

ISSUED MARCH 26, 2001

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

SPIRIT ENTERPRISES, INC.	)	AB-7604
dba Unocal Station # 5664)	
21930 Lassen Street	)	File: 20-301706
Chatsworth, CA 91311,	)	Reg: 99047344
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Ronald M. Gruen
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	December 12, 2000
	)	Los Angeles, CA

Spirit Enterprises, Inc., doing business as Unocal Station #5664 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, for its clerk, Kanw al Jeet Sandhu, having sold an alcoholic beverage (a six-pack of Budw eiser beer) to Katy Paschal, a minor who at the time of the sale w as acting as a police decoy, the sale 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

¹The decision of the Department, dated February 17, 2000, is set forth in the appendix.

Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Spirit Enterprises, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 17, 1995. On September 23, 1999, the Department instituted an accusation charging that appellant, by action of its employee, violated Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on January 11, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Scott Romero ("Romero"), a Los Angeles police officer, and Katy Paschal ("Paschal"), the minor. Paschal was a police decoy.

Romero testified that he was inside the store when the sale took place, and was in a position where he could observe it in its entirety. He testified that Paschal, who was accompanied by a second decoy, selected a six-pack of Budweiser beer from the cooler and took it to the front counter. The clerk at the counter asked her if she wanted anything else, and when she said she did not, he rang up the sale, gave Paschal her change, and placed the beer in a plastic bag, concluding the transaction. Paschal was not asked for identification. Paschal left the store. She then returned, and at the direction of Sergeant Delvecchio, another Los Angeles police officer, identified Sandhu as the person who sold her the beer.

Paschal's testimony concerning the transaction and her identification of the clerk closely paralleled that of officer Romero. Paschal also testified concerning her height and weight, hair color, her instructions, training and prior experience as a decoy, and her involvement and responsibilities as an Explorer Scout lieutenant.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven, and that appellant had failed to establish any defense under Rule 141.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(5) was violated; and (3) appellant was denied its right to discovery and to a transcript of its hearing on its motion to compel discovery.

DISCUSSION

I

Appellant contends that the police violated Rule 141(b)(2) through their use of a decoy whose appearance was not that which could generally be expected of a person under 21 years of age. Appellant points to the decoy's physical stature, her experience and responsibilities assisting the police in her role of Explorer Scout, the number of times she acted as a decoy, and her lack of nervousness, as factors which, together, appellant argues, compel such finding that she lacked the appearance required by the rule.²

² Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)) states: "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 offense."

The Administrative Law Judge (ALJ) made an express finding that the decoy, although 5' 5" in height, and weighing 150 pounds on the day of the sale, "is youthful looking," and "displayed the appearance and demeanor of a person which could generally be expected of a person under 21 years of age."

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.

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.

We do not ignore the evidence in this case that the decoy was able to purchase alcoholic beverages in other establishments she visited. While this suggests that she presented a more mature experience to some sellers than she did to others, we can only assume the ALJ took this into consideration in his deliberations.

II

Appellant contends that Rule 141(b)(5) was violated. Rule 141(b)(5) requires the officer directing the decoy to have the decoy make a face to face identification

of the seller. Appellant concedes that a face to face identification was made, but contends that it was not made by the officer directing the decoy, but, instead, by the officer who was directing that officer.

Appellant's contention is premised on the assumption that there can be only one police officer in charge of the decoy and that officer must be the one who conducts the identification process.

We think such an argument ignores the dynamics involved once a sale to a decoy has occurred. In some operations, only one peace officer may be involved; in such a case, that peace officer is necessarily the officer directing the decoy. In others, such as the decoy operation in this case, 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 upon the circumstances. Thus, a decoy may be directed by one officer to attempt a purchase at a particular establishment, and, if there is a sale, directed by another officer to identify the seller.

There is nothing in Rule 141(b)(5) that locks a particular peace officer into a particular role in a decoy operation. Every decoy operation is different; unless the peace officers are afforded the flexibility to move with the situation, the potential for loss of control is enhanced. The requirement that a chain of command for a decoy operation be created as a condition of compliance with Rule 141(b)(5) is simply unrealistic.

We believe the only realistic interpretation of Rule 141(b)(5) is that the peace officer who conducts the identification process is deemed the officer directing the decoy. 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 even 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].

III

Finally, appellant contends that it was denied its right to discovery of the identities of those licensees who made a sale to the decoy in this case during the 30-day periods preceding and following the night of the sale in this case, and that it was denied a transcript of the hearing on its motion to compel discovery.

The administrative law judges have, with few exceptions, routinely denied similar motions to compel the discovery in issue, as well as claims concerning the hearing transcript.

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.

The Department has 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 appellant was 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.

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 in light of our ruling on the discovery issue.³

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

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 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.