ISSUED JULY 6, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

7-ELEVEN, INC. and MOHAMMAD S. and RUKHSANA URSANI dba 7-Eleven Store #24246 18205 Prairie Avenue Torrance, CA 90504, Appellant/Licensee,	)	AB-7364
	)	File: 20-215223
	)	Reg: 98044090
	)	Administrative Law Judge at the Dept. Hearing: E. Manders
v.	)	
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Date and Place of the Appeals Board Hearing: March 2, 2000 Los Angeles, CA

7-Eleven, Inc. and Mohammad S. and Rukhsana Ursani, doing business as 7-Eleven Store #24246 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, with five days stayed for a two-year probationary period, 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,

[1]The decision of the Department, dated February 11, 1999, is set forth in the appendix.

article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Mohammad S. and Rukhsana Ursani, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 6, 1988. Thereafter, the Department instituted an accusation against appellants charging that, on May 22, 1998, appellants' clerk, Azhar Kazi ("the clerk"), sold beer to Joelle Anderson, an 18-year-old decoy working for the Torrance Police Department ("the decoy").

An administrative hearing was held on October 23, 1998, at which time oral and documentary evidence was received, and testimony was presented by the decoy; by Hector Bermudez, a Torrance police officer; and by the clerk.

Subsequent to the hearing, the Department issued its decision determining that the violation had occurred as charged and no defense had been established.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) Rule 141(b)(5) was violated; (2) Rule 141(b)(2) was violated; (3) the ALJ improperly disallowed expert testimony; (4) the Department violated appellants' right to discovery; and (5) the Department violated Government Code §11512, subdivision (d), when a court reporter was not provided to record the hearing on appellants' Motion to Compel.

DISCUSSION

I

Appellants contend the clerk did not see the decoy identify him, so there was not a face-to-face identification as required by Rule 141(b)(5).

Rule 141(b)(5) states:

> "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 licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages; . . ."

Subdivision (c) of Rule 141 provides that failure to comply with Rule 141 shall be a defense to an accusation charging a sale-to-minor violation.

The ALJ specifically addressed appellants' contention in Finding VI:

> "[Appellants'] counsel contends there was not a face-to-face identification of Kazi by Anderson. This contention is rejected. The credible evidence established that there was a valid face-to-face identification. Although there is an inconsistency between the testimony of Anderson and Bermudez regarding whether Anderson actually left the premises before identifying Kazi, the crucial evidence is that both Anderson and Bermudez testified credibly that Anderson directly identified Kazi to Bermudez as the clerk who sold the six-pack of beer to her. Although Kazi testified that Anderson did not point to him and he did not hear Anderson speak, he did testify Anderson returned with the police officers. It does not stand the test of reason that Anderson would return to the counter with the police officers if not for some purpose. While Kazi did not hear Anderson speak, it is found that Anderson spoke and properly identified Kazi to the officers."

The decoy testified that after the sale, she returned to the counter with officer Bermudez and, standing across the counter from the clerk, pointed to the clerk and said he was the one who sold the beer to her [RT 10-11, 24-25]. Officer Bermudez testified to the same events [RT 34, 40-44, 47]. The clerk testified that he did not see the decoy point at him, nor hear her say anything [RT 59, 65-66].

We conclude the identification require by the rule was made. The decoy identified the seller to the police officer while the decoy was looking at the seller and standing just a few feet away from him. There is no indication that the identification was done surreptitiously, and the clerk should reasonably have been aware of the identification taking place.

The ALJ found the decoy and the police officer to be credible, and their testimony clearly supports the conclusion that Rule 141(b)(5) was complied with.

II

Appellants contend that the ALJ used an improper standard in assessing the apparent age of the minor.

Rule 141(b)(2) provides:

> "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense; . . ."

