

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

AB-7590

7-ELEVEN, INC., BALRAJ CHOPRA, and NEELAM CHOPRA
dba 7-Eleven Food Store #20336
16929 Roscoe Boulevard, Sepulveda, CA 91343,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-215120 Reg: 99047278

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: May 3, 2001
Los Angeles, CA

ISSUED JUNE 21, 2001

7-Eleven, Inc., Balraj Chopra, and Neelam Chopra, doing business as 7-Eleven Food Store #20336 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which ordered their license suspended for 15 days after finding that appellants violated Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Balraj Chopra, and Neelam Chopra, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren 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 January 18, 1983.

¹The decision of the Department, dated February 3, 2000, is set forth in the appendix.

Thereafter, on September 14, 1999, the Department instituted an accusation against appellants charging that, on July 30, 1999, appellants' clerk, Sarbjitt Singh Nijjer, sold an alcoholic beverage (beer) to Katy Paschal, a minor. Although not stated in the accusation, Paschal was acting as a decoy for the Los Angeles Police Department.

An administrative hearing was held on December 7, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles police officer Cesar Corona and by Paschal regarding the circumstances of the transaction. Appellants presented no witnesses on their behalf.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the suspension from which this timely appeal has been taken.

Appellants raise the following issues: (1) there was no compliance with Rule 141(b)(2); and (2) appellants were hindered in the preparation of their defense by the Department's refusal to provide them the identity of other licensees who had sold alcoholic beverages to the decoy in question.

DISCUSSION

I

The Administrative Law Judge (ALJ) made the following finding² with respect to the appearance of the decoy:

"8. Minor Paschal had an overall youthful appearance and wore no make-up or nail polish. She had on no jewelry, except an earring in one ear and a

² Findings of Fact, paragraph 8.

wrist watch. She was then 5' 6" tall and weighed 150 pounds. Her hair and clothes were typical for a young lady her age. She wore jeans, a shirt, a pullover sweater and white tennis shoes.

“The minor was an individual who could reasonably be taken to be under twenty-one years of age at the time of the sale.”

Appellants contend that the finding evidences a failure on the part of the ALJ to apply the standard set forth in Rule 141(b)(2). Citing the Appeals Board's decision in Long's Drug Stores (1999) AB-7356, where the Board determined that the standard adopted by the ALJ in that case did not comply with Rule 141(b)(2), appellants say that this case must be reversed for the same reason.

In Long's Drug Stores, the ALJ had found that the decoy's "physical appearance was such as to be reasonably considered to be under the age of 21." The Board agreed with the appellant in that case that, despite the additional references to the manner of dress, jewelry, height and hair color of the decoy, such a finding improperly limited the assessment of the decoy's appearance to her physical appearance, an assessment the Board had previously rejected in a series of cases involving Circle K Stores, Inc.³

The decision involved in the present appeal does not, at least on its face, limit the assessment of the decoy's appearance to her physical appearance. Indeed, the language of the finding which refers to the decoy's "overall youthful appearance" suggests the contrary.

However, in Long's Drug Stores, the Board also found fault with the

³ Circle K Stores, Inc., AB-7080, AB-7112, AB-7122, and AB-7108, all issued on April 14, 1999.

Department's use of the "reasonable" standard rather than the "could generally be expected" standard set forth in Rule 141(b)(2):

"The use of the "reasonable" standard instead of the "generally to be expected" standard of the statute is also wrong. It could be "reasonable" to conclude that a person was under 21 even if that person's appearance was not that which would "generally be expected" of people under the age of 21. It is certainly conceivable that a decoy who could reasonably be considered to be under 21 might also be reasonably considered to look over the age of 21, and might display an appearance that was not at all that which could generally be expected of a person under the age of 21."

The decision presently under review utilizes the very same standard that was rejected by the Board in Long's Drug Stores, *supra*.

For these reasons, the decision of the Department must be reversed for its use of an improper standard under Rule 141(b)(2).

II

Appellants claim they were prejudiced in their ability to defend against the accusation by the Department's refusal and failure to provide them 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. They also claim error in the Department's failure to provide a court reporter for the hearing on their motion to compel discovery. Appellants cite Government Code §11512, subdivision (d), which provides, in pertinent part, that "the proceedings at the hearing shall be reported by a stenographic reporter." The Department contends that this reference is only to an evidentiary hearing and not to a hearing on a motion where no evidence is taken.

The Board has issued a number of decisions directly addressing these issues.

(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 has 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 the appellants were limited to the discovery provided in Government Code §11507.6, but that “witnesses,” as used in subdivision (a) of that section 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.”

The Board also held in the cases mentioned above that a court reporter was not required for the hearing on the discovery motion. We continue to adhere to that position.

We are aware that in several of the more recent appeals coming to the Board, the record reveals that the Department has granted the “same day” discovery the Board has consistently said was required. We assume that, upon remand, that course will be followed in this case.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration in light of the comments herein.⁴

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

⁴ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.