ISSUED NOVEMBER 6, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

SPIRIT ENTERPRISES, INC. dba Unocal 21930 Lassen Street Chatsworth, CA 91311, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-6780 File: 20-301706 Reg: 96036277 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: August 6, 1997 Los Angeles, CA

Spirit Enterprises, Inc., doing business as Unocal (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for appellant's clerk having sold an alcoholic beverage to a minor acting as a police 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 November 21, 1996, is set forth in the appendix.

Appearances on appeal include appellant Spirit Enterprises, 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 off-sale beer and wine license was issued on November 17, 1995. Thereafter, the Department instituted an accusation against appellant charging that, on February 23, 1996, appellant's clerk, Rogelio F. Roxas, sold an alcoholic beverage (a four-pack of Seagram's Coolers) to Kellie McElroy, a minor, without asking for or looking at Ms. McElroy's identification. On that date, Ms. McElroy was 18 years old and working with the Los Angeles Police Department (LAPD) in an undercover minor decoy operation.

An administrative hearing was held on September 26, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the sale of the Seagram's Coolers to the minor, the manner in which the decoy operation was conducted, and appellant's training for its employees regarding the sale of alcoholic beverages. Officer Reyes, of the LAPD, testified that Mr. Roxas, when issued a citation, commented that he knew he should have asked the minor for her identification, but he just did not.

Subsequent to the hearing, the Department issued its decision which determined that appellant's clerk had sold an alcoholic beverage to a minor as charged and that no defense had been established under Business and Professions Code §25660, since the clerk had not relied on any identification.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) The Department failed to demonstrate that the item purchased was an alcoholic beverage; and (2) the police failed to comply with Rule 141, in that the minor was not returned for a face-to-face identification of the seller.

DISCUSSION

I

Appellant contends the Department failed to demonstrate that the product purchased, a four-pack of Seagram's Wild Berries flavored coolers, was an "alcoholic beverage" within the meaning of Business and Professions Code §23004, as one having an alcoholic content greater than one-half of one percent by volume. Appellant cites the definitions of "alcohol" and "alcoholic beverage" as used in the statutes, and argues the ALJ erred in presuming the coolers were an alcoholic beverage from the fact the label identified them as an "alcohol beverage." Appellant argues there is no evidence that the product is an "alcoholic beverage," citing the fact there was no chemical analysis of the contents, and asserting the nomenclature "alcohol beverage" refers to a product which is not prohibited to minors.

Characterizing appellants' contentions as "patently absurd," the Department contends the product is an alcoholic beverage. It relies on several factors, citing the description on the label of the bottle's contents as a "refreshing alcohol beverage;" the statement of the clerk that he knew he should have checked the

decoy's age; the termination of the clerk's employment for his conduct; and the presence of the Surgeon General's warning concerning the dangers of consuming alcoholic beverages.

As the ALJ noted, courts have consistently upheld the legal presumption that "bottles [labeled as alcoholic beverages] contained what they purport to contain." (Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626, 634 [301 P.2d 474].) "It is a reasonable inference that the liquid poured from a bottle labeled 'Vermouth' was in fact vermouth." (Wright v. Munro (1956) 144 Cal.App.2d 843, 847 [301 P.2d 997].)

The Surgeon General's warning (referred to by the Department as the "Government Warning") warns against the dangers of "alcoholic beverages," and there would seem to be no purpose to be served by the manufacturer's affixing that warning to its product, indeed, against its own interest, if it did not believe it was required to do so.

Further, the statement by the clerk that he knew he should have asked for identification is, by inference, an admission that the product was an alcoholic beverage which could not lawfully be sold to a minor. Again, if the product is not an alcoholic beverage (excluding cigarettes), the age of the purchaser is, ordinarily, irrelevant.

II

Appellant contends the police failed to have the decoy make the face-to-face identification required by Rule 141, subdivision (b)(5), ("rule 141," or "the

rule") which states:

> "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."

Appellant cites the minor's testimony that she left the store after making the purchase, and contends that she lied when she later said, testifying as a rebuttal witness, that she pointed out the clerk to the officer "right from inside the door" [RT 51]. The clerk testified that the minor left the store after making the purchase and did not return [RT 28-29].

The Administrative Law Judge (ALJ) rejected appellant's argument that the rule was intended to ensure that the clerk knew and understood to whom he had sold the alcoholic beverage. Instead, the ALJ expressed the view, with which the Department has concurred, that the rule "is intended to prevent a mistaken description in those cases where the directing police officer did not observe the transaction." (Finding VI.)

The ALJ's understanding of the purpose of the face-to-face identification requirement is, in our opinion, the correct one. By taking such steps, the officer ensures that he charges the person who should be charged, and confirms that he has a witness to support his charge in the event the clerk denies responsibility. We think the use of the terms "alleged seller" and "identification" indicate the clear intent of the rule to safeguard against a mistaken accusation.

The ALJ found that the rule's requirements were satisfied by Officer Reyes' having observed the transaction. Accordingly, there was no doubt who the seller was, and the decoy had, in fact, pointed him out to the officer.

A review of the testimony of both McElroy and Reyes supports the ALJ's conclusion that the rule was satisfied. Reyes testified he met McElroy as she exited the store [RT 12]. McElroy testified she pointed out the clerk "right from the inside of the door" [RT 50]. As she walked out the door, Reyes walked in [RT 53]. "I handed it [the purchase] to him, and we walked back in the doorstep ... . Then I identified who sold it to me to Officer Reyes" [RT 56].

It appears that the interaction between the decoy and Officer Reyes was brief, took place as she was exiting and he was entering, and was essentially completed while each was in the doorway. The questions posed to the witness might have better illuminated what happened, but there is sufficient evidence to support the findings.

Appellant asserts that McElroy lied during her rebuttal testimony. However, it is well established that 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.App.2d. 315 [314 P.d. 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)[2]

[2] In the course of his cross-examination of McElroy, appellant's counsel indicated [at RT 55-56] there was a video camera which recorded everything which transpired in the course of the incident. We can only assume that the videotape

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (substantial evidence supported both the Department's and the license-applicant's position); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 229 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Applying those standards here, the ALJ's finding that the rule was satisfied should be sustained.

CONCLUSION

The decision of the Department is affirmed.[3]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
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was not supportive of appellant's contentions, since no attempt was made to introduce it into evidence.

[3] 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 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.