

ISSUED APRIL 12, 2001

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

7-ELEVEN, INC., and BHOOPENDRA	)	AB-7597
KAUR VIRK and RAJBIR SINGH VIRK)	
dba 7-Eleven #201 1-2 17 93	)	File: 20-349327
850 West Mission Avenue	)	Reg: 99047441
Escondido, CA 92025,)	
Appellant s/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Rodolfo Echeverria
)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	December 12, 2000
Respondent.	)	Los Angeles, CA
)	

7-Eleven, Inc., Bhoopendra Kaur Virk, and Rajbir Singh Virk, doing business as 7-Eleven #2011-21793 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 15 days, with 5 days thereof stayed for a one-year probationary period, for their clerk, Michael R Norgaard, having sold an alcoholic beverage (a six-pack of Bud Light beer) to Rachel Kisner, a minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22,

¹The decision of the Department, dated February 10, 2000, is set forth in the appendix.

arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant 7-Eleven, Inc., Bhoopendra Kaur Virk, and Rajbir Singh Virk, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 1, 1999. Thereafter, the Department instituted an accusation charging that appellants, through the action of their clerk, had violated Business and Professions Code §25658, subdivision (a), through a sale to Rachel Kisner ("Kisner"), a minor, on August 7, 1999. The accusation charged that Kisner was 19 years of age at the time of the sale.

An administrative hearing was held on January 6, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Kisner, who was acting as a police decoy at the time of the sale, and by Richard Callister, an Escondido police officer who, together with Kisner and another police officer, conducted the decoy operation on August 7.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and rejected appellants' claim that Rule 141 had been violated.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) Rule 141(b)(2) was violated; and (2) appellants' right to discovery and to a transcript of the hearing on their motion to

compel discovery was denied.

DISCUSSION

I

Appellants contend that the decoy failed to present the appearance required by Rule 141(b)(2). Appellants point to her extensive prior experience as a decoy, her status as a police cadet, and the fact that she works as a teaching assistant at Juvenile Hall, factors which, in combination, bar her use as a decoy.

The Administrative Law Judge assessed the appearance of the decoy as follows (Finding of fact II-C):

“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 her hair down on August 7, 1999 and was wearing her hair in a ponytail at the hearing. Although the decoy had participated in several prior decoy operations prior to August 7, 1999 and although she had volunteered as a cadet with the Escondido Police Department, 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 August 7, 1999 accurately depicts the decoy’s appearance as of that date.”

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as she testifies, and making the determination whether the decoy’s appearance met the requirement of Rule 141, that she possessed 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance

required by the rule, and an equally partisan response that she did not.

We do feel compelled to address specifically the contention that the decoy's prior experience disqualifies her from acting as a decoy. To use the words of appellants' counsel [RT 71], "there's only so many ways you can do a decoy operation. They're not exactly earth-shattering events. They are routine" This is particularly true of the decoy's role, which is to bring an alcoholic beverage to a seller, wait to be asked for identification and/or proof of age, pay for the purchase, and leave the store. It would seem that there is little room for variation on this theme, no matter how many times the decoy has done it. It is difficult to understand how, other than, perhaps, to eliminate nervousness, experience changes the appearance that is presented to the seller. Nervousness, or lack thereof, is only one consideration, to be balanced against such other considerations as overall appearance, demeanor, manner of dress, manner of speaking, physical movements, and the like. And, while facial appearance alone is not determinative, it is certainly an important consideration. In this regard, we note that the photograph of the decoy (Exhibit 2) depicts a very youthful appearing person, one who appears, at least to this Board, to be well under 21 years of age.

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that

impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older.

We think it worth noting that we hear many appeals where, despite the supposed existence of such a policy, the evidence reveals that the seller made the sale in the supposed belief that the minor was in his or her early or mid-20's, and for that reason did not ask for identification and proof of age. It is in such cases, and in those where there is a completed sale even though the buyer - not always a decoy - displayed identification which clearly showed that he or she was younger than 21 years of age, that engenders the belief on the part of the members of this Board that many sellers, or their employees, do not take sufficiently seriously their obligations and responsibilities under the Alcoholic Beverage Control Act.

By the same token, we appreciate the fact that, on occasion, police have used decoys whose appearance, because of large physical stature, facial hair, or other feature of appearance, is such that a conscientious seller may be unfairly induced to sell an alcoholic beverage to that person. Within the limits that apply to this Board as a reviewing tribunal, we have attempted to deter such practices, either by outright reversal, or by stressing the importance of compliance with Rule 141. If licensees feel more is necessary, their resort must be to another body.

II

Appellants contend they were denied their right to discovery of the identities of those licensees who made a sale to the decoy in this case during specified periods preceding and following the night of the sale in this case, and that they

were denied a transcript of the hearing on their motion to compel discovery.

The Appeals Board, in Circle K Stores, Inc. (January 4, 2000) AB-7031a, in a lengthy analysis of the issue, ruled that the Department erred in denying appellant's motion in its entirety. Instead, the Board ruled, the Department was obligated to supply the requested information for those licensees who sold to the decoy in question on the same day as the sale in question. In addition, the Board ruled that the Department was not obligated by Government Code §11512, subdivision (d), to provide a transcript of the discovery hearing, since that provision applied only to a hearing where evidence was taken.

Although the administrative law judges have routinely denied similar motions to compel the discovery in issue, as well as claims concerning the hearing transcript, there have been cases seen by the Board where the Department appears to have voluntarily produced such information, at least for the particular date in issue. This, of course, is not one of them.

The Department has several times sought appellate review of the Board's rulings on discovery, thus far without success.

There is no reason why the Board's position should be any different in this case, that is, that appellants were entitled to the identities of those licensees who made sales to the decoy in this case on the same day as the sale which gave rise to this case, but their claim concerning the hearing transcript is without merit.

ORDER

The decision of the Department is affirmed except as to the issue involving

discovery, and the case is remanded to the Department for such further proceedings as may be necessary and appropriate in light of our comments herein.²

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

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.