The ALJ analyzed the decoy's appearance in Finding III, stating:

> "Joelle Anderson was, at the time of the sale, wearing white tennis shoes, black jeans and a long-sleeved button-down shirt. Her hair was pulled back and placed in a hair clip. She wore a gold chain, a high school class ring, a silver band around her middle finger, three earrings and a stud in each ear. She stood 5 feet 8 inches tall and weighed 170 pounds. She was nervous at the time she purchased the six-pack of beer. Anderson appeared at the hearing, and although her hair was worn down, she was the same height, weight and overall appearance as on May 22, 1998. Her physical appearance and demeanor are such as to reasonably be considered as being under the age of twenty-one years, such that a reasonably prudent licensee would request her age or identification before selling her an alcoholic beverage."

Appellants argue that the ALJ "rather than comparing this minor to what would generally be expected under the circumstances, simply stated that this

person was reasonably considered as being under the age of 21 . . . ." (App. Opening Br. at 8.) This argument differs from the usual argument made that the ALJ did not use the right standard in assessing the decoy's apparent age because he or she considered only the decoy's physical appearance, disregarding such factors as demeanor, maturity, and behavior.

Appellants substitute "*would* generally be expected" for the rule's language, "*could* generally be expected" in describing the standard against which the decoy's appearance is measured. Clearly, the language of the Rule has more latitude than that used by appellants. Appellant urges strict adherence to the language of the rule, but has here rewritten the rule in language more amenable to its argument.

We believe the language of the decision demonstrates that the ALJ properly analyzed the decoy's appearance as a whole, as required by the rule. The additional language regarding what a prudent licensee would do is mere surplusage which does not detract from the finding.

III

Appellants contend that the ALJ improperly excluded the expert testimony of Dr. Edward Ritvo, a professor of psychiatry at UCLA. According to appellants, the expert testimony would have assisted the trier of fact on the issue whether the decoy presented the appearance which could reasonably be expected of a person under the age of 21 years.

The Board has affirmed the Department's exclusion of the proposed testimony in a number of cases. (See, e.g., Prestige Stations, Inc. (January 4,

2000) AB-7248.) This case raises no issue concerning such testimony not previously considered and rejected by this Board.

IV

Appellant claims it was prejudiced in its ability to defend against the accusation by the Department's refusal and failure to provide it discovery with respect to the identities of other licensees alleged to have sold, through employees, representatives or agents, alcoholic beverages to the decoy involved in this case, during the 30 days preceding and following the sale in this case.

The Board has issued a number of decisions directly addressing this issue. (See, e.g., The Circle K Corporation (Jan. 2000) AB-7031a; The Southland Corporation and Mouannes (Jan. 2000) AB-7077a; Circle K Stores, Inc. (Jan. 2000) AB-7091a; Prestige Stations, Inc. (Jan. 2000) AB-7248; The Southland Corporation and Pooni (Jan. 2000) AB-7264.) In these cases, and many others, the Board reviewed the discovery provisions of the Civil Discovery Act (Code of Civ. Proc., §§2016-2036) and the Administrative Procedure Act (Gov. Code §§11507.5-11507.7). The Board determined that appellants were limited to the discovery provided in Government Code §11506.6, but that "witnesses" in subdivision (a) was not restricted to percipient witnesses. We concluded that:

> "a reasonable interpretation of the term "witnesses" in §11507.6 would entitle appellant to the names and addresses of the other licensees, if any, who sold to the same decoy as in this case, in the course of the same decoy operation conducted during the same work shift as in this case. This limitation will help keep the number of intervening variables at a minimum and prevent a "fishing expedition" while ensuring fairness to the parties in preparing their cases."

This issue should be disposed of in accordance with the cases listed above.

V

Appellant contends the decision of the ALJ to conduct the hearing on its discovery motion without a court reporter present was error, citing Government Code §11512, subdivision (d), which provides that "the proceedings at the hearing shall be reported by a stenographic reporter." The Department argues that this refers only to an evidentiary hearing, not to a hearing on a motion where no evidence is taken.

This issue has also been decided in the cases mentioned in IV, above. The Board held that a court reporter was not required for the hearing on the discovery motion. There is no reason to treat the issue any differently in the present case.

ORDER

The decision of the Department is affirmed with respect to its determinations regarding Rule 141(b)(2) and 141(b)(5), and the proffered expert testimony. The matter is remanded to the Department for such other and further proceedings as are appropriate and necessary following compliance with appellant's discovery request, as limited by this opinion.[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.