ISSUED MARCH 23, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

EQUILON ENTERPRISES, LLC dba Equilon Station 3090 Main Street Irvine, CA 92614, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7533 File: 20-344296 Reg: 99046833 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: September 7, 2000 Los Angeles, CA

Equilon Enterprises, LLC, doing business as Equilon Station (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, for appellant's clerk, Tetyana Tsykalo ("Tsykalo"), having sold an alcoholic beverage (a six-pack of 12-ounce bottles of Coors Light beer) to Sarah Hatcher, a minor, then approximately 19 years of age, 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

[1]The decision of the Department, dated November 4, 1999, is set forth in the appendix.

Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Equilon Enterprises, LLC, appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 11, 1999. On July 14, 1999, the Department instituted an accusation against appellant charging an unlawful sale of an alcoholic beverage to a minor on March 29, 1999.

An administrative hearing was held on October 1, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Deborah Sugg ("Sugg"), a police officer employed by the City of Irvine, and Sarah Hatcher ("Hatcher"), the minor. When she made the purchase in question, Hatcher was acting as a decoy for the Irvine Police Department.

Officer Sugg testified that she accompanied Hatcher to the store, and was in the store when Hatcher made her purchase. Hatcher was not asked her age or for identification. After the sale was completed, Hatcher left the store, turned the beer over to another officer, and returned to the store. While standing opposite Tsykalo and facing her, Hatcher identified Tsykalo as the seller. Hatcher also testified, and her testimony about the transaction mirrored that of Sugg. Hatcher also identified photographs (Exhibits 4 and 5) that were taken of her prior to the start of the decoy operation. She was cross-examined extensively on aspects of her personal appearance.

Following the conclusion of the hearing, the Administrative Law Judge issued his proposed decision, which the Department adopted, sustaining the charge of the accusation, and rejecting appellant's contention that the decoy operation violated Rule 141(b)(2).

Appellant has filed a timely appeal, and now raises the following issues: (1) the decoy operation violated Rule 141(b)(2), in that the minor lacked the appearance which could generally be expected of a person under the age of 21; (2) appellant was denied discovery regarding other licensees who sold to the decoy in the course of that same operation; and (3) appellant was denied its right to a transcript of the hearing on its motion to compel discovery. Issues (2) and (3) will be addressed together.

DISCUSSION

I

Appellant contends that the decoy operation violated Rule 141(b)(2) by its use of a decoy that, appellant contends, would best be described as "matronly" and "sophisticated." Appellant argues in its brief:

> "In this case, the appearance of the decoy is so overwhelmingly not what would generally be expected of a person under 21 years of age that it is astonishing that the Irvine Police Department would use her as a decoy. Perhaps out of convenience to the [Irvine Police] Department, Hatcher replaced her boyfriend who just turned 21.
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> "But a decoy whose hair is colored in a professionally styled manner, whose nails are professionally manicured, who wears makeup, and who is between 5 feet, 7 inches and 5 feet, 8 inches and weighs approximately 225 pounds, and is a matter of days shy of 20 years of age should not fit anyone's expectation of what one would generally expect to find in somebody under the age of 21. It is astonishing that the Police Department used Hatcher. It is more astonishing that the department chose to try this

> case after counsel for the Department observed Hatcher. It is overwhelmingly astonishing that the Administrative Law Judge would observe Hatcher and come to the conclusion reached. Fortunately for Appellant, the proposed decision submitted by the Administrative Law Judge demonstrates that the judge was apologizing for the use of the decoy while circumventing the rule."

This is another of the troublesome cases that visit the Board which involve the question of the appearance of a police decoy. Here, however, appellant's contentions to the contrary notwithstanding, the decision satisfies the requirements of the rule, consistent with the directive in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126], that there be strict compliance with the rule.

As the Board is well aware, attorneys representing appellants commonly focus on a decoy's appearance as so mature, sophisticated, or physically developed that it is inconceivable that anyone might think the decoy under the age of 21. An administrative law judge, on the other hand, may view the same decoy and conclude he or she does possess the requisite appearance under the rule.

The Board, which never sees the decoy, except, perhaps, in a photograph, is effectively bound by the administrative law judge's factual findings, unless patently inconsistent with the record, so is limited to confirming whether the decoy's appearance was measured in accordance with the standards set forth in the rule. In many cases, the Board has held it improper for an administrative law judge to limit his or her assessment of a decoy's appearance to physical characteristics, requiring that other aspects of appearance also be assessed, such as poise, maturity, mannerisms, and demeanor.

But, when it is apparent that the administrative law judge has considered sufficient indicia of appearance to fairly test whether the decoy could reasonably be considered to have the appearance of a person under the age of 21, and so concludes, the likelihood of affirmance by the Appeals Board is extremely great.

