

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

AB-7644

TRADER JOES COMPANY dba Trader Joe's
327-333 South Mountain Avenue, Upland, CA 91786,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 21-287241 Reg: 00048040

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: March 1, 2001
Los Angeles, CA

ISSUED JULY 27, 2001

Trader Joes Company, doing business as Trader Joe's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for appellant's clerk selling an alcoholic beverage to a person under the age of 21, 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 Trader Joes Company, appearing through its counsel, Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated May 11, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 2, 1993.

Thereafter, the Department instituted an accusation against appellant charging that, on September 30, 1999, appellant's employee, Michael Anziano, sold beer, an alcoholic beverage, to 19-year-old Ryan Holmes. At the time of the sale, Holmes was acting as a minor decoy for the Upland Police Department.

An administrative hearing was held on March 30, 2000, at which time documentary evidence was received and testimony was presented by Upland police officer Gregory Huff; by the decoy, Holmes ("the decoy"); and by the clerk, Anziano ("the clerk").

Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale had occurred as charged in the accusation and that no defense had been established pursuant to Business and Professions Code §25660 or Rule 141 (4 Cal. Code Regs. §141.)

Appellant thereafter filed a timely appeal in which it raises the following issues: (1) the Department applied an incorrect standard under Rule 141(b)(2), and (2) Rule 141(b)(3) and the general fairness requirement of Rule 141(a) were violated.

DISCUSSION

I

Appellant contends that the wrong standard was used in evaluating the appearance of the decoy because the decision focuses on the appearance of the decoy at the hearing rather than his appearance at the time of the sale.

The ALJ found as follows with regard to the decoy's appearance (Finding III.A.):

"Ryan Holmes was, at the time of the sale, wearing very baggie [sic] blue jeans, a black t-shirt with a logo saying "ambiguous industries," and black tennis shoes. The jeans were worn with a belt, but rode extremely low on Holmes' hips. Holmes wore his brown hair cut quite short, in a military-type cut. He wore a wristwatch, a ring and a necklace, but the necklace could not be seen as it was hidden by his t-shirt. Holmes stood about 5 feet, 8 inches tall and weighed about 150 pounds. He appeared at the hearing dressed as he was dressed on September 30, 1999. His appearance at the hearing, that is, his physical appearance, his poise, demeanor, maturity and mannerisms, was that generally expected of a person his age, if not younger. He gave the overall appearance of a typical, modern-day teenager. He appeared clean shaven at the afternoon hearing, having shaved most recently the day before about 8:00 p.m. The appearance of Ryan Holmes at the hearing was substantially the same as his appearance before [appellant's] clerk on September 30, 1999."

Appellant complains that the decision does not explicitly state that the decoy displayed the appearance which could generally be expected of a person under 21 at the time of the sale, as required by the rule. Appellant is wrong. The ALJ stated: "His appearance at the hearing . . . was that generally expected of a modern-day teenager. . . . The appearance of Ryan Holmes at the hearing was substantially the same as his appearance before [appellant's] clerk on September 30, 1999." In the first sentence, the ALJ establishes that the decoy displayed the appearance that could generally be expected of a person under the age of 20 ("a modern-day teenager"). In the second, he finds that the decoy also displayed this appearance at the time of the sale. The decision states what the rule requires.

Appellant contends the evidence does not support the finding that the decoy's appearance was the same at the hearing and at the time of the sale. This contention is based on the statement in Determination of Issues I.A. that the decoy displayed "nervous characteristics" at the hearing, while the testimony showed that he appeared to the clerk to be "calm, collected and self-assured at the time of the purchase."

The ALJ found that the decoy's appearance was substantially the same at the hearing as at the time of the sale. That does not mean that every aspect of his demeanor must have been the same; indeed, that would be impossible for the ALJ to know, since he was not actually present at the time of the sale. The ALJ's comment about the decoy's likely display of nervousness at the time of the sale, even though unrealized by the decoy, is no more than a comment on the weight the ALJ accorded the testimony of the decoy and the clerk in this regard.

Appellant contends that, "Because the Department relied on the decoy's demeanor and behavior at the hearing, rather than his actual conduct at the time of the sale, the Department's Decision should be reversed." (App.Br. at 5.) Of necessity, the ALJ must rely on the decoy's demeanor and behavior at the hearing in assessing the decoy's apparent age at the time of the sale, since the ALJ was not present at the time of the sale. In a number of cases recently, the Board recognized the difficulty the ALJ's face in making these findings and delineated what it felt would show that the finding was appropriately made:

"We are well aware that the rule requires the ALJ to undertake the difficult task of assessing that appearance many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date. A specific finding by the ALJ to the effect that the minor's appearance was substantially the same at both times shows that the ALJ was aware of, and took into consideration, the rule's requirement that the minor's apparent age must be judged as of the time, and under the actual circumstances, of the alleged sale."

