ISSUED OCTOBER 13, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

LUCKY STORES, INC., DELAWARE dba Lucky Store #133 1133 Old County Road San Carlos, CA 94070, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-7227 File: 21-261472 Reg: 98043617 Administrative Law Judge at the Dept. Hearing: Robert R. Coffman Date and Place of the Appeals Board Hearing: July 22, 1999 San Francisco, CA

Appellant, Lucky Stores, Inc., Delaware, appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered its off-sale general license suspended for ten days, for appellant's clerk Martin Sandoval, having sold a six-pack of beer to David Buelow, a 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).

Appearances include appellant, Lucky Stores, Inc., Delaware, appearing through its counsel, John A. Hinman and Beth Aboulafia, and Robert M. Murphy, appearing on behalf of the Department of Alcoholic Beverage Control.

DISCUSSION

[1] A copy of the decision of the Department, dated September 24, 1998, is set forth in the appendix.

Appellant contends that there was no compliance with three of the subdivisions of Rule 141, the Department rule governing the conduct of decoy operations. We address each of these contentions seriatim.

Rule 141(b)(2)

Rule 141(b)(2) requires that:

> "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."

After characterizing "most" of appellant's contentions as "frivolous and without merit," the Administrative Law Judge (ALJ) stated (Finding of Fact III, penultimate paragraph):

> "Respondent evidently believes that Rule 141 was violated because the decoy did not give the appearance, by dress and manner, of a high school sophomore. However, Buelow's facial appearance is of a mature individual approximately 19 to 21 years of age. While that may not make him the ideal decoy, he was 19 years old and he did display the appearance that could generally be expected of a person under 21. In addition, Sandoval asked the decoy if he was 21, an indication that he either believed the decoy was under 21 or was borderline."[2]

Appellants assert that these findings are vague, ambiguous and equivocal, while the Department argues that the ALJ's findings that the decoy possessed the facial appearance of a mature individual approximately 19 to 21 years of age, and, though not the ideal decoy, an appearance that could generally be expected of a person under 21, was a determination that the decoy "did, in the words of Rule 141(b)(2), '... display the appearance which could generally be expected of a person under 21 years of age ....'"

It seems to us somewhat inconsistent to say that a decoy can have the facial appearance of a mature individual approximately 19 to 21 years of age, and, in the next

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[2] Where there is a store policy that a clerk must ask for identification from anyone who appears to be under 30 years of age, as the evidence shows was the case here, there is little basis for inferring that a clerk who requests identification must necessarily have believed "the decoy was 21 or borderline."

breath, say that individual displayed the appearance which could generally be expected of a person under the age of 21.

In any event, this can hardly be said to be the definitive finding that the Board, in Southland Corporation and R.A.N., Inc. (1998) AB-6967, said should be made by the ALJ.

What does "approximately" 19 to 21 mean. Does it mean the decoy could even appear to be 22? If so, how can that be reconciled with a finding that his appearance could generally be considered that of a person under the age of 21?

The testimony established that the decoy showed few, if any, of the characteristics which might be expected to be displayed by a person under the age of 21 as those characteristics are set forth in the Department's training materials.[3] The Department claims that the clerk's testimony that the decoy mumbled an answer to a question about his age calls into question two of the age indicia in the Department's materials, one involving voice inflections and the other an impression of guardedness or evasiveness, and those should have put the clerk on notice that the decoy might be under 21 years of age.

The ALJ did not refer to these, or to any of the factors which led him to think that despite his mature appearance of a person 19 to 21, the decoy, nonetheless, presented the appearance of a person who could generally be considered to be under the age of 21.

Rule 141(b)(4)

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[3] It is worth noting that appellant's training manual, which this clerk studied when he was first employed, incorporates verbatim the age-indicative characteristics from the Department's training materials. By any fair measure, those characteristics would not have assisted in identifying this particular decoy as a purchasing minor. Indeed, the evidence showed that the decoy was successful in purchasing an alcoholic beverage in five of the nine attempts on the evening in question [RT 42], and had acted as a decoy on more than five prior occasions for three different police departments [RT 18].

Rule 141(b)(4) requires that "a decoy shall answer truthfully any question about his or her age."

Appellant contends the decoy violated this portion of the rule when he failed to answer a question about his age. The Department contends he had no obligation to respond, since what was said was not in the form of a question.

The evidence is uncontested that, after the clerk had examined the decoy's California Driver's License, he spoke the words "1978. You are just 21" (per the decoy) or "1978. You are 21" (per the clerk). In either case, the decoy made no verbal response, and the transaction went forward. Appellant cites the clerk's testimony that his statement was in the form of a question, wishing to confirm what he understood from the license, and elicited only a grin, leading him to think the decoy was agreeing with him [RT 64, 69]. The Department counters with the decoy's testimony that the remark was in the form of a statement, to which he did not need to reply [RT 33]:

Q: When the clerk made that comment, did you consider it a question?

A: I don't think so. I think he just - I felt like he was just giving me a break. Like "1978. You just turned 21." I don't believe it was phrased as a question.

