

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

AB-7667

7-ELEVEN, INC., KULJIT SINGH, and BABLY K. SINGH dba 7-Eleven Store
2538 East La Palma, Anaheim, CA 92806,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-244064 Reg: 00048297

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

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

ISSUED JUNE 21, 2001

7-Eleven, Inc., Kuljit Singh, and Bably K. Singh, doing business as 7-Eleven Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk, Jose Luis Lara Livonitti, having sold an alcoholic beverage (a six-pack of Bud Light beer in cans) to Joseph DiBenedetto, a minor decoy, 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 appellants 7-Eleven, Inc., Kuljit Singh, and Bably K. Singh, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing

¹The decision of the Department, dated June 22, 2000, is set forth in the appendix.

through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 3, 1990. On February 16, 2000, the Department filed an accusation against appellants alleging a violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on May 5, 2000. Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation.

Appellants thereafter filed a timely appeal. Appellants raise the following issues: (1) the decoy failed to present the appearance required by Rule 141(b)(2); and (2) the "prior violation" which served as the basis for an enhancement of the penalty was not established by competent evidence.

DISCUSSION

I

Appellants contend that the decoy involved in this case did not present the appearance which is required of a decoy by Rule 141(b)(2). That rule provides that a 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."

Appellants refer to the decoy's employment as a paid jailer for the City of Anaheim, charged with the responsibility of caring for and transporting inmates to and from the city jail, and appear to argue that this consideration overrides all others, including the considerations relied upon by the Administrative Law Judge

(ALJ). Appellants variously characterize the findings of the ALJ regarding the decoy's appearance as cynical, a manifestation of his inabilities, apologetic, and unsupported by substantial evidence.

This appears to be just another instance of an effort by appellate counsel to persuade the Board to substitute, as its own, appellants' less-than-objective opinion about a decoy's appearance, in place of that of the ALJ.

The ALJ spelled out the considerations which led him to conclude that the decoy presented the requisite appearance under the rule:

"[The decoy] was, at the time of the sale, dressed as shown in Exhibit 4. He stood about 5 feet, 9 inches tall and weighed somewhere between 165 and 180 pounds. [The decoy] testified he weighed 180 pounds at the hearing and that he weighed about 165 pounds on October 8, 1999. He also testified that he could not recall when around or before October 8, 1999, he had last weighed himself. His dark hair was unremarkable, neither exceptionally short or exceptionally long. He was wearing a wristwatch, but no other jewelry appears in Exhibit 4. [The decoy] appeared at the hearing and, despite having gained some weight and being 20 years of age, his overall appearance, that is, his physical appearance, his poise, demeanor, maturity and mannerisms, was that generally expected of a person his age, under 21 years. At the hearing he wore wire-rimmed spectacles which he had not worn while in respondent's store. He had a few adolescent pimples on his forehead at the hearing, but testified smoothly with a noticeable soft-spoken tone. Despite these differences, the appearance of [the decoy] at the hearing was substantially the same as his appearance before respondent's clerk on October 8, 1999.

...

"[The decoy's] employment as a non-sworn employee of the Anaheim Police Department says nothing about his appearance or compliance with the rule. He appeared no more mature at the hearing than any other 20 year-old young man. He gave no appearance of 'toughness' and, in fact, did appear a bit 'shy,' if only due to his soft-spoken demeanor. Little of this matters, however, since on the evening in question, he spoke not at all to respondent's selling clerk. His size did not at the hearing and, therefore, certainly did not before clerk Livonitti make him appear over the age of 21 years. Considering the overall appearance of [the decoy] at the hearing and

drawing appropriate inferences as to how he must have appeared in front of respondent's selling clerk, [the decoy's] appearance complied with the rule."

The ALJ has spelled out at some length the reasons he was satisfied the decoy's appearance complied with Rule 141(b)(2). We defer to his findings.

II

Appellants contend that there is no competent evidence in the record establishing the date of the previous violation relied upon by the Department to support its penalty enhancement. They argue that the only evidence that establishes the date of the prior violation is the accusation which is included in Exhibit 5, which they suggest was never filed.

The accusation in question is part of Exhibit 5. Affixed to Exhibit 5 is a certification by Theresa Laster, a Department Custodian of Records/Legal analyst, which states that the copies of the decision, stipulation and waiver, order granting offer in compromise and accusation attached to her certificate are true and correct copies of documents on file and of record in the Department's Sacramento office. Notably, there is nothing on the certification that addresses the question whether the accusation included in Exhibit 5 had been filed

We have been given no explanation why the accusation does not reflect that it was ever filed.

In Loresco (2000) AB-7310, the Board found that the lack of a registration number connecting the accusation to the decision establishing the violation resulted in a failure of proof. In the present case, we are unwilling to accept what may be an unfiled accusation as proof of the date a violation was committed. Without such a date, we have no way of measuring the appropriateness of the prior violation as a factor in

aggravation for purposes of a penalty enhancement.

ORDER

That portion of the decision of the Department finding a violation of Business and Professions Code §25658, subdivision (a), is affirmed. The case is remanded to the Department for reconsideration of the penalty.²

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

² 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.