

ISSUED APRIL 12, 2001

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

| | | |
|-----------------------------------|---|--------------------------|
| 7-ELEVEN, INC., and STEVEN L. and |) | AB-7591 |
| DORENE WILLIAMS |) | |
| dba 7-Eleven #20359 |) | File: 20-214592 |
| 1701 Kraemer Boulevard |) | Reg: 99047346 |
| Anaheim, CA 92806, |) | |
| Appellant s/Licensees, |) | Administrative Law Judge |
| |) | at the Dept. Hearing: |
| v. |) | Rodolfo Echeverria |
| |) | |
| |) | Date and Place of the |
| DEPARTMENT OF ALCOHOLIC |) | Appeals Board Hearing: |
| BEVERAGE CONTROL, |) | December 12, 2000 |
| Respondent. |) | Los Angeles, CA |
| _____ |) | |

7-Eleven, Inc., and Steven L. and Dorene Williams, doing business as 7-Eleven #23059 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 15 days for their clerk, Robert Vicario, having sold an alcoholic beverage to Robert Triechler, a minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of

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

Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Steven L. and Dorene Williams, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 28, 1986. Thereafter, the Department instituted an accusation charging the violation by appellants of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on December 22, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Robert Adair, a reserve officer of the Anaheim Police Department, and Robert Triechler, the minor to whom the alcoholic beverage was sold. Triechler, 19 years of age, was acting as a police decoy at the time of the sale.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged and that appellants had failed to establish any defense to the charge, and ordered the suspension from which this timely appeal has been taken.

In their appeal, appellants raise the following issues: (1) Rule 141(b)(2) was violated; and (2) appellants were denied their right to discovery of the identities of other licensees who sold to the decoy.

DISCUSSION

Appellants contend that the police violated Rule 141(b)(2) through their use of a decoy whose appearance was not that which could generally be expected of a person under 21 years of age. Appellants point to the decoy's physical stature, his experience and responsibilities assisting the police in his role of Explorer Scout, the number of times he acted as a decoy, and his lack of nervousness, as factors which, together, appellants argue, compel such finding that he lacked the appearance required by the rule.²

The Administrative Law Judge (ALJ) made an express finding that the decoy, although 6' 2" in height, and weighing 180 pounds on the day of the sale, "is youthful looking," and "displayed the appearance and demeanor of a person which could generally be expected of a person under 21 years of age."

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he possessed 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance

² Rule 141(b)(2) (4 Cal. Code Regs. §141(b)(2)) states: "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 ...".

required by the rule, and an equally partisan response that he did not.

The rule, through its use of the phrase “could generally be expected,” implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy’s appearance is one which could generally be expected of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many, if not most, sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older.

We think it worth noting that we hear many appeals where, despite the supposed existence of such a policy, the evidence reveals that the seller made the sale in the supposed belief that the minor was in his or her early or mid-20's, and for that reason did not ask for identification and proof of age. It is in such cases, and in those where there is a completed sale even though the buyer - not always a decoy - displayed identification which clearly showed that he or she was younger than 21 years of age, that engenders the belief on the part of the members of this Board that many sellers, or their employees, do not take sufficiently seriously their obligations and responsibilities under the Alcoholic Beverage Control Act.

By the same token, we appreciate the fact that, on occasion, police have used decoys whose appearance, because of large physical stature, facial hair, or other feature of appearance, is such that a conscientious seller may be unfairly induced to sell an alcoholic beverage to that person. Within the limits that apply to

this Board as a reviewing tribunal, we have attempted to deter such practices, either by outright reversal, or by stressing the importance of compliance with Rule 141. If licensees feel more is necessary, their resort must be to another body.

We do not ignore the evidence in this case that the decoy was able to purchase alcoholic beverages in more than half - seven of thirteen - of the establishments he visited. While this suggests that he presented a more mature appearance to some sellers than he did to others, we can only assume the ALJ took this into consideration in his deliberations.

II

Appellants contend they were denied their right to discovery of the identities of other licensees who may have sold alcoholic beverages to the decoy during the 30-day periods preceding and following the date of the sale in this case, and to a transcript of the hearing which was conducted on their motion to compel discovery.

The Appeals Board has held in numerous cases that an appellant's request for discovery should have been granted with respect to the identities of those licensees where sales were made to the decoy on the same day as the sale in question.

The Board addressed this issue at length in The Circle K Corporation (January 4, 2000) AB-7031a, and other cases, and its views have not changed. Appellants were entitled to the limited discovery allowed in those cases.

ORDER

The decision of the Department is affirmed except as to the issue involving discovery, and the case is remanded to the Department for such further proceedings as may be appropriate in light of the comments herein.³

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

³ 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.