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

**AB-7666**

7-ELEVEN, INC. and APAND INCORPORATED dba 7-Eleven Store #2135-13864
17720 Burbank Boulevard, Encino, CA 91316,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-301927 Reg: 99047921

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen
Appeals Board Hearing: June 7, 2001
Los Angeles, CA

**ISSUED JULY 31, 2001**

7-Eleven, Inc. and Apand Incorporated, doing business as 7-Eleven Store #2135-13864 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to a person under the age of 21, in violation of Business and Professions Code §25658, subdivision (a). The person to whom the alcoholic beverage was sold was acting at the time as a minor decoy for the Los Angeles Police Department (LAPD).

Appearances on appeal include appellants 7-Eleven, Inc. and Apand Incorporated, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated June 29, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 23, 1994. Thereafter, the Department filed an accusation against appellants charging the illegal sale noted above.

An administrative hearing was held on May 11, 2000, at which time documentary evidence was received and testimony was presented by LAPD officers Victor Salguero and Joseph Kalyn; by the minor decoy, Mania Demirjian ("the decoy"); and by Sunil Dhir, president and sole stockholder of appellant Apand Incorporated.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven and no defenses had been established under Business and Professions Code §25660 or Rule 141 (4 Cal.Code Regs. §141).

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(2) was violated; (2) there was not an adequate finding regarding Rule 141(b)(5); and (3) the penalty constitutes an abuse of discretion because it was imposed pursuant to an "underground regulation."

DISCUSSION

I

Appellants contend the decoy's appearance was not that which could generally be expected of a person under the age of 21. Appellants point out that the decoy, as the Administrative Law Judge (ALJ) found in Finding 9, was five feet eight inches tall, weighed 150 to 155 pounds, and was not nervous, either at the hearing or during the decoy operation. They argue that she was "not only not nervous . . . but had a figure

that would have fooled any reasonable clerk and any reasonable trier of fact." [2] Therefore, they conclude, the ALJ's finding that the decoy's appearance did not violate Rule 141(b)(2) is not supported by substantial evidence.

The ALJ found that the decoy's overall appearance complied with Rule 141(b)(2). In rejecting appellants' argument on this point, the ALJ stated "It is found quite to the contrary, that the minor was an intelligent, lively, almost overeager young lady, who was quite youthful appearing facially, in demeanor, in attitude and in her mannerisms." (Finding 8.) He also criticized appellants' argument, saying (Finding 10):

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[2]At oral argument before the Appeals Board, appellants argued that the ALJ indicated the decoy did not meet the requirements of Rule 141(b)(2) when he prefaced questions about the decoy's height and weight by saying he hated to ask her. The full text of the exchange shows no implication of a belief that the decoy's appearance disqualified her as a decoy [RT 62]:

> THE COURT: Okay. I hate to ask you. How tall were you then?
> THE WITNESS: I would say five-eight.
> THE COURT: And how much did you weigh?
> THE WITNESS: About 150, 155.
> THE COURT: Sorry to ask you that question. You never ask a lady how much they weigh, but this is really important.
> THE WITNESS: That's okay.

Clearly, the ALJ was simply apologizing for having to ask what he perceived as a "socially unacceptable" question.

Only minutes later, appellants' counsel apologized to the decoy for asking an even more "socially unacceptable" question: he asked her to describe her figure [RT 64]. Both the ALJ and counsel for the Department felt the question was awkward, and the ALJ, as an alternative, offered to let appellants' counsel describe the decoy's figure for the record. Ultimately, however, the ALJ and both counsel agreed that the decoy's photograph would have to suffice for evidence in the record of the decoy's "figure."

The photograph shows that the decoy had somewhat large breasts. Her body was generally somewhat heavy-set, however, and her breasts were not disproportionately large. The decoy's "figure" certainly fell within the range one would expect to see in young women of 18 or 19 years old. A decoy need not appear as a pre-pubescent girl in order to display the appearance generally to be expected of a person under the age of 21.

> "It is not one or two elements in the makeup and impression of a minor that are usually controlling in assessing whether a person has the appearance which could generally be expected of a person under 21. It is the overall impression based on numerous factors, such as the appearance, demeanor, mannerisms, attitude, etc., that form the foundation for a finding on this critical issue. The [appellants'] argument is based on a few selected characteristics and impressions which, without more, are misleading in making a reasonable assessment of the appearance of the minor's 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 she testifies and it is he who is charged with making the determination whether the decoy's appearance met the requirement of Rule 141, that she 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. Here, the ALJ clearly understood appellants' objections to the decoy's appearance, carefully considered them, and rejected them as having too narrow a focus. We are not in a position to second-guess the trier of fact, especially in the face of the ALJ's carefully considered evaluation of the decoy's appearance.

