ISSUED OCTOBER 24, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KV MART COMPANY dba Valu Plus Food Warehouse 6820 De Soto Avenue Canoga Park, CA 91303, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7459 File: 21-325855 Reg: 99045723 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: September 7, 2000 Los Angeles, CA

KV Mart Company, doing business as Valu Plus Food Warehouse (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's employee 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, subdivision (a).

Appearances on appeal include appellant KV Mart Company, appearing

[1]The decision of the Department, dated July 22, 1999, is set forth in the appendix.

through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on September 23, 1997. Thereafter, the Department instituted an accusation against appellant charging that, on December 18, 1998, appellant's clerk, Robert Smythe ("the clerk"), sold an alcoholic beverage to Rebecca Marks, who was then 18 years old and acting as a police decoy at the time.

An administrative hearing was held on May 4, 1999, at which time documentary evidence was received, and testimony was presented by Los Angeles Police officer Joseph Kalyn; Marks ("the decoy"); Jon Stokes, director of loss prevention for appellant; and the clerk, Smythe.

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

Appellant filed a timely appeal in which it raises the following issues: (1) the decoy operation violated Rule 141 because it was unfairly conducted during "rush hour"; (2) Rule 141(b)(4) was violated; and (3) Rule 141(b)(2) was violated because the decision does not address the issue of the apparent age of the decoy.

DISCUSSION

I

Appellant contends that decoy operation took place at 7 p.m. on a Friday, violating the Department guideline which discourages decoy operations during a "rush hour," and thus violating Rule 141(a) which requires that decoy operations be conducted in a manner that promotes fairness.

Appellant cites the Board's decision in Saif Assaedi (1999) AB-7144, asserting the Board there ruled that it would be unfair for a law enforcement agency to engage in a decoy operation during a true rush hour circumstance. Assaedi does contain broad language which suggests there may be circumstances when violation of one of the Department's guidelines may render a particular decoy operation unfair when measured against Rule 141. We believe, however, that such an instance will be rare, because the guidelines are merely that, and are not written with sufficient precision to warrant their application as if they were rules of law.

The guideline at issue, which discourages the conduct of decoy operations during rush hour, is an example of imprecision. "Rush hour" is a term ordinarily used in connection with freeway traffic, and associated with commuters traveling to and from their workplace. As applied to individual premises, the term has no practical meaning, and is of little use as a guideline.

The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy. We believe it is asking too much of law enforcement to require it to know in advance the time of day or evening that, for any particular establishment, would fairly be considered "rush hour."

It is conceivable that where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate.

There was no showing here that any law enforcement official acted improperly or unfairly in the course of the decoy operation. All the record fairly shows is that the operation took place at a time when a second clerk was away from his register and several customers were at the open register, in line to make purchases. There was no unfairness.

II

Appellant argues that, although the decoy gave her correct age when asked by the clerk, she "provided incorrect information concerning her identity in an age-related context" which "resulted in the clerk being misinformed as to the purpose of the presence of the decoy." Appellant contends that this violated Rule 141(b)(4), which provides that "The decoy shall answer truthfully any questions about his or her age."

Here, the clerk asked the decoy how old she was, and she replied that she was 18. (Finding III; RT 8-9, 23.) The clerk asked if she was joking, to which she replied "no." (Finding III; RT 23.)

What happened after that is the subject of conflicting testimony. The ALJ resolved those conflicts and concluded that "The clerk then asked another clerk if the decoy was "one of those inspector persons." (Finding III.) The ALJ did not make any finding that the decoy replied.

The Appeals Board is bound by this finding of the ALJ, adopted by the Department, unless it is clearly unreasonable. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, and where there are conflicts in the evidence,

must resolve them in favor of the Department's decision, and accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].) In addition, it is for the trier of fact, not the Appeals Board, to reasonably weigh the credibility of a witness's testimony. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Although the testimony of the officer, the decoy, and the clerk differed somewhat as to details, there is substantial evidence in the record to support the ALJ's finding, and it cannot be said to be unreasonable. Regardless of whether the clerk spoke to the decoy or to another clerk; regardless of whether the clerk made a statement or asked a question; regardless of whether the decoy answered or not– there was no violation of Rule 141(b)(4). The rule says that the decoy must answer truthfully any question about his or her age. The decoy answered truthfully the question about her age.

Whatever the clerk's further comment or question was, it was not about the decoy's age, it was about, as stated by appellant, "her identity" or "the purpose of the presence of the decoy." The rule does not require a decoy to admit that he or she is a decoy. The rule is to be strictly adhered to (Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575, 581 [79

Cal.Rptr.2d 126]) and words cannot be added or subtracted from the rule to change its meaning.

III

Appellant contends the failure of the ALJ to address the appearance of the minor decoy constitutes a violation of Rule 141(b)(2), which requires that a decoy "shall display the appearance which could generally be expected of a person under 21 years of age . . . ."

The ALJ said nothing in the decision about the appearance of the decoy. In a number of prior cases, the Board has reversed decisions of the Department because it was not clear from the decisions that the ALJ's had considered more than simply the physical aspects of appearance in determining that decoys looked under 21. We follow those cases here.

ORDER

The decision of the Department is reversed.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, 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.