

ISSUED MARCH 2, 2001

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

7-ELEVEN, INC., ANJANA SINGH, and	)	AB-7559
GURINDER S. WALIA)	
dba 7-Eleven # 13606	)	File: 20-337985
768 Midway Ave.	)	Reg: 99047002
Escondido, CA 92027,)	
Appellant s/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Rodolfo Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	November 3, 2000
	)	Los Angeles, CA

7-Eleven, Inc., Anjana Singh and Gurinder S. Walia, doing business as 7-Eleven # 13606 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 15 days for permitting the sale of an alcoholic beverage to a person under the age of 21 years, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from a violation of Business and Professions Code §25658, subdivision (a).

¹The decision of the Department, dated December 16, 2000, is set forth in the appendix.

Appearances on appeal include appellants 7-Eleven, Inc., Anjana Singh, and Gurinder S. Walia, appearing through their counsel, Ralph B. Saltsman, Stephen Warren Solomon, and Joseph R. Budesky, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on February 5, 1998. Thereafter, the Department instituted an accusation against appellants charging that a sale of an alcoholic beverage had been made to a person under the age of 21 years [who at the time of the sale was working with the Escondido Police Department as a decoy (minor)].

An administrative hearing was held on November 9, 1999, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation occurred.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(5) was violated; and (3) Rule 141(a) was violated.

DISCUSSION

I

Appellants contend Rule 141(b)(2)² was violated. Appellants argue that the overriding factor considered by the Administrative Law Judge (ALJ) was the physical appearance of the minor, and the ALJ failed to describe what about the minor's demeanor led him to the conclusion about her apparent age.

The portion of the Rule under review states:

²4 California Code of Regulations § 141(b)(2).

“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 sale.”

Finding C of the decision states:

“The decoy is youthful looking and her appearance at the time of her testimony was substantially the same as her appearance at the time of the sale except that she was wearing fingernail polish, a watch and several rings at the time of the hearing. The decoy was wearing no makeup except mascara on February 27 and that she is fairly sure that she was not wearing any rings either on that night. Although the decoy had participated in several prior decoy operations and although she was working for the Escondido Police Department as of February 27, 1999 as a civilian dispatcher, she displayed the appearance and demeanor of a person which could generally be expected of a person under 21 years of age. The photograph in exhibit 2 which was taken on February 27, 1999 accurately depicts the decoy’s appearance as of that date.”

It appears that appellant would have the ALJ state almost every thought process he used in the evaluation of the minor. This is twisting the intent and meaning of the Rule to the extreme. In the spirit that all reasonable inferences in favor of the decision must be indulged in, the writing and thinking of the ALJ as shown is sufficient. A view of the photo of the minor shows a young person who fits within the description of the ALJ.

We conclude the findings are sufficient to convey to this appellate review Board, the view that the ALJ evaluated the appearance of the minor properly to write this “ultimate fact” that the appearance of the minor came within the demands and boundaries of the Rule.

II

Appellants contend Rule 141(b)(5) was violated. Appellant argues that the findings are defective because the findings failed to state who the directing police

officer was. The Rule 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 to make a face to face identification of the alleged seller of the alcoholic beverages.”

Finding B states:

“The evidence established that a face to face identification of the seller of the beer did in fact take place. After exiting the premises, the decoy met Officer Callister and Sergeant Starr. Callister and the decoy subsequently returned to the premises. Callister then approached the female clerk, identified himself as a police officer, motioned to the female clerk with his right hand and asked the decoy if this was the clerk who had sold an alcoholic beverage to her. The decoy then said yes. This identification took place while the clerk and the decoy were standing about two feet from each other and while they were facing each other. The clerk asked to see the decoy’s driver’s license and the officer complied with her request. A citation was subsequently issued to the clerk.”

This Board on many previous occasions on other matters, has stated that the phrase “directing the decoy” is not to be used in an overly confining manner.