II

Appellants contend that the ALJ erred in failing to resolve the conflict in testimony between officer Kalyn and the decoy with regard to the face to face identification of the seller by the decoy required by Rule 141(b)(5). Kalyn testified that the decoy identified the seller even though he had not yet asked her to do so, while the decoy testified that she identified the seller after Kalyn asked her to. Appellants appear to argue that if the decoy identified the clerk without being asked to, there was not strict compliance with Rule 141(b)(5), and the clerk might not have had a reasonable

opportunity to be aware he was being identified. Without resolving the conflict in testimony, appellants argue, the ALJ could not adequately analyze whether there was compliance with the rule.

The conflict in the testimony is acknowledged and described by the ALJ in Finding 7. However, immediately preceding the description of the conflict, the ALJ states: "The officer and the minor approached clerk Singh who was still behind the cashier counter. The minor and the clerk were within three to five feet of one another and were directly face-to-face." There was no conflict in testimony as to the relative positions of the clerk and the minor during the identification, and their proximity and position makes it clear that the clerk knew or should have known that he was being identified, regardless of whether the officer asked the minor to make the identification or the minor made the identification without being asked.

As to the argument that the rule was not strictly complied with, Rule 141(b)(5) directs the officer to "have the minor decoy . . . make a face to face identification of the alleged seller . . . ." Regardless of how strictly it might be construed or applied, the rule simply does not require the officer to request or direct the decoy to make that identification. It is enough that the officer returned the decoy to the store to make the identification and the identification was, in fact, made.

The ALJ did not err in his conclusion that it was unnecessary to resolve the conflict in testimony; either way, the rule was not violated.

III

Appellants contend the Department's "standard" penalty of 15 days which was imposed in this case is based not on any factual determination, but on an "underground

regulation," and thus is an abuse of discretion. They state "the Department should be able to factually justify a penalty in light of a spotless record at these licensed premises."

The Department contends that the Board should not consider this argument because appellants did not raise this issue in the Special Notice of Defense, but waited until the closing argument at the hearing to bring it up. If the Board does consider this issue, the Department argues that it should be rejected because no evidence was presented by appellants to support their contention about an "underground regulation." In addition, the Department asserts that it merely made a non-binding recommendation regarding the penalty, and the ALJ based his penalty determination on "the unique facts and circumstances of the case."

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The statutory provisions dealing with "underground regulations" are found in Government Code §11340.5, subdivision (a), and §11342.600. Section 11340.5, subdivision (a)[3], provides:

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[3] This section was amended by Stats. 2000, c. 1060 (A.B.1822), §3, to correct references to the definition of "regulation" in former §11342, subdivision (g), which was continued in §11342.600, as noted below (ftnt. 4). The Law Revision Commission Comments state, in relevant part: "Amendment of this section is not intended to ratify or abrogate the opinion in Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal.4th 557, 927 P.2d 296, 59 Cal.Rptr.2d 186 (1996)."

> "No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."

Section 11342.600[4] provides:

> "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure."

Appellants did not raise this issue in the Special Notice of Defense, which is the first pleading appellants file in response to a Department accusation. They did raise the issue during closing argument at the hearing. Ordinarily, a factual issue not raised until closing argument, at least where the Department did not have the opportunity to respond, would not be considered to have been timely raised. The present issue, however, deals with the imposition of penalty and would not have been an issue unless the Department had recommended what appellants call the "standard" penalty in a case of this type. Since appellants would not know with absolute certainty that this particular penalty would be involved until the end of the hearing when the Department made its penalty recommendation, we are reluctant to say that the issue was untimely raised.[5]

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[4] Added by Statutes 2000, chapter 1060 (A.B. 1822), §8. The new section continues, with one change, former Government Code §11342, subdivision (g). The only change is the omission of the concluding phrase of the former subdivision: "except one that relates only to the internal management of the agency."

[5] If, as appellants contend, this is a "standard" penalty that the Department always recommends, appellants would presumably have been able to include this issue in some pleading prior to the hearing, putting the Department on notice that it would need to address the issue. However, we will not reject consideration of the issue on that speculative basis.

This is a mixed question of fact and law, that is, appellants must provide evidence supporting their contention that an "underground regulation" exists and that the penalty imposed in this case was the result of the "underground regulation." Then this Board would need to decide the legal questions of whether the purported "underground regulation" was subject to the APA rule-making provisions and, if so, whether it was a regulation as defined in Government Code §11342.600.

This Board does not need to reach the legal questions involved, because appellants have presented no evidence that such an "underground regulation" exists. Appellants have presented nothing other than the bald assertion that an "underground regulation" exists and the penalty was the result of it. This does not provide us with the necessary factual basis for resolving this question.

No other argument is made that the penalty is excessive or an abuse of discretion. Therefore, we defer to the Department's imposition of the penalty as a reasonable exercise of its discretion.

ORDER

The decision of the Department is affirmed.[6]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6]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.