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

AB-7689

7-ELEVEN, INC., BONNY A. CUMMINGS, and PATRICK C. CUMMINGS
dba 7-Eleven #2237-25585
1170 North Clovis Avenue, Clovis, CA 92612,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
File: 20-214253 Reg: 00048440

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: August 3, 2001
San Francisco, CA

ISSUED SEPTEMBER 27, 2001

7-Eleven, Inc., Bonny A. Cummings, and Patrick C. Cummings, doing business as 7-Eleven #2237-25585 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for appellants' clerk selling an alcoholic beverage to a minor decoy, 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 appellants 7-Eleven, Inc., Bonny A. Cummings, and Patrick C. Cummings, appearing through their counsel, Ralph B. Saltsman and

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

Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging that, on November 6, 1999, appellants' clerk, Linda Dunham ("the clerk") sold a six-pack of Bud Light beer to 18-year-old McKay Marshall. Marshall was working as a decoy for the Clovis Police Department at the time of the sale.

An administrative hearing was held on June 13, 2000, at which time documentary evidence was received, and testimony was presented concerning the transaction by Marshall ("the decoy"), by Clovis police officers Thomas Dailey and David Medina, and by co-licensee Patrick Cummings.

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.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) appellants' right to discovery was violated; (2) Rule 141(b)(2) was violated; and (3) the testimony of the Department's witnesses was inherently unreliable.

DISCUSSION

I

Pursuant to a Discovery Order, the Department provided appellants with the name of one other licensee who sold to this decoy during the same work shift in which the sale at issue here was made. Appellants contend their discovery right was violated because evidence at the hearing indicated there were a total of seven sales that night,

not just two, and the Administrative Law Judge (ALJ) did not grant appellants' request for a continuance to allow the Department to comply with the Discovery Order previously issued by providing the names of the other five licensees.

At the hearing, appellants' counsel obtained the police report used by the decoy and officer Dailey to refresh their recollections of the decoy operation involved here. Attached to that report was a Department form entitled "Decoy Information Sheet," which showed 41 licensed premises visited that night, with seven sales to minors. Appellants' counsel asked for a continuance, saying, "This paints an entirely different picture, this paints a picture of 41 investigations and 7 sales. I believe we've been denied our right to discovery and we have been denied the information that I believe the court has ordered to be turned over" [RT 84-85].

Officer Dailey, asked by the ALJ if he could respond to appellant's counsel, said, "Yeah. I think you're talking about two different issues here. Our group went out and we did two buys out of the six. But there were several other groups and I couldn't tell you what each of the other groups did" [RT 85]. The decoy had previously testified that he had entered six licensed premises during the decoy operation, and that he had been able to purchase alcoholic beverages at two premises, appellants' and one other. [RT 23-24.] He had also referred to the several "decoy-and-officer teams" that participated in decoy operations that night. [RT 32, 48.]

The ALJ rejected appellants' request for a continuance, saying ". . . unless you have something to rebut it [Dailey's] testimony overrules that document. He has explained the document, there are other decoy teams" [RT 85]. Appellants contend the ALJ "should have interrupted the proceedings so as to ascertain the correct numbers

and to assure that the Discovery Order issued by this same Administrative Law Judge had, in fact, been followed."

An appellant has no absolute right to a continuance. Pursuant to Government Code §11524, the ALJ has the right to grant a request for a continuance for good cause. The grant or denial of a continuance is at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

The explanation of the officer, bolstered by the prior testimony of the decoy, provided a logical explanation of the much higher number of sales shown on the ABC form. The testimony of the decoy and the officer was a sufficient basis for the ALJ to conclude that the document did not reflect additional undisclosed sales to this decoy and, therefore, did not constitute good cause for granting a continuance. He did not abuse his discretion in rejecting appellants' motion. With no other basis for their contention, appellants have failed to show that their discovery rights were violated.

II

Appellants contend Rule 141(b)(2) was violated because, in finding that the decoy displayed the appearance generally expected of a person under 21 years of age, the ALJ "appears to have relied on a transparently unintelligible photocopy of a photograph" of the decoy on the night of the decoy operation. The photographs of the decoy taken that night had been disposed of by the Clovis Police Department prior to the administrative hearing, and only black-and-white photocopies of the photographs were available at the hearing. [RT 82-83.]

The ALJ's discussion of the decoy's appearance is found in Finding VI:

> "A. On November 6, 1999, the decoy was approximately 6' tall and weighed 165 pounds; on the date of the hearing, he was 6' tall and weighed 170 pounds. He was wearing a greenish hooded sweat-shirt, khaki pants and black thong sandals; he wore a white tee-shirt under his sweat-shirt. He wore a ring on his middle finger; he did not wear any other jewelry. He had short, blonde hair with short sideburns. He may have had a blonde beard stubble which was unlikely to be visible. Copies of photographs of the decoy, taken shortly prior to the decoy operation, indicated that the decoy looked substantially the same on the day of the decoy operation as he did on the day of the hearing. On both occasions, the decoy displayed the physical appearance which could generally be expected of a person under 21 years of age.
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> "B. Although that was the first occasion he participated in a decoy operation, there is no evidence that the decoy was nervous on the date of the decoy operation. He went to a total of six businesses and the above-captioned store was the last business he visited. It appears that the decoy had an attitude that he was participating in a voluntary assignment, and was following the instructions he had been given to attempt to purchase an alcoholic beverage.
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> "C. This Administrative Law Judge has observed the decoy's appearance, including his physical appearance, his demeanor, maturity, poise and mannerisms at the hearing. It is found that nothing apparent at the hearing indicates the decoy exhibited an age beyond his actual age of eighteen years. He displayed the appearance generally expected of a person under the age of 21 years. No evidence was presented that Mr. Marshall presented a substantially or significantly different appearance to [appellants'] clerk, Ms. Dunham."

