

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

K.R.C., INC.	)	AB-7000
dba Bullfrog's)	
5046 Newport Ave.	)	File: 48-130818
San Diego, CA 92107,	)	Reg: 97039512
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	October 7, 1998
	)	Los Angeles, CA
	)	Re-Submitted:
	)	January 6, 1999
	)	Re-Hearing:
	)	April 1, 1999

K.R.C., Inc., doing business as Bullfrog's (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its on-sale general public premises license for ten days, for permitting the sale and service of an alcoholic beverage to a person under the age of 21 years, and for allowing that minor person to unlawfully remain in the premises, 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

¹*The decision of the Department, dated December 11, 1997, is set forth in the appendix.*

Code §§25658, subdivision (a), and 25665.

Appearances on appeal include appellant K.R.C., Inc., appearing through its counsel, John B. Barriage, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's present on-sale general public premises license was issued on January 26, 1995.² Thereafter, the Department instituted an accusation against appellant charging that a minor person under the age of 21 years had been sold and served an alcoholic beverage, and also, allowed to remain within the premises, contrary to statute.

An administrative hearing was held on October 29, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the sale and service of the alcoholic beverage, and the stringent controls used by appellant's management and employees to control access to the premises by minors.

Subsequent to the hearing, the Department issued its decision which determined that the minor was in fact sold and served the alcoholic beverage thereby violating the statute prohibiting such sale and service, and also violating the statute prohibiting a minor remaining within a public premises.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was no face to face identification of the seller as required by law, and (2) the penalty of ten days' suspension is an abuse of

² Appellant's vice-president, Mark Gorski, testified that the corporation had been licensed for 12 years, under other management [RT32-33].

discretion.

DISCUSSION

I

Appellant contends that there was no face to face identification of the seller, in compliance with Rule 141(b)(5).³ In a supplemental brief following the decision of the District Court of Appeal in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [179 Cal.Rptr.2d 126], appellant points out that the record on direct examination does not reflect that the decoy made a face to face identification of the bartender.⁴ Appellant cites the record at RT 17:

“Q. Now, after -- at some point after the vice detective you were with made contact with the bartender, did you have a meeting with the bartender?

A. Not personally.”

It does not follow that because the decoy did not have a “meeting” with the bartender, he did not identify him to the police officer.

Appellant’s counsel’s question to the decoy, and the decoy’s response, immediately following the portion of the decoy’s testimony quoted in appellant’s brief and quoted above, set the stage for a redirect examination aimed directly at the identification requirement found in the rule [RT 17-18]:

“Q. Now, after -- at some point after the vice detective you were with made contact with the bartender, did you have meeting with the bartender?

A. Not personally.”

Q. Okay. Did he look at you and talk with the detectives while you were

³*California Code of Regulations, title 4, §141.*

⁴*There is little merit in the suggestion that, if the requisite identification was not established in the course of the minor decoy’s examination, there has been no compliance with the rule.*

present?

A. Yes”

Then, on redirect examination, the following testimony was elicited:

“Q. And were you present when that citation [to the bartender] was issued?

A. Yes, I was.

Q. And was the person that sold you the Budweiser the same person who received the citation?

A. Yes.

Q. And did you identify that person for the officers so a citation could be written?

A. Yes, I did.”

There is nothing in the testimony or evidence that suggests the decoy was so remotely located that his identification of the bartender could be said to be something other than face to face. Thus, the decoy’s direct statement that he identified the bartender is not only entitled to considerable weight, it suffices for the purposes of Rule 141(b)(5). While the Court of Appeal has made it plain that strict compliance with the rule is essential, it did not say that the direct testimony of the person who must make that identification can be ignored, or that something more is required.

II

Appellant contends that the penalty of ten days’ suspension is an abuse of discretion. 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].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage

Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Appellant argues that the Department in its recommendation to the Administrative Law Judge (ALJ) should not have proposed a penalty for the minor's remaining in the premises. We would agree with appellant if the penalty ordered showed a stepped-up penalty for violations of the sale and also the remaining within the premises. However, we do not determine that is the case. The violation was one act upon which the penalty must be levied, and this review will proceed on that premise.

The normal penalty for a sale to a minor is 15 days' suspension. The penalty for allowing a minor to remain in the premises is 10 days' suspension. The recommendation by the Department to the ALJ was for 15 days' suspension, a penalty which the Board has found the Department in most cases levies on first-time sales to minors. Presumably, the ALJ took the many and apparently good faith efforts of appellant to control minor access, into account (see Finding 5). Appellant in its brief itemized 17 items of policy and procedure, all mainly designed to control minor access to the premises (App. Brief, pages 3-4).

On the other hand, all these good intentions and policies failed to stop the sale to the minor, and in fact, such policies, even though conveying the appearance of "tight" security, failed to impact the mind of the bartender sufficiently to cause at least some concern, prior to the sale.

Considering all this, the reduction of 5 days from the "standard" or usual penalty, seems to be within reasonableness.

ORDER

The decision of the Department is affirmed.⁵

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵*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.