The Administrative Law Judge (ALJ) began his assessment with a mistaken premise that controlled the result. He did this in Finding of Fact II:

> "Sandoval [the clerk] returned the license and stated '1978, you're lucky, you just turned 21' or words to that effect."[4]

There is no evidentiary support for the inclusion of the words "you're lucky" as part of the clerk's remark. The phrases "1978. You are 21," or "1978. You just turned 21," appear numerous times in questions and answers, but the words "you're lucky" never do.

The inclusion of the words "you're lucky" virtually compelled the conclusion that the

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[4] The ALJ again misquoted the clerk in the final paragraph of Finding of Fact III.

clerk's remark was a statement, and not a question.

While it is true that the ALJ articulated reasons why he deemed the clerk's comment a statement rather than a question, it seems undeniable that his reasoning would have been impacted, and, possibly, misled, by a faulty recollection of the testimony on a subtle but critical point.

In any event, the Board finds considerable guidance in a case it recently decided, involving a similar, but not identical, issue. (See The Southland Corporation and Dandona (April 16, 1999) AB-7099.) In that case, the Board rejected the Department's contention that the decoy was not required to respond to the remark "1978. You're 21." made by the clerk after having examined the decoy's driver's license, concluding that, in the unique circumstances of that case, the decoy had a duty to respond. In that case, the decoy's testimony made it clear that she was of

the belief she did not have to respond even if she had been asked a question about her age. The Board stated, at page 7 of its decision:

> "[In] this case, ... we have considerable doubt that the clerk's statements about the decoy's age can be dismissed as irrelevant simply because the decoy insists she heard them as a statement and not as a question.
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> "When a clerk makes a sale to a minor after having seen a driver's license that shows the minor's true age, the sale could either have been intentional, or the result of a mistake. In either case, the sale violates the law, and the minor has no obligation to interrogate the clerk which it was. But here, where, at least for all that appears, the clerk was misreading the driver's license and looking to the decoy for assistance or confirmation, it was the duty of the decoy to respond, and truthfully. But for the erroneous advice given to her when she was trained to be a decoy, [the decoy] might very well have responded that she was not 21, and the sale might not have occurred. Her failure to respond, in the unique circumstances of this case, fell short of that requirement of Rule 141, and resulted in unfairness."

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In the case we are presently reviewing, the decoy was familiar with his obligation

to answer truthfully any question about his age. [See RT 23-24, 31-32.] The Department contends that, since he heard the remark of the clerk as a statement, he was entitled to remain silent. But, as the Board has said, "there can be a very fine line between a remark that is a mere statement and a remark that is really a question." (The Southland Corporation and Dandona, supra, at page 8). Evidence that the line is equally thin in this case is found in the following exchange between appellant's counsel and the decoy [RT 23-24]:

"Q: And he said to you "1978 You just turned 21"; did he not?

A: Yes, he did.

Q: You were silent in response to that question, were you not?

A: I believe so.

Q: You didn't say anything?

A: Well, we are required by –if we are asked a question to answer him, so if he phrased it in the terms of a question I would have answered him."

Our concern is that it is asking too much of a decoy to leave it to him or to her to make that critical judgment whether a remark about age is intended to elicit from them either a confirmation or a correction, or is simply conversation. If fairness of the decoy operation is an important goal, as the Rule proclaims, then, in its implementation, it ought to be the case that where the clerk's remark about age is such that an honest clarification from the decoy may prevent a sale from occurring, the decoy has the obligation to offer such clarification by saying "No, I am not 21," or words to that effect.

Rule 141(b)(5)

Appellant also contends that there was no compliance with the face to face identification requirement of Rule 141(b)(5). Rule 141(b)(5) provides:

> "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 premises and have the minor decoy who purchased alcoholic beverages to make a face to face identification of the alleged seller of the alcoholic beverages."

There is no explicit finding of the precise manner in which the requisite identification occurred. Appellant's counsel did not attempt to elicit any detail from the decoy as to precisely what he did to identify the clerk. The decoy testified that, upon his return to the store after leaving with his purchase, he "just came in to identify him as he just sold it to me and that was my extent" [RT 16]; "I remember going back in and identifying Mr. Sandoval" [RT 25]. Unless his testimony is to be disregarded, and we do not feel it can be, there was sufficient evidence of identification as required by the rule. The decoy returned to the store for the purpose of identifying the seller, and, as he so testified, he did so. Whether the identification took place in front of the cash register, or in the store manager's office, where the decoy and the officers later met with the clerk and the store manager, and where the clerk and the minor were the subject of discussion, it seems impossible to believe a face to face identification did not take place.[5]

However, in light of our determination that there was no compliance with other important aspects of Rule 141, we do not believe we need to resolve this issue.

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[5] The rule does not define face to face. We note that, in most attacks on the identification process, appellants focus on whether the minor and the clerk faced each other. It could be said that a more important focus is on whether the seller is visible to the decoy <u>and</u> the peace officer, so that the officer is directed to an actual person rather than to someone merely described to him.

ORDER

The decision of the Department is reversed..[6]

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

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[6] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district 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.