The black-and-white copies of photographs, entered into evidence as Exhibit 2, are almost certainly not as clear and detailed as the color photographs were. However, they are clear enough to make out significant detail and are certainly not "transparently unintelligible" as appellants contend.

The only reference made by the ALJ to the photocopies is in paragraph A. of Finding VI: "Copies of photographs of the decoy, taken shortly prior to the decoy operation, indicated that the decoy looked substantially the same on the day of the decoy operation as he did on the day of the hearing." The only thing the ALJ used the photocopies for was to aid him in judging whether the decoy's physical appearance was

substantially the same at the time of the decoy operation as it was at the time of the hearing.

Appellants opine that the ALJ used the copies of the photographs to draw his conclusion that the decoy "may have had a blonde beard stubble which was unlikely to be visible." Appellants are correct that such a conclusion would not be able to be drawn from the copies of the photographs. However, the ALJ did not rely on the photocopies for his conclusion, but on the decoy's testimony [RT 34]:

"Q. [By Mr. Budesky]	And come evening time, do you get stubble – five o'clock shadow?
"A. [By the decoy]	It's probably not visible.
"JUDGE AHUJA:	I'm sorry.
"THE WITNESS:	It's probably not visible.
"Q. BY MR. BUDESKY:	But let me reask the question. Do you get stubble in the evenings?
"A.	Yes."

The ALJ also questioned the decoy about what he meant when he said it wasn't visible. The decoy explained that his beard was very light blond, not very thick, and didn't grow that fast, so what stubble there might be was not really noticeable. [RT 60-61.]

The limited use to which the ALJ put the photocopies of the photographs was reasonable and appropriate. There was no violation of Rule 141(b)(2).

III

Appellants contend that the Department's witnesses testified based on their review of the police report prepared after the decoy operation, which consisted of a pre-printed template generated before the decoy operation, with the blanks on the form filled in by a person who was not present during the decoy operation. They argue that "such patently unreliable evidence should not provide the basis for testimony, and, in turn,

factual findings." Appellants also assert that "this is not the type of information upon which reasonably responsible persons rely."

It is true that the decoy and the officers all reviewed copies of the police report before testifying and that the narrative report consisted of pre-printed text with blanks for names, dates, etc., filled in by hand by Officer Medina, who was not present during the sale to the decoy. However, neither the decoy nor Dailey testified based on the report.

Dailey stated that his review of the report refreshed his recollection "[s]omewhat" [RT 72, 89], but that he had independent recollection of the events at appellants' premises [RT 89, 99-100] and that previous decoy operations he had participated in did not interfere with his recollection of those events [RT 103-104]. The decoy stated that his review of the report helped refresh his memory of the date of the decoy operation, but otherwise simply confirmed what he had already recalled [RT 25]. He also testified that he had only looked at the 12- or 13-page report for about five minutes approximately a month before the hearing and for less than two minutes on the morning of the hearing [RT 58-59]. The minimal time the decoy spent reviewing the police report makes it extremely improbable that his testimony was based on the report.

While the format of the report may not instill the greatest confidence that it accurately captured the unique facts of what occurred at each licensed premises, it does not mean that the information in the report is wrong. There is no indication that the format precludes additions to cover unusual circumstances or amendments to correct errors, as was done in this case.[2]

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[2]The original narrative portion of the report gave the date of the operation as 10/6/99 and the alcoholic beverage purchased as a 12-pack. A "Supplemental Report" attached to the original corrected the date to 11/6/99 and the item purchased to a 6-

The reality of most decoy operations this Board has seen is that they take place very quickly and usually involve a fairly limited number of relevant facts. There is no reason that a pre-printed form with blanks to fill in at the appropriate places could not be used to record the basic pertinent facts, such as the names of the decoy, the officers, the clerks, and the witnesses; whether the decoy carried identification or not; whether the decoy was asked for identification and, if so, whether he or she presented it; and what the decoy purchased. The police report was not made part of the record, so this Board is unable to say that its pre-printed format was inappropriate or unreliable. In any case, such an evaluation is unnecessary, because the witnesses testified to the relevant facts based on their own independent recollections.

ORDER

The decision of the Department is affirmed.[3]

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

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pack of 12-ounce cans, both corrections corresponding to the recollections of the decoy and Dailey. It was not established who prepared the Supplemental Report, which was dated 1/5/00.

[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.