

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

AB-7654

EQUILON ENTERPRISES, LLC dba Texaco
2110 West Mission Road, Escondido, CA 92029,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-348422 Reg: 00048132

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 17, 2001
Los Angeles, CA

ISSUED OCTOBER 18, 2001

Equilon Enterprises, LLC, doing business as Texaco (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk, Ayazali M. Inander (“the clerk”) having sold an alcoholic beverage (a six-pack of Bud Light beer) to Rachel Kisner (“Kisner”) a minor, 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 on appeal include appellant Equilon Enterprises, LLC, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele Wong.

¹The decision of the Department, dated June 8, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 16, 1999.

Thereafter, the Department instituted an accusation against appellant charging the sale on September 24, 1999, of an alcoholic beverage by its clerk to Kisner. Although not set forth in the accusation, Kisner was acting as a decoy for the Escondido Police Department at the time of the transaction.

An administrative hearing was held on April 26, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Richard Callister, an Escondido police officer, and Kisner, the decoy.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been established, and imposed the suspension from which this timely appeal has been taken.

Appellant raises the following issues: (1) Rule 141(b)(2) was violated in that the decoy did not display the appearance which could generally be expected of a person under the age of 21 years; and (2) there was no compliance with Rule 141(b)(5).

DISCUSSION

I

Appellant contends that the Administrative Law Judge erred in his conclusion that the decoy displayed the appearance which could generally be expected of a person under 21 years of age. Appellant contends that the Administrative Law Judge mistakenly assumed that the indicia of age displayed by the decoy at the hearing were the same as those displayed during the decoy operation.

Appellant concedes that "while difficult, it is not impossible for an Administrative

Law Judge to view a minor decoy during an Administrative Hearing and conclude that that individual displayed the appearance which could generally be expected of a person under the twenty-one years of age at the time of the decoy operation.” (App.Br., page 7.)

Appellant then argues that this is not what occurred. Instead, appellant tells this Board, what occurred was that the Administrative Law Judge viewed the decoy and assumed, mistakenly, that those indicia of age displayed by the decoy at the time of the administrative hearing were the same as those displayed at the time of the decoy operation.

The Administrative Law Judge found, in part, that “the decoy’s overall appearance including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a nineteen year old” His findings regarding her nervousness are part of the overall picture presented by the decoy, and clearly not the predominant factor in his findings.

This Board has often said that an Administrative Law Judge may not rely solely on a decoy’s physical appearance in determining whether there has been compliance with Rule 141(b)(2). It has never said an Administrative Law Judge may not rely on such considerations. Indeed, it would be folly to suggest that such common-place determinants of apparent age should be ignored totally, and reliance placed solely on more elusive standards.

It may well be true that the Administrative Law Judge has more time than does a sales clerk to view a decoy’s appearance. However, it does not follow that an Administrative Law Judge is unable to visualize, from the standpoint of apparent age, how the decoy probably would have appeared on the day in question, as Rule 141(b)(2)

requires.

In this case, we think the Administrative Law Judge fairly articulated those considerations which led him to conclude Rule 141(b)(2) had been satisfied. We are not in a position to question his judgment.

II

Appellant contends that, because the decoy simply reentered the premises and identified the seller, without any action being taken by the peace officer directing the decoy operation, there was no compliance with Rule 141(b)(5). Calling this “substantial compliance,” with the rule, appellant asserts that the decision must be reversed because there was not the “strict compliance” required by Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126].

The decoy testified that, after she made her purchase, she left the store and met with police officers Callister and Hanson. She reentered the store with them, and identified the clerk who sold her the beer by stating “this is the person who sold me the beer.” She could not remember whether she had been asked to do so by either of the two officers.

The decoy also testified that Detective Callister and the other officers always went over what she was supposed to do at each and every decoy operation in which she participated. That being so, it is a fair inference that such instructions would have included what she should do by way of following through with the identification process. It would be more unlikely that she simply assumed that was what she was required to do.

Rule 141(b)(5) does not state when an officer must direct the decoy to make the

identification. It simply requires the officer to “make a reasonable attempt to reenter the premises and have the minor decoy ... make a face to face identification.”

Appellant concedes that the decoy made a face to face identification. Therefore, the only question is whether the officers were required, at that time, to instruct or direct the decoy to make such identification. The rule does not so require, regardless of how strictly it might be construed or applied. It is enough that the officers returned the decoy to the store and she made the requisite identification.

ORDER

The decision of the Department is affirmed.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.