

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

AB-7765

File: 20-344256 Reg: 00048665

EQUILON ENTERPRISES, LLC dba Texaco
660 Douglas Drive, Oceanside, CA 92054,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 1, 2001
Los Angeles, CA

ISSUED DECEMBER 28, 2001

Equilon Enterprises, LLC, doing business as Texaco (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to Brendan Smith, 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 appellant Equilon Enterprises, LLC, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated January 18, 2001, is set forth in the appendix.

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 February 25, 2000, appellant's clerk, Maria Snyder ("the clerk") sold a six-pack of Budweiser beer to 18-year-old Brendan Smith.

An administrative hearing was held on December 7, 2000, at which time documentary evidence was received and testimony was presented by Smith ("the decoy"), by Oceanside police officer Julian Hutzler, and by Diana Thompson, a cashier at the premises.

Subsequent to the hearing, the Department issued its decision which determined that appellant, through its clerk, violated the statute as charged and that no defense had been established.

Appellant thereafter filed a timely notice of appeal in which it contends that the ALJ did not make proper findings regarding credibility.

DISCUSSION

Appellant contends the decision must be reversed because the ALJ did not make adequate findings explaining why he, apparently, did not find credible the testimony of appellant's witness, Diana Thompson, that the premises was busy at the time of the sale to the decoy. Appellant's argument is convoluted and not easily paraphrased, but we will attempt to present it in an intelligible manner.

Appellant cites provisions of the Administrative Procedure Act, the Business and Professions Code, and state and federal case law for the proposition that the ALJ must make specific findings in support of his credibility determinations. It speculates that "if the Administrative Law Judge had believed the testimony of Diana Thompson, [he] may

well have determined that because the store was busy, the decoy operation was not conducted in a fashion that promoted fairness" in violation of Rule 141(a). Appellant reaches the conclusion that, because he found there was no violation of Rule 141(a), the ALJ must have determined that Thompson's testimony was not credible, and he was required to make explicit findings explaining why he made that credibility determination. Without those findings, appellant asserts, it is not obvious why the ALJ reached the result he did, because "Thompson's testimony would have at least established [a] *prima facie* [sic] case that the store was sufficiently crowded so as to impact the ability of the seller to adequately perform her job. This would be an issue directly within the four corners of Rule 141(a) and whether the Department conducted this decoy operation in a fashion that promoted fairness."

Thompson, the clerk who testified, did not see the decoy in the premises until he came in with the police officers to identify the seller. She testified that during the half hour before she saw the decoy and the officers come in, at some point, another clerk came to help because "It was busy" [RT 57]. By "busy" she said she meant "there was quite a few people coming in and out of the store. And they just kept coming, you know, in waves, you might say" [ibid.]. There was a line at each cash register, Thompson testified, but "it was more like a jumble of people standing in front of both registers" [RT 58].

The ALJ made the following findings with regard to Thompson's testimony and the appellant's argument that the store was busy [Findings II-F and II-G]:

"F. Diana Thompson testified that she was working as a cashier at the premises on September 25, 2000 and that she was present when detectives entered the premises with the decoy. However, she did not see the decoy purchase beer from [the clerk] and she did not recall seeing the decoy inside the premises before the detectives escorted him into the premises.

"G. The argument by the [appellant's] attorney that the decoy operation was unfair because the premises was busy at the time of the sale to the decoy is rejected. The preponderance of the evidence did not establish that the decoy operation was conducted in an unfair manner."

Appellant's argument is premised on the ALJ making a credibility determination that he did not make. The ALJ did not need to disbelieve Thompson's testimony to make the finding he did. He rejected the *argument* that the decoy operation was unfair because the store was busy when the clerk sold to the decoy. He did not reject the testimony that the store was busy, just the argument that what was testified to proved that the decoy operation was conducted unfairly: "The preponderance of the evidence did not establish that the decoy operation was conducted in an unfair manner."

This Board has consistently rejected the argument that Rule 141 was violated because the premises was busy at the time of the decoy operation. While not saying that a busy premises could never violate the rule, the Board has stated that a rule violation could only occur under very unusual circumstances:

"It is conceivable that in a situation which involved an unusual level of patron activity that truly interjected itself into a decoy operation to such an extent that a seller was legitimately distracted or confused, and the law enforcement officials sought to take advantage of such distraction or confusion, relief would be appropriate."

(Tang and Tran (10/19/00) AB-7454; see also 7-Eleven, Inc., and Atwal (10/30/01)

AB-7739.) This is not such a case.

Appellant is clearly wrong in its contention that "Thompson's testimony would have at least established [a] *prima facie* [sic] case that the store was sufficiently crowded so as to impact the ability of the seller to adequately perform her job." The clerk who sold to the decoy did not even testify. There was no evidence that the

number of patrons in the store at the time of the decoy operation had any effect on the seller's ability to ensure that she did not sell an alcoholic beverage to a minor.

ORDER

The decision of the Department is affirmed.²

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

²This 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.