

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

AB-7790

File: 20-285453 Reg: 00049811

7-ELEVEN, INC., and JANIZEH CORPORATION dba 7-Eleven #13896
27761 Bouquet Canyon Road, Santa Clarita, CA 91350,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 4, 2002
Los Angeles, CA

ISSUED MAY 28, 2002

7-Eleven, Inc. and Janizeh Corporation, doing business as 7-Eleven #13896 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold an alcoholic beverage (beer) to an eighteen-year-old 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. and Janizeh Corporation, 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.

¹The decision of the Department, dated March 22, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 12, 1993.

Thereafter, the Department instituted an accusation against appellants charging the unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on January 31, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Sergeant Bruce Sonnenblick of the Los Angeles County Sheriff's Department; by Tara Christine Nolan, the minor decoy; and by Martin Janizeh, the store franchisee and co-licensee.

Sergeant Sonnenblick testified that he observed the transaction from a viewpoint outside the store. He saw Nolan, the decoy, take a six-pack of Miller Lite beer from the cooler, place the beer on the counter, display her driver's license to the clerk, pay for the beer and leave the store. He made a radio request for uniformed deputies, and remained with Nolan, who continued to hold the beer she had purchased. Sonnenblick, deputy O'Neill and Nolan then entered the store, stood directly in front of the clerk, and O'Neill asked the clerk if she remembered selling the beer to Nolan. The clerk responded affirmatively. O'Neill also asked the decoy to identify the person who sold her the beer, and Nolan identified the clerk. The clerk was identified as Kim Weber. A photograph was then taken of Weber, Nolan, and one of the deputies.

On cross-examination, Sonnenblick acknowledged that he was accompanied by a second decoy, but testified that the second decoy remained out of sight with other deputies, and did not enter the store. He did not recall how Nolan had been selected as a decoy, but knew that Nolan was not a cadet or employee of the Sheriff's

Department. He said he had not heard any conversation between the clerk and the decoy, nor had he interviewed the decoy about the conversation at the counter. There were two clerks working at the time, one male and one female.

Nolan, on the other hand, testified that the second decoy, also female, accompanied her throughout, both during her initial entry into the store, when she bought the beer, and also when she returned to identify the clerk who made the sale. Nolan also confirmed that she had presented her California driver's license when asked for identification, and that she was 18 years of age at the time of the transaction.

Nolan recalled that it was Sergeant Sonnenblick who asked her to identify the clerk who sold her the beer. She was five feet away from the clerk when she identified her. Nolan testified that she identified the clerk while she was finishing her last customer. At that point, the deputies asked if there was anyone who could take over for her, and another employee did so. Nolan was of the opinion the clerk was slightly aware she was being identified.

The second decoy was named Ludy Chavez. Chavez was at Nolan's side when Nolan purchased the beer. The clerk was looking at both of them when she requested identification. Nolan handed the clerk her license, while Chavez stood silently. Nolan handed the clerk the money, picked up the change, and took the beer outside. She had no conversation with Chavez while the two were standing at the counter. The two were talking with each other on their way to the cooler and then to the counter.

Janizeh testified that Weber's employment was terminated three months later in connection with a separate incident. Weber had received the 7-Eleven "Come of Age" training after she was employed. Janizeh also testified that another store he owns

declined to sell to a decoy on the same evening.

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) the presence of a second decoy rendered the decoy operation unfair; and (2) there was no adequate face to face identification.

DISCUSSION

I

Appellants contend that the presence of Chavez, the second decoy, rendered the decoy operation unfair. Appellants stress that Chavez was with Nolan throughout the entire operation; Chavez was at Nolan's side while at the counter; the clerk looked at both decoys when she asked for identification; and the clerk placed the change on the counter directly between the two decoys.

It seems to this Board that the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law. The clerk did not testify, so there is no evidence or claim that the clerk was distracted.

Nolan testified that, when she and Chavez were at the counter, Chavez was silent. The fact that the clerk was satisfied once Nolan displayed her identification suggests that she understood Nolan was the customer, and Chavez a companion. The record is silent as to Chavez's appearance, and there is no suggestion that Chavez

appeared older than 21 years of age. Nolan removed the change from the counter and carried the beer from the store.

The cases appellants cite are inapposite. In Hurtado (2000) AB-7246, the undercover police officer shared a table with the decoy. In 7-Eleven, Inc./Smith (2001) AB-7740, the second decoy's appearance as a person under the age of 21 was in serious question, and there was evidence that she had some involvement in the transaction.

Here, on the other hand, the only involvement Chavez had was to stand next to the decoy who made the purchase. No question was raised about her appearance, and no effort was made to determine what that was.

II

Appellants claim that the face to face identification required by Rule 141(b)(5) was lacking. They cite the testimony of Nolan that the clerk was engaged in a transaction with another customer when the identification took place. Appellants cite and quote from the Board's decision in Kyung Ok Chun (1999) AB-7287:

"The phrase 'face-to-face' means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller."

Nolan testified that she identified the clerk by pointing to her. The clerk was "slightly" paying attention to her, in that she remembered who the decoy was, and that she had sold her alcohol.

Sergeant Sonnenblick also testified about the identification. He said that he, Nolan, and deputy O'Neill were standing opposite the clerk, with only the counter

between them, when Nolan identified her as the seller. This occurred just after O'Neill had asked the clerk if she remembered having sold the beer to Nolan.

The ALJ's finding that the clerk's attention seemed to be split between the patron she was then serving and Nolan's identification of her as the person who sold beer to Nolan reflects a fair assessment of the record, one with which we agree. We also agree with the ALJ that the identification complied with Rule 141(b)(5).

ORDER

The decision of the Department is affirmed.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.