

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

DUYEN THI LE and DE PHAM	)	AB-7178
dba D & D Liquors)	
7877 Greenback Lane	)	File: 21-283013
Citrus Heights, CA 95610,	)	Reg: 97041546
Appellants/Licensees,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Jeevan S. Ahuja
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	July 22, 1999
	)	San Francisco, CA
_____)	

Duyen Thi Le and De Pham, doing business as D & D Liquors (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale general license, subject to a stay and actual suspension of 180 days in order to permit sale or transfer of the license, for their clerk having sold an alcoholic beverage to an 18-year-old minor participating in a decoy operation being conducted by the Sacramento Sheriff's Department, 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 Duyen Thi Le and De Pham, appearing through their counsel, Gerald Singer, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

¹The decision of the Department, dated June 25, 1998, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 27, 1993.

Thereafter, on October 22, 1997, the Department instituted an accusation against appellant charging that, on November 22, 1996, appellant's clerk, Pham Trinh, sold a six-pack of Budweiser Light beer to Justin Hinkley, a minor decoy.

A hearing on the charge of the accusation was held on April 15, 1998, following which the order described above was entered. Appellant has filed a timely appeal from the Department's decision, and now contends that there was no compliance with the face to face identification requirements of Rule 141(b)(5) (4 Cal.Code Regs. §141, subd. (b)(5)).

The Department contends there was no violation of the rule in this case.

DISCUSSION

Appellants have confined their appeal to the single issue whether there was compliance with Rule 141(b)(5), citing Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575, 79 Cal.Rptr. 126. In that case, the court stated:

“The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection of the licensees, the public and the decoys themselves. If the rules are inadequate, the Department has the right and the ability to seek changes. It does not have the right to ignore a duly adopted rule.

“We hold that rule 141(b)(5) means what it says and that ‘following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the premises and have the minor decoy who purchased the alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.’ A ‘failure to comply with [rule 141(b)(5)] shall be a complete defense to any action brought pursuant to ...[s]ection 25658.’ (Rule 141(c).)”

The court reversed the decisions of the Appeals Board and the Department for non-compliance with the face to face identification requirement of Rule 141(b)(5) even though the record contained the uncontradicted testimony of a police officer who was

inside the store and observed the entire transaction. The decision was not appealed, and the Appeals Board and the Department have complied with its mandate in a substantial number of cases since the decision was rendered.

Appellant asserts that there is no statement in the decision concerning the “face to face” requirement of the rule, and that there is no evidence in the record to support the finding (in Finding of Fact III, paragraph 4) that “[the decoy] pointed out the clerk who sold him the beer. The clerk was then issued a citation.”

The Department contends there was compliance with the rule. Citing the testimony of Deputy Sheriff Steven Murphy, the Department argues (Dept. Br., page 3) that a prima facie case of compliance had been established, and that the burden shifted to appellants to show the contrary. Significantly, the Department does not dispute, at least directly, appellant’s statement that there is no evidence that the minor identified the seller. Instead, the Department argues, an inference can be drawn that the decoy pointed out the seller.

Deputy Murphy and a fellow officer were seated in their patrol car in the parking lot, about 50 yards from the front door of the store, when the sale took place. Murphy testified [RT 28] that, when the decoy came out of the store,

“He came out holding a brown paper bag and that was our cue to come in, that he had actually purchased alcohol from the business and that was our cue to come in and take him back in to identify the clerk who sold it to him.”

The Department, arguing that this established a prima facie case, states in its brief:

“Licensees, who were represented by counsel at the hearing, cross-examined both decoy Hinkley and Deputy Murphy extensively. Licensees’ counsel had ample opportunity to cross-examine them regarding the face to face identification requirement of Rule 141. If he had asked cross-examination questions about this aspect of the rule, the testimony would have been, with substantial particularity, that decoy Hinkley went back into the premises and identified the clerk, face-to-face, as the one who sold to him. This is the inference to be deduced from the record.”

There are a number of things wrong with the Department's position. First, just because the deputy had been given a cue that he should take certain action, i.e., have the decoy identify the clerk, it does not follow that he took that action. Second, we know of no requirement that a party use its cross-examination to repair weaknesses in their opponent's case. Third, there is evidence in the record that the identification of the seller came not from the decoy, but from the seller's brother. It is for these reasons, we think, the Department's arguments must fail.

Department counsel asked Deputy Murphy [RT 30-31]:

Q: Did you identify the clerk?

A: No, I identified the clerk through the business owner, I guess who was the clerk's brother.

Q: And did the clerk -- did you watch this happen?

A: I don't recall. Like I said, I was filling out paperwork, the property receipt, when this was going on.

Q: But you wrote the report that reflected that this was done.

A: Right."

Later in his testimony [RT 38], Murphy was asked by the Administrative Law Judge (ALJ):

Q: You're not aware of any statements that may have been made by the clerk in this case?

A: I'm not aware of them, no.

Q: And you believe that it was the clerk's brother who identified the clerk?

A: That's correct.

Although Murphy was questioned about certain statements in his report, the report itself is not part of the record, and neither the questions nor Murphy's responses are sufficiently informative to shed any additional light on what may have occurred

during the critical identification process. One could speculate that if there was any identification by the minor, it took place between the minor and one of the other two deputies. That, of course, is conjecture, just as is the Department's belief that, when the deputies got their cue that a sale of alcohol had taken place, they took the precise steps that Rule 141 mandates.

We hardly think an inference can be drawn from Deputy Murphy's testimony, as the Department contends, that the decoy made a face to face identification of the clerk when (a) the decoy gave no such testimony; (b) Deputy Murphy gave no such testimony; (c) it was the owner of the business, the clerk's brother, who identified the clerk, and (d) Murphy does not even have a recollection of having talked to the clerk.

It is our belief that the record presented to the Board demonstrates the absence of any compliance with Rule 141.

ORDER

The decision of the Department is reversed.²

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

² *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.