(See, e.g., The Southland Corporation (3/21/00) AB-7315; Yakow (1/4/00) AB-7268.)

Any difference in the decoy's "nervous characteristics" at the hearing and during the sale was not enough to establish that there was a "discernable change in the appearance or conduct of the minor decoy." Certainly, there is nothing to indicate, even if he was nervous at the hearing and not during the sale, that this caused him to appear substantially younger at the hearing than he did at the time of the sale. The ALJ made the specific finding that this Board has said is a sufficient indication that the ALJ was aware of, and took into consideration, the requirement that he judge the minor's apparent age as of the time of the sale.

II

Appellant contends the decoy violated Rule 141(b)(3) when he offered his California driver's license to the clerk without being asked for it. This action also violated the general requirement of Rule 141(a) that the decoy operation be conducted in a fashion that promotes fairness, according to appellant.

When the decoy put the six-pack of pale ale on the counter, the clerk said, "You got ID, right?" The decoy responded, "Yeah," and pulled out his California driver's license, which showed the decoy's birthdate and, in bold white letters on a red background, "AGE 21 in 2001." The clerk took the driver's license, looked at it, gave it back to the decoy, and rang up the sale.

Appellant argues that the clerk did not request to see the decoy's identification; the question asked required only a "yes" or a "no." When the decoy also pulled out his identification without hesitation, appellant contends, the clerk assumed that the license would show the decoy was over 21, since the clerk believed that a person attempting to purchase alcoholic beverages would not show identification unless it showed the

purchaser to be 21. Then, appellant asserts, the clerk was only concerned with whether the picture matched the decoy, that is, whether the license was actually the decoy's. Whether intentional or not, appellant argues, the decoy's unsolicited offering of his identification unfairly misled the clerk. The unfairness makes this violative of Rule 141(a), and the offer of the identification when there was no request to see it violated Rule 141(b)(3).²

Appellant points out that the Department acknowledges that, technically, the clerk did not request the decoy's identification, but only asked for a "yes" or "no" in reply. What appellant leaves out is the statement following that "acknowledgment": "While this question, technically calls for either a 'yes' or 'no' answer, *it also would commonly be taken as a request to produce identification. . . .* [The decoy] thought he had been asked for it and show it is what he did." (Emphasis added.)

Appellant argues that Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], requires strict adherence to the requirements of Rule 141, which makes the decoy's offer of his identification without being asked violative of Rule 141(b)(3). To the extent that the question was ambiguous, appellant argues, the ambiguity must be resolved in favor of a literal interpretation of the rule. This is true, appellant contends, even if there was no intent to mislead.

Appellant cites the appeal of Thrifty Payless, Inc. (12/30/98) AB-7050, in support of its position. In Thrifty Payless the licensee alleged a violation of 141(b)(4), which

² Rule 141 (b)(3) provides that " a decoy who carries identification shall present it upon request to any seller of alcoholic beverages; . . ."

requires that the decoy "answer truthfully any questions about his or her age." The decoy in that case, when asked by the clerk if she were 21, did not answer "no," but asked the clerk if she would like to see her driver's license. The clerk failed to examine the proffered license carefully and sold an alcoholic beverage to the decoy. The Department's decision concluded that the offer and production of the decoy's driver's license was a "truthful answer" within the meaning of Rule 141(b)(4). The Appeals Board reversed, finding the decoy's response "was borderline misleading," and "invited confusion, and led to unfairness," causing it to "[a]ll short" of the requirements of Rule 141(b)(4).

Thrifty Payless is readily distinguishable from the present appeal. In the first place, it involved subdivision (b)(4) of Rule 141, not (b)(3), as here. Subdivision (b)(4) requires a truthful answer to any question about age. Secondly, the clerk there asked a simple, unambiguous question, which the decoy did not answer, responding instead with a question of her own. The issue presented in that appeal was whether the decoy's response complied with the requirements of subdivision (b)(4). In the present appeal, the clerk asked an ambiguous question, one which is commonly understood as a request for production of identification, and the decoy both answered the question and produced the license. The question in the present appeal is whether the clerk's question was a request to produce identification, and we agree with the ALJ that it was.

The question, "You got ID, right?" is, as noted by the ALJ, commonly understood to be a request to produce the identification. Therefore, the clerk made a request for identification, with which the decoy complied as the rule required.

Appellant contends it was unfair for the decoy to offer his identification without hesitation when asked if he had identification, because the lack of hesitation indicated to the clerk that the identification would show that its owner was 21, and his only concern then was whether the identification actually belonged to the decoy. The presentation of the decoy's driver's license might have been unfair if the decoy had acted in a misleading manner. However, as discussed above, the decoy's response to the clerk's question was appropriate and not misleading; the clerk's erroneous assumption that he did not need to be concerned about the birthdate on the license does not make the decoy operation unfair.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This 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.