

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

AB-7680

7-ELEVEN, INC., KYUNG J. HUH and YU B. HUH dba 7-Eleven #29003
9502 Hamilton, Huntington Beach, CA 92646,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-214461 Reg: 99047618

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 7, 2001
Los Angeles, CA

ISSUED AUGUST 16, 2001

7-Eleven, Inc., Kyung J. Huh and Yu B. Huh, doing business as 7-Eleven #29003 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, all of which were stayed for a one-year probationary period, for their clerk, Jin Soo Kim, having sold an alcoholic beverage (a six-pack of Budweiser beer) to Heidi Bentz, a minor decoy, 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., Kyung J. Huh and Yu B. Huh, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its

¹The decision of the Department, dated August 4, 2000, is set forth in the appendix.

counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988.

Thereafter, the Department instituted an accusation against appellants charging that, on July 3, 1999, their clerk sold an alcoholic beverage to a minor.

An administrative hearing was held on February 9, 2000, at which time oral and documentary evidence was received regarding the charge of the accusation.

Subsequent to the hearing, the Department issued its decision which determined that the transaction had occurred as alleged, and ordered the stayed suspension.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) There was no compliance with Rule 141(b)(2), in that the decoy lacked the appearance required by that rule; and (2) there was a violation of Rule 141(b)(4), in that the decoy failed to answer truthfully when asked about her age.

DISCUSSION

I

Appellants contend the decoy did not display the appearance which could generally be expected of a person under the age of 21. They stress the fact that the decoy was able to purchase an alcoholic beverage in five of the locations she visited without being asked for identification. According to appellants, the decoy's combined employment experience and personal appearance may have led those sellers to believe she was 21 years of age or older.

The Administrative Law Judge found the following with respect to the decoy's appearance:

"The decoy's appearance at the time of her testimony was substantially the same

as her appearance at the time of the sale except that she was five pounds heavier at the time of the hearing and she was not wearing a small transmitter which looks like a pager at the time of the hearing. The decoy is five feet seven inches in height and weighed one hundred fifteen pounds as of the date of the hearing. The decoy's hair is brown and she adds blond highlights. She was wearing small stud earrings both at the hearing and on July 3, 1999. She was also wearing sunglasses on top of her hair on July 3, 1999, but the glasses did not cover her eyes. After considering the decoy's appearance, her demeanor, and the way she conducted herself at the hearing, a finding is made that the decoy displayed the appearance of a person which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller at the time of the alleged offense. The fact that the decoy had been a police cadet with the Huntington Beach Police Department since May of 1999 and the fact that she had been an explorer with the Newport Beach Police Department prior to becoming a cadet were also considered in making this finding. The photograph in Exhibit 2 which was taken on July 3, 1999 accurately depicts what the decoy looked like and what she was wearing on that date."

It is clear from this finding that the Administrative Law Judge was aware of what was expected of him by Rule 141(b)(2). Only if we were to infer that the finding is a mere recitation intended to satisfy this Board, and not one reflective of the sincere judgment of the Administrative Law Judge could we agree with appellants' contention. We decline to do so.

The number of times a decoy is able to purchase alcoholic beverages may have some relevancy, but only when the ratio between premises visited and number of purchases appears excessive. We do not find that five purchases out of 21 or 24 premises² visited is so disproportionate as to suggest that it was unfair to use the decoy in question because of her appearance.

II

Appellants contend that the Administrative Law Judge erred in accepting the

² Huntington Beach police officer Douglas Tallman testified that 24 locations were visited. According to a decoy fact sheet, 21 locations were visited.

decoy's denial of having been asked her age, and rejecting the testimony of the clerk that when he asked if she was over 21, she only smiled, and did not answer.

Rule 141(b)(4) requires that a decoy shall answer truthfully any question about his or her age.

Appellants contend that the clerk's testimony that he asked "how old are you" is essentially corroborated by officer Tallman's testimony that he heard the clerk ask "how are you." Appellants suggest that what Tallman actually heard was the clerk asking the decoy her age. Thus, appellants argue, Tallman's testimony that he heard a greeting, coupled with the clerk's testimony that he asked the decoy her age, should have led the Administrative Law Judge to accept the clerk's testimony over that of the decoy, who, appellant asserts, testified that there was no conversation at all.

This is the classic case for the rule that credibility is generally a question for the trier of fact. (See, e.g., Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) Despite appellants' characterization of the statements which were made, or claimed to have been made, as conversation, there is nothing in the clerk's testimony that is so undeniably true that testimony in conflict with it must be disregarded. Conversely, there is nothing in the decoy's testimony that is so demonstrably untrue that the Administrative Law Judge was bound to reject it.

Contrary to appellants' assertion, the Administrative Law Judge did not conclude that there was no conversation whatsoever. He simply concluded that the clerk's testimony that he asked the decoy her age was unworthy of belief. (See Finding of Fact E.) Based on our review of the record, we are not in a position to say

he was wrong.

Appellants contend that the Department, in making a credibility determination, is obligated to make specific findings which explain why one witness's testimony is deemed credible and that of another not. They cite a federal court of appeals case involving a claim for Social Security benefits, where the appellate court so held.³ We have reviewed the decision in that case, and the court decisions cited in support of that portion of the court's holding, and are satisfied that the view expressed by the court is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California. While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed.

ORDER

The decision of the Department is affirmed.⁴

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

³ Holohan v. Massaneri (2001) 246 F.3d 1195 (9th Cir.).

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.