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

AB-7631

7-ELEVEN, INC., and SOUHAIL G. and SUZANNE Y. AZZAM
dba 7-Eleven #27495
1334 West Valley Parkway, Suite 401, Escondido, CA 92029,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 21-241765 Reg: 99047407

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria
Appeals Board Hearing: March 1, 2001
Los Angeles, CA

ISSUED APRIL 26, 2001

7-Eleven, Inc., and Souhail G. and Suzanne Y. Azzam, doing business as 7-Eleven #27495 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a person under the age of 21, 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(a).

Appearances on appeal include appellants 7-Eleven, Inc., and Souhail G. and Suzanne Y. Azzam, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Joseph R. Budesky, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated April 13, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 3, 1990. Thereafter, the Department instituted an accusation against appellants charging that, on August 7, 1999, appellants' clerk, Ethan C. Mary ("the clerk") sold a six-pack of Budweiser beer to 19-year-old Rachel Kisner. Kisner was acting as a decoy for the Escondido Police Department at the time of the sale.

An administrative hearing was held on March 3, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Kisner ("the decoy"), Escondido police officer Richard Callister, and appellant Souhail Azzam.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(5) was violated; (2) Rule 141(b)(2) was violated; and (3) appellants' rights to discovery and to a court reporter at the hearing on the motion to compel were violated.

DISCUSSION

I

Appellants contend Rule 141(b)(5) was violated because the record is silent as to whether the citation was issued to the clerk before or after the decoy identified the clerk.

Aside from the fact that it was not raised at the administrative hearing and need not even be considered by the Board, appellants' contention that the record fails to

show that the face-to-face identification preceded the issuance of the citation is in complete disregard of the record and of common sense.

The decoy testified that when she left the store after the purchase, she was met outside by Detective Callister and Sergeant Griffen, the three of them re-entered the store, and she identified the clerk who had sold her the beer. [RT 13-15.] Callister testified that he entered the store after the decoy, observed the sale, and met the decoy outside after she left the store [RT 41-43]. He re-entered the store with the decoy and Sergeant Griffen and saw the decoy identify the clerk [RT 43-46]. He also issued a citation to the clerk for a sale to a minor [RT 46]. Callister also testified that he remained outside for no more than two or three minutes after exiting the store, during which time he got his "cite book" to take into the store with him [RT 54].

In the many appeals that have been heard by the Board since the advent of Rule 141, it is the normal course in decoy operations for the face-to-face identification to occur prior to issuance of a citation.[2] While there is not specific testimony in the present case regarding when the citation was issued relative to the time the clerk was identified, logic, common sense, and usual practice dictate that the identification occurred first, and then the citation was issued. The ALJ so found (Finding III-C), and that finding is based on a reasonable inference from the testimony.

Appellant relies on The Southland Corporation/R.A.N. (1998) AB-6967 for its assertion that the Department has failed to satisfy its burden of presenting a prima facie

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[2] In the early days of Rule 141, this was not necessarily the case. Once the requirements of the rule became better known and understood, the absence of a face-to-face identification became uncommon. More often, now, the issue concerns the mechanics of the identification process.

case of compliance with Rule 141. They contend that, despite straightforward testimony by the officer and the decoy that a face-to-face identification occurred, more is required.

We disagree. Once there is affirmative testimony that the face-to-face identification occurred, the burden shifts to appellants to demonstrate non-compliance, i.e., that the normal procedure of issuing a citation after identification of the clerk, was not followed. We are unwilling to read our decision in The Southland Corporation/R.A.N. as expanding the affirmative defense created by Rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule.

II

Appellants contend the ALJ erred in finding compliance with Rule 141(b)(2) because the decoy's "work experience" as a decoy caused her appearance to not be what would generally be expected of a person under 21 years of age. Appellants argue that, because this decoy worked for four law enforcement agencies and entered from 50 to 100 premises as a decoy before she entered appellants' premises, she had attained a "comfort level" that "is certainly not what would generally be expected of a person under 21 years of age." (App. Br. at 10.)

The ALJ found that the decoy displayed the appearance that could generally be expected of a person under the age of 21, as required by Rule 141(b)(2), and stated that in making this finding, he had taken into consideration her participation in decoy operations prior to August 7, 1999.

In Prestige Stations, Inc., AB-7624, issued on the same date as the present

decision, counsel presented a very similar argument regarding the effect of a decoy's experience working for law enforcement. In that case, the ALJ addressed this argument at some length, and part of his comments are pertinent here:

> "While the trier of fact must consider the entire person, physical and demeanor attributes, in determining the apparent age of a decoy, work or education experience and levels of responsibility attained do not, *ipso facto*, aid in that determination or otherwise produce a given result. A person, all things considered, appears to be a certain age. Achievements and responsibility, while they certainly have a bearing on the apparent age, are just an inherent part of the appearance the decoy projects. They do not, independently, become elements which permit a magic addition of a year or two or three to a person's physical appearance."

Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

III

Appellants claim they were prejudiced in their ability to defend against the accusation by the Department's refusal and failure to provide discovery with respect to the identities of other licensees alleged to have sold, through employees,

representatives or agents, alcoholic beverages to the decoy involved in this case, during the 30 days preceding and following the sale in this case. They also claim error in the Department's failure to provide a court reporter for the hearing on their motion to compel discovery. Appellants cite Government Code §11512, subdivision (d), which provides, in pertinent part, that "the proceedings at the hearing shall be reported by a stenographic reporter." The Department contends that this reference is only to an evidentiary hearing and not to a hearing on a motion where no evidence is taken.

The Board has issued a number of decisions directly addressing these issues. (See, e.g., The Circle K Corporation (Jan. 2000) AB-7031a; The Southland Corporation and Mouannes (Jan.2000) AB-7077a; Circle K Stores, Inc. (Jan. 2000) AB-7091a; Prestige Stations, Inc. (Jan. 2000) AB-7248; The Southland Corporation and Pooni (Jan. 2000) AB-7264.)

In these cases, and many others, the Board has reviewed the discovery provisions of the Civil Discovery Act (Code of Civ. Proc., §§2016-2036) and the Administrative Procedure Act (Gov. Code §§11507.5-11507.7). The Board determined that the appellants were limited to the discovery provided in Government Code §11507.6, but that "witnesses," as used in subdivision (a) of that section, was not restricted to percipient witnesses. We concluded that:

> "A reasonable interpretation of the term 'witnesses' in §11507.6 would entitle appellant to the names and addresses of the other licensees, if any, who sold to the same decoy as in this case, in the course of the same decoy operation conducted during the same work shift as in this case. This limitation will help keep the number of intervening variables at a minimum and prevent a 'fishing expedition' while ensuring fairness to the parties in preparing their cases."

The Board also held in the cases mentioned above that a court reporter was not

required for the hearing on the discovery motion. We continue to adhere to that position.

ORDER

The decision of the Department is affirmed in all respects except the issue of compliance with appellant's discovery request, which is reversed, and the matter is remanded for further proceedings in accordance with this Board's previous decisions with regard to that issue. [3]

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

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[3]This 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.