Appellant assumes that there can be only one police officer in charge of a minor and that officer must be the one who conducts the identification process. Such an assumption ignores the dynamics of a sale to a minor, acting as a decoy. In some instances, only one police officer may be involved; in such a case, that officer is necessarily the officer directing the minor. In other operations, multiple officers may be involved. When multiple officers are involved, a decoy must be prepared to follow the direction of any one of them, depending on the circumstances. Thus, a minor may be directed by one officer to attempt a purchase at a premises, and if there is a sale, directed by another officer to identify the seller.

There is nothing in Rule 141(b)(5) that demands a particular officer play a specific role in the operation. Every decoy operation is different; unless the officers are afforded the flexibility to move with the situation before them, the potential for loss of control is enhanced. The requirement that a chain of command for a minor acting as a decoy be created as a condition of compliance with the Rule is not demanded.

The only realistic interpretation of the Rule is that the officer who conducts the identification process is deemed the officer directing the minor. Any more rigid interpretation would go beyond the obvious intent of the rule - to ensure that an innocent clerk not be cited for another's violation - and well beyond the "strict adherence" standard enunciated in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal. App.4th 575, 581 [79 Cal.Rptr.2d 126].

However, appellants raise a different issue which must be addressed as it is a very troublesome issue. Apparently, officer Callister issued a report in March and a supplemental report in April (about a month and a half apart). The second report was prepared because the local office of the Department called the officer and inquired about the face to face identification.

At the administrative hearing, the officer testified as follows:

"... I received a call from ABC, San Marcos [district office]. And they said this particular report [the first report] was being held by – I think the L.A. office [most likely the Department's attorney's office in L.A.] because of a face-to-face, you know, problem. That was the first I heard of the procedure [the requirement of a face to face identification]. Okay. Prior to that, that wasn't the procedure on this as far as what they wanted me to do.

“So I called the L.A. office and spoke to one of their attorneys. And he said, Yeah, we need another little supplemental indicating how you felt face-to-face was satisfied. I said, I can do that. I did, and that’s the supplemental that you see there, and that’s what they accepted” [RT 101].

Appellants ask how the officer can conduct a face to face identification if at the time he was not aware that procedure was part of the decoy sting?

On direct examination, prior to the testimony of the officer as shown above, the minor testified that she made a face to face identification [RT 57]. Then officer Callister testified that he too caused the face to face identification to be accomplished (prior to the testimony of officer Callister, as cited above). This Board has concerns as to a proper answer to the same question, as raised by appellants. However, the Board views the operation as set forth in the record as almost an impossibility that the decoy operation proceeded without some type of identification of the seller, ignoring for this discussion, the actual magic words of “face to face”. The record implies strongly some type of mechanism to identify the seller, and the issuance of a citation. If we discount the use of the “implanted” idea of the words “face to face,” we still have this process of recognition of the seller and the minor.

We therefore, must conclude, based on the record as it is before us, that there is substantial evidence to support the decision.

III

Appellants contend that fairness was absent in the decoy operation, arguing that the decoy was an employee of the police, was sophisticated by extensive

decoy operations, and was only one month shy of her 20th birthday. Appellants also argue that cross examination of the decoy was inhibited.

Appellants characterize the minor decoy as a “professional,” having had experience in 50 to 60 decoy buys, and was a dispatcher for the police department. Appellants’ counsel has raised these issues on many occasions, and still the argument is without substance. Any minor who has had some experience would act calm and as a “professional.” This is unrealistic and not part of the real world of youth trying to get alcoholic beverages. Whether or not the decoy’s employment was with the police department, it does not matter. The decoy either looks under 21 years or not, as he or she appears before the seller at all times of the day or night. However, the decoy should not be chosen as one so close to the line that there is created by police authority, a situation that borders on unfairness. Such is not the case in the present appeal. The photo shows a girl well under the age of 21 years.

Appellants further contend that the decoy testified that she had confidence in her actions and that she could differentiate between the many operations she had been in [RT 72]. Appellants’ counsel then tried on cross examination to determine to what extent she could remember each of the prior operations [RT 73-74]. This young woman boasted too broadly and then could not produce the real thing - her ability to remember each of the prior events.

The ALJ has broad powers to control the process of the hearing. The ALJ finally ruled that it was irrelevant to inquire into the places the decoy had visited

prior to the instant operation [RT 74]. We agree.

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.