The Administrative Law Judge (ALJ) in this case devoted a great deal of his proposed decision to the appearance of the decoy. His summary of her appearance, in Finding of Fact paragraph III-A fairly reflects the evidence elicited at the hearing:

> "Sarah Hatcher was, at the time of the sale, wearing a button-front, short-sleeved shirt, black trousers and black loafer-style shoes. (Exhibit 5.) The shirt was not tucked into the trousers as is shown in the photograph, but she did not wear the backpack into the store. Hatcher stood between 5 feet, 7 inches and 5 feet, 8 inches in height and weighed a bit less than 225 pounds. Her hair was pulled back from her face in a pony-tail. The hair was artificially colored, using a weave and channel method, the result of which was to make it appear overall a shade or two lighter than it was naturally. Hatcher wore light makeup, which appeared as if she was wearing none, and light lipstick. Hatcher's finger nails were professionally manicured both at the time of the sale and at the hearing. She testified they were done with acrylics and with French tips. The appearance of the nails was natural as to color, with the tips perhaps more white than natural, and they were shiny. She also wore very small silver stud or ball-type earrings through the hole pierced on the tragus of each ear. Hatcher appeared at the hearing and, despite having cut her hair short, her appearance there, that is, her physical appearance and demeanor, was that of a person her age, 20 years at the time of the hearing, such that a reasonably prudent licensee would request her age or identification before selling her an alcoholic beverage. The appearance of Sarah Hatcher at the hearing was substantially the same as her appearance before respondent's clerk on March 29, 1999. If anything, the pony-tail and longer hair she wore in March 1999 would make her appearance younger than the short hair she wore at the hearing."

Specifically addressing Rule 141, the ALJ, after setting forth the pertinent portions of the rule, explained his determination that there was no violation of the rule:

> "Respondent's contention that the accusation should be dismissed because the decoy failed to provide the appearance required by Rule 141(b)(2) is rejected for the reasons set out in Findings of Fact, paragraph III-A. That decoy Hatcher was tastefully attired and paid attention to her grooming is not necessarily indicative of one who is over the age of 21 years, although having her shirt untucked does not necessarily comport with appellant's assertion as to tasteful attire. Neither does the overall size of Sarah Hatcher say anything particular about her age. Finally, respondent's clerk elicited no conversation from Hatcher, so nothing as to Hatcher's personality which might have aided Tsykalo in determining Hatcher's age, was either exhibited to the clerk or learned by the clerk. Hatcher's appearance at the time of the sale complied with Rule 141(b)(2)."

The Board is not in a position to second-guess the ALJ. He saw and heard her testify. The Board has only the cold record and a photograph, neither of which compels the conclusion that the ALJ erred. Nonetheless, after viewing the photographs, one could form the opinion that they more depict a teenager with a weight problem than a decoy who is "matronly" and "sophisticated."

II

Appellant claims it was prejudiced in its ability to defend against the accusation by the Department's refusal and failure to provide it discovery with respect to the identities of other licensees alleged to have sold, through employees, representatives or agents, alcoholic beverages to the decoy involved in this case, during the 30 days preceding and following the sale in this case. It also claims error in the Department's failure to provide a court reporter for the hearing on their motion to compel discovery. Appellant cites Government Code § 11512, subdivision (d), which provides, in pertinent part, that "the proceedings at the hearing shall be reported by a stenographic reporter." The Department contends that this reference is only to an evidentiary hearing and not to a hearing on a

motion where no evidence is taken.

The Board has issued a number of decisions directly addressing these issues. (See, e.g., The Circle K Corporation (Jan. 2000) AB-7031a; The Southland Corporation and Mouannes (Jan. 2000) AB-7077a; Circle K Stores, Inc. (Jan. 2000) AB-7091a; Prestige Stations, Inc. (Jan. 2000) AB-7248; The Southland Corporation and Pooni (Jan. 2000) AB-7264.)

In these cases, and many others, the Board has reviewed the discovery provisions of the Civil Discovery Act (Code of Civ. Proc., §§2016-2036) and the Administrative Procedure Act (Gov. Code §§11507.5-11507.7). The Board determined that the appellants were limited to the discovery provided in Government Code §11506.6, but that "witnesses," as used in subdivision (a) of that section was not restricted to percipient witnesses. We concluded that:

> "A reasonable interpretation of the term 'witnesses' in §11507.6 would entitle appellant to the names and addresses of the other licensees, if any, who sold to the same decoy as in this case, in the course of the same decoy operation conducted during the same work shift as in this case. This limitation will help keep the number of intervening variables at a minimum and prevent a 'fishing expedition" while ensuring fairness to the parties in preparing their cases."

The Board also held in the cases mentioned above that a court reporter was not required for the hearing on the discovery motion. We continue to adhere to that position.

ORDER

The decision of the Department is affirmed with respect to the issue involving Rule 141(b)(2), and the case is remanded to the Department for such

further proceedings as may be appropriate in light of our discovery ruling herein.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2] 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.