Department]." The court then observed the Department did promulgate guidelines in the form of Rule 141.

The Rule is unequivocal in its language:

(a) A law enforcement agency may use [an underage person] ... in a fashion that promotes fairness ... (b) The following minimum standards shall apply [one of which is the appearance as will be discussed hereinafter]."

The rule is clear. Law enforcement shall adhere to certain minimum standards in their decoy operations: (1) the decoy SHALL be less than 20 years; (2) the decoy SHALL display the appearance of a person under 21 years under the circumstances at the time of the sale; (3) the decoy SHALL carry correct identification, or no identification; (4) the decoy SHALL answer truthfully concerning age; and (5) the police officer SHALL have the decoy make a face to face identification of the seller. We perceive that the words "shall" serves as both a burden and an obligation on law enforcement to act within the constraints of the Rule. Thus, the Department must show conformity to these minimum standards by law enforcement, that is, a

prima facia showing that the demands of the Rule have been adhered to. If law enforcement fails to adhere to the rule, then such failure becomes a defense to the accusation. Thus the burden is on the Department to show conformity to its own rule. The burden by the seller is to show, following a prima facia showing by the Department, that law enforcement did not follow the requirements of the Rule.

II

Appellants contend there is no substantial evidence supporting the finding that the minor displayed the appearance generally expected of a person under the age of 21 years, arguing that the appearance and demeanor of the minor was not that as depicted in the Department's licensees' training program's criteria as to the appearance and mannerisms to be expected of a minor.

We have considered the issue of identification above. We emphasize that the ALJ erred in concluding that the request for identification essentially eliminated the need to consider the issue of appearance. It appears from a reading of Finding VI-A, that the ALJ gave insufficient consideration to the mandate on law enforcement that Rule 141 demands. The ALJ's attempt to consider the matter in Finding VI-B lends little to the fundamental error. Rule 141 stands on its own terms. It provides a complete defense if not adhered to by law enforcement, and its demands on law enforcement will not be thwarted by simplistic arguments to the contrary.

A. Appearance.

The court in Acapulco v. Alcoholic Beverage Control Appeals Board, *supra*, a factually dissimilar matter concerning the same rule, sets forth a fundamental view that is applicable to this case. The court said: "... when a rule requires certain affirmative acts by law enforcement, law enforcement must comply" The force of such ruling applies equally to the decoy. The court stated that the Appeals Board's decision under review looked to a "'common-sense interpretation' of Rule 141 and [the Appeals Board] asks us [the Court of Appeal] to reject the plain language of the rule." The appeals court held such a view by the Appeals Board was not in conformity with a strict interpretation of the rule. "Strict interpretation" of Rule 141, now, is the law, as mandated by the court of appeal.

While the issue in the present appeal is less subject to precision than the issue in Acapulco, *supra*, as the present issue is highly subjective, our attempt at fairness as called for in the rule, will be to follow the ruling and the intent of the court of appeals' directive.

Rule 141 states, in pertinent part:

"(b)(2) The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense."

The overall consideration in the decision of the Department, and its factual underpinnings, is the term "fairness, as found in the Rule." The term "fairness" is defined as:

"Characterized by honesty and justice, free from fraud, injustice, prejudice, or favoritism ...syn ... implies a disposition in a person or group to achieve a

fitting and right balance of claims or considerations that is free from undue favoritism even to oneself, or implies a quality or result in an act befitting such a disposition ... 'just' stresses more than fair, a disposition to conform with or conformity with the standard of what is right, true, or lawful, despite strong, esp. personal, influence tending to subvert that conformity" (Webster's Third New International Dictionary, 1986, p. 815.)

The rule addresses the requirement that the decoy shall display at the time of the sale, an appearance generally to be expected of a person under 21 years -- the Department must properly find that the decoy displayed such a required appearance at the time of the sale. The record in the present appeal, however, shows:

(1). The decoy for some unexplained reason was accompanied by an 18-year old female into the premises and the female stood beside the decoy during the sale [RT 22-23]. A video [Exhibit F], shows the actual transaction, and shows the other female with the decoy. We find little help from a review of the video.²

(2). The decoy was five foot three or four inches in height; 120 to 126 pounds in weight; dressed in jeans, brown shoes, suede jacket, and a white shirt or sweater; wore a necklace and earrings; had bangs in front of her face, and her hair was pulled up or to the side, on each side, displaying her ears -- she appeared at the hearing with her hair worn as it was at the time of the sale [RT 20-21, 31, 37-40, 42]. The decoy re-applied makeup about 3 or 4 o'clock in the afternoon -- foundation, eye shadow, blush, lipstick, and

²We do not need to consider the use of this "unknown" female as the disposition of the case renders such consideration non-essential. However, such an apparent loose practice may cause confusion at the time of the sale, which may be contrary to the Rule's demands for "fairness."

mascara [RT 21, 28, 65].³ The sale occurred a little after 9 p.m. (Exhibit F, a video, shows 9:45 p.m.) [RT 65, and Exhibit F].

(3). The ALJ made a credibility determination that the decoy's and the reserve deputy's testimony was accepted. The seller's, and other appellant's personnel's testimony, gave opinions as to the decoy's age, but such testimony was rejected by the ALJ. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) Notwithstanding, this credibility determination does not resolve the problem as to the decoy's appearance at the time of the sale.

