ISSUED MARCH 26, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

EQUILON ENTERPRISES, LLC dba Texaco Starmart 601 North Second Avenue El Cajon, CA 92021, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7622 File: 20-344230 Reg: 99047237 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: December 12, 2000 Los Angeles, CA

Equilon Enterprises, LLC, doing business as Texaco Starmart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk having sold an alcoholic beverage to 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).

[1]The decision of the Department, dated March 23, 2000, is set forth in the appendix.

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. Thereafter, the Department instituted an accusation against appellant charging that, on May 21, 1999, appellant's clerk, James Kevin Randolph ("Randolph"), sold an alcoholic beverage (beer) to Mike Mejia ("Mejia"), a minor, then 18 years of age and acting as a decoy for the El Cajon Police Department.

An administrative hearing was held on January 27, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by El Cajon police officer Sal Campos and Mejia regarding the circumstances of the sale in question, and by Luis Garcia, an area manager for appellant, who described alcohol sales training programs utilized by appellant throughout California. The prospective testimony of William H. Schultz was excluded because he was not identified in response to the Department's discovery request.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged and that no defenses had been established, and ordered the 15-day suspension.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant's discovery rights were violated by the

Department's refusal to provide the identity of other licensees who sold to the minor decoy; (2) appellant's rights under Business and Professions Code §25666 were violated when the Department's request for a continuance was granted after the minor had failed to appear; (3) the Administrative Law Judge (ALJ) misapplied and misinterpreted Rule 141(b)(5) in determining whether the officer directing the decoy had the decoy make a face to face identification; (4) the ALJ erred in excluding the testimony of a percipient witness; and (5) the ALJ failed properly to consider evidence in mitigation.

DISCUSSION

I

Appellant contends the Department improperly denied it discovery of the identity of other licensees who may have sold to the minor decoy.

The Board has addressed this issue on numerous occasions, and has ruled that the Department must provide such information relating to sales to the decoy on the same day as the sale in question. We do so in this case as well.

II

Appellant contends that the ALJ erred by continuing the hearing when informed that, despite having been subpoenaed, the minor decoy had not appeared. Appellant claims that Business and Professions Code §25666 mandates a reversal.

Section 25666 provides:

> "In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless

> the licensee has waived, in writing, the appearance of the minor. When a minor is absent because of a then-existing physical or mental illness or infirmity, a reasonable continuance shall be granted to allow for the appearance of the minor if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time. Nothing in this section shall prevent the department from taking the testimony of the minor as provided in Section 11511 of the Government Code."

Although the record is silent as to the reason the ALJ granted the Department's request for a continuance of the hearing, appellant informs us in its brief (at page 3) that the ALJ found the minor had failed to respond to a subpoena.

It is well settled that the granting or denial of a motion for a continuance is a matter of discretion. Where, as here, the request is timely - when the non-appearance of an essential witness who has been subpoenaed is first known - that a continuance would be granted is a foregone conclusion.

We find nothing in §25666 that deprives a hearing officer of the discretion he or she possesses with respect to whether a continuance may or should be granted. The purpose of that section is to ensure the presence of a minor at a hearing in which the alleged violation relates in some direct way to the conduct of the minor. We do not see it as intended to preclude the Department from continuing to pursue a violation simply because its witness failed to respond to a subpoena.

This is not to say that, upon a showing that the Department had not subpoenaed the minor to appear at the hearing, a continuance would have been

proper.[2] But, given appellant's concession that the minor had been subpoenaed, we cannot say the ALJ abused his discretion by granting the continuance.

Finally, we note that appellant has not claimed that it was prejudiced by the granting of the continuance, other than being forced to defend itself on the merits. That, we believe, is not the kind of prejudice that warrants reversal.

III

Appellant claims that the ALJ misinterpreted and misapplied Rule 141(b)(5) when he concluded that there was compliance with the rule "so long as one of the officers on the operation has the identification properly done."

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.

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[2] We decline to accept the suggestion in the Department's brief (at pages 6-7) that the ALJ's discretion is broad enough for him or her to disregard §25666 in all circumstances.

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].

The record is very clear that the identification process took place. While officer Campos thought he was the officer who conducted the identification process, and the decoy thought it was conducted by a Department investigator (also a peace officer), no one contends the seller was never identified. Even the witness whose testimony was excluded would have testified, according to appellant's offer of proof, that the identification process took place and that Randolph was identified as the seller.

IV

Appellant contends that the ALJ erred in excluding the proposed testimony of William Schultz, a clerk who was on duty on the night in question, on the ground

his name had not been disclosed to the Department during pre-hearing discovery.

Appellant's argument is difficult to understand. It appears to assert that the ALJ acted in response to a request for discovery first made on the day of the hearing. Yet, in another breath, appellant virtually concedes that the request accompanied the accusation:

> "According to the ALJ the Department's discovery request was buried in the Accusation served on Appellant. While this reasoning is not supported by the facts of this case or statutory and/or case authority defining what a discovery request is, for the sake of argument solely this reasoning will be accepted at face value."[3]

In any event, unless appellant is able to demonstrate prejudice flowing from the exclusion of Schultz's testimony, the contention lacks merit. And, based upon the offer of proof tendered by appellant's counsel [RT 44], any prejudice is inconceivable. If anything, as the ALJ himself observed, the proposed testimony only demonstrated that the identification process worked the way it was supposed to work. The decoy, Schultz supposedly would have testified, was first asked if he, Schultz, was the seller, and said he was not. The decoy then went on to identify Randolph as the seller.[4]

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[3] Appellant's position on this point is somewhat ingenuous. Appellant's hearing counsel is a member of perhaps the single most prominent firm in the State of California involved in alcoholic beverage control matters. We find it impossible to believe that appellant, and its counsel, might have been unaware of the manner in which the Department propounds its discovery requests, generally and in this case in particular.

[4] Garcia, appellant's manager, testified that Schultz remained an employee, while Randolph was fired the next day.

V

Appellant contends the penalty must be reversed because the ALJ failed properly to consider evidence presented in mitigation.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].)

Appellant quarrels with the ALJ's characterization of its alcohol training program as nothing unusual, and, in the case of Randolph, ineffective.

Appellant seems to labor under the misconception that mitigation is automatic once any evidence is presented that a licensee either conducted a training program or its employees attended such a program offered by others, or by the Department. We do not understand this to be the law.

It is clear that the ALJ considered appellant's training program. He simply was not persuaded that what he heard about it - and what he did not hear, from Randolph, who, according to Garcia, would have attended such a program - warranted any departure from the standard penalty for a first-time sale-to-minor violation.

Nor are we.

ORDER

The decision of the Department is affirmed in all respects except as to the issue involving discovery, and the case is remanded to the Department for such

further proceedings as may be necessary or appropriate in light of our comments herein.[5]

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

[5] 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.