

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

KOUROSE SHENASSA	)	AB-6973
dba Venice Ranch Market)	
425 Rose Avenue	)	File: 20-300264
Venice, CA 90291,	)	Reg: 97039712
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	June 3, 1999
	)	Los Angeles, CA
)	

Kourose Shenassa, doing business as Venice Ranch Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his off-sale beer and wine license for his clerk, Marco Antonio Gonzalez, having sold an alcoholic beverage, beer, to Theresa Miller, a minor decoy under the supervision of the Los Angeles Police Department, being contrary to the universal and generic public welfare and morals provisions of the California Constitution,

¹The decision of the Department, dated October 30, 1997, is set forth in the appendix.

article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Kourose Shenassa, appearing through his counsel, Ralph Barat Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

The Department's decision in this case was rendered prior to the decision of the Court of Appeal in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], in which the court held that the requirements of Rule 141 must be complied with strictly. It there reversed a decision of the Department which had accepted, as substantial compliance with the rule, in lieu of a face to face identification of the seller by the decoy, the identification of the seller by a police officer who was inside the premises and witnessed the transaction.

The present case falls squarely within the Acapulco holding. The decision itself recites that "it was not established how Picardi [the officer issuing the citation] knew for certain that Gonzalez [the clerk] was the one who sold the beer to Miller [the decoy] but Miller was standing next to Picardi when Picardi issued the citation to Gomez." Thus, there is no finding that the decoy made the requisite identification.² Consequently, it would seem that the Board has no alternative but

² Prior to Acapulco, the Appeals Board had affirmed several decisions where the officer issuing the citation witnessed the transaction while inside the premises.

to reverse the decision of the Department.

The Department, however, argues that the case should be remanded to give the Department a chance to supplement the record and permit the administrative law judge the opportunity to reconsider his decision. The Department's position is that its decision was rendered prior to the court ruling in Acapulco Restaurants, Inc., and employed a "reasonable and rational" way of interpreting Rule 141(b)(5):

"Remanding the case to the ALJ seems only appropriate especially in light of the fact that the licensee is now attempting to hold the ALJ to a standard of review which was not even announced until one year after he heard the evidence and submitted his Proposed Decision to the Department."

The problem with the Department's current request is that the record will not fairly support any findings which would satisfy the Acapulco rule.

The Department points to the testimony of officer Kelly Clark [at RT 10-11] that the decoy "pointed to the guy at the register and said that's who sold her to officer Picardi."

Despite such testimony, the ALJ found (Finding III-C) that:

"It was not established how Picardi knew for certain that Gonzalez [the clerk] was the one who sold the beer to Miller [the decoy], but Miller was standing next to Picardi when Picardi issued the citation to Gomez."

Our assessment is that, after hearing Clark's testimony on cross-examination, the ALJ must have had doubts about the strength of that testimony.

In some instances, the officer was close enough to the clerk and the decoy as to be able to overhear, as well as observe, the transaction. In this case, the officer who witnessed the transaction was not the officer who issued the citation. Whether, but for Acapulco, the Appeals Board would have found substantial compliance with Rule 141, is forever left to speculation.

Officer Clark, after testifying she had included everything important in her written report, and left nothing out, was forced to admit that the report did not include the part about the decoy identifying the seller. Clark explained that it was not until some later date that officers had been instructed to include the decoy's identification in the report. A reading of her testimony on this subject leads us to conclude the ALJ had good reason to base Rule 141 compliance on some different theory.

The ALJ chose to follow the rationale that the Department had followed in other cases. He explained (in Determination of Issues IV):

"In a case such as this, where Officer Clark observed the transaction from a position so close as to hear the conversation between the clerk 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 Officer Picardi confronted Gonzalez, he identified himself and advised Gonzalez of the alleged violation, all in the presence of the both [sic] the minor and Officer Clark. It is a maxim of jurisprudence that the law neither does nor requires idle acts. (California Civil Code §3532.) Nothing more is required under the Rule."

We see no valid purpose in a remand. Acapulco has mandated strict compliance. The ALJ's findings reflect an assessment of substantial compliance, which the Acapulco court found unacceptable. A remand, in our opinion, would simply invite the Department and the ALJ to find strict compliance with the rule upon evidence not thought sufficient for such a determination when the case was originally heard. That is equally unacceptable.

ORDER

The decision of the Department is reversed.³

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

³ 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 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.