(4). It is noted that the ALJ did not make any finding as to the appearance of the decoy as she appeared at the administrative hearing. The decoy had testified that she looked the same at the time of the sale as she did at the time of the hearing. In the main, the testimony of similar appearances, both at the time of the sale and at the time of the administrative hearing, was to her hair style [RT 20, 22, 31, 36-38, 42]. The record does not support the nebulous and ambiguous finding by the ALJ referencing the above stated finding based upon the testimony of Schreiber and Huber that, at the time of

³However, the deputy stated the instructions were that the decoy was not to wear makeup, and that the decoy concerned was not wearing makeup on the night in question [RT 54, 57, 60].

the sale, the decoy displayed the appearance of one under the age of 21 years [Finding VI-B, last part of the 3rd paragraph, on page 4 of the ALJ's decision].

(5). The testimony of Jerry Huber, a part-time reserve deputy since 1995, shows that this was his third decoy operation, the second with the present decoy [RT 44, 51]. The deputy stated that, in his opinion, if makeup is worn, it must not cause the decoy to look over 21 years. The deputy had a checklist which stated that no makeup was to be used by decoys [RT 53-54]. The deputy testified that the decoy was not wearing makeup that night, because he viewed her as he talked with her before going out on the assignment [RT 54, 57, 60-61]. The decoy had no acne, pimples, or a bad complexion; did not act nervous, immature, childish, confused, or insecure; she did not sweat, but was confident in manner, calm, just like a normal customer [RT 55-56, 59].

(6). The testimony shows that the decoy violated one of the rules of the police decoy program as well as the Department's Decoy Program Guidelines, that is, in the use of makeup. But such flirtation with unfairness, in this case, does not clearly violate the Rule.

The ALJ's only finding as to the decoy's appearance is:

"It is found that, based on Ms. Schreiber's [the decoy] and Mr. Huber's [the deputy] description of her appearance at the time Mr. Bains [the clerk] sold her the beer, her appearance was of a person under 21 years of age. ... As noted above, Ms. Schreiber's appearance, at the time Mr. Bains sold her the beer, was of a person under 21 years of age."

[Finding VI-B]

There is no substantial evidence as to the decoy's appearance at the time of the sale, or even at the time of the administrative hearing, only as to her makeup, clothes worn, and hair style. The ALJ's finding is meaningless and is not supported by substantial evidence -- the ALJ should have made a definitive finding that the decoy looked under 21 at the time of the sale, based on his observations at the time of the hearing and the other evidence of her appearance at the time of the transaction. Absent this, adequate support for the ALJ's equivocal finding is lacking.

B. Decoy Guidelines.

The Department's Decoy Program Guidelines, 1996 edition, sets forth some criteria for law enforcement: (1) the decoy must be under age 20; (2) male decoys must not be large in stature and females should wear no (or minimal) makeup; and (3) a photo of the decoy should be taken prior to the operation.

Exhibit 3 is a photocopy of a photo of the decoy near the time of the purchase. The photo or the photocopy, was not placed into evidence.⁴

⁴The Appeals Board has from time to time admonished the Department to provide appellate review with a photo of the decoy made at the approximate time of the sale, as the Department's Guidelines demand. Also, the apparent current use of copies of photos is of little benefit. In the present appeal, the deputy testified that the decoy was not wearing makeup [RT 54, 57, 60-81], but the decoy stated she was wearing makeup [RT 21, 28, 65]. What makes this issue troublesome is the fact the Department had a photo of the decoy at the hearing which was marked as Exhibit 3 [RT 107]. The photo was shown to the decoy who attested to its accuracy [RT 38-39]. Yet, another document -- a photocopy of the photo, was thereafter marked as Exhibit 3. Inexplicability, neither the photo or the copy was placed in evidence.

The ALJ referenced a document used as a handout to licenses taking the Department's LEAD Program⁵ (Finding VI-B, last half of the first paragraph and the first part of the following paragraph):

Appellants argue "... that [the decoy] did not behave as a typical minor would behave when attempting to purchase an alcoholic beverage and did not have the appearance of a typical minor. Respondents [appellants] have focused on factors such as a lack of acne or pimples on [the decoy's] face, that she did not giggle, act in a childish manner, or otherwise display factors listed in the above-described handout [the attachment following this summary] used by the Department as part of its training program to educate licensees about avoiding sales to minors.

"It is noted that the handout merely suggests some factors that a licensee may consider in making a determination whether a minor is presenting the appearance of a person under 21 years of age; the lead-in question to a discussion of the factors is, 'What are some of the clues that a person is underage?' (Emphasis added.) [The underline and emphasis note is the ALJ's]. There is no evidence how the list offered by Respondent [appellant] was used in that training program; it does not appear, however, that the list is intended to be all-encompassing. Secondly, it is a licensee's responsibility, with or without training, to ensure that a licensee does not sell alcoholic beverages to a minor"

The ALJ's finding, in the last sentence shown, while true as a statement of principle, begs the question where the Department has created a document that appears to "divert" the mind of licensees and their employees, away from the more numerous real-life characteristics of non-neophyte underage purchasers. The handout is a disservice to good faith knowledge-seeking licensees. One of the comments in the Acapulco case, supra, is instructive in this matter;

"Forty-eight percent of all violations [sales to minors] over the past three years have been based on decoy sales. The Department's increasing reliance

⁵A copy of the handout entitled "Identifying Minors," is set forth in the appendix.

on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public and the decoys themselves. If the rules are inadequate, the Department has the right and the ability to seek changes. It does not have the right to ignore a duly adopted rule.”

ORDER-

The decision of the Department is reversed.⁶

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

JOHN TSU, MEMBER, did not participate in the hearing or decision in this matter.

⁶This 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.