

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

AB-7791

File: 20-353443 Reg: 00049841

7-ELEVEN, INC., KIRSTEN JILL PAUL, and PARMINDER S. PAUL
dba 7-Eleven Store #2131-13646F
735 Bradley Avenue, El Cajon, CA 92021,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 7, 2002
Los Angeles, CA

ISSUED MAY 7, 2002

7-Eleven, Inc., Kirsten Jill Paul, and Parminder S. Paul, doing business as 7-Eleven Store #2131-13646F (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a 17-year-old police decoy, Czara Apgar, 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., Kirsten Jill Paul, and Parminder S. Paul, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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 June 22, 1999. Thereafter, the Department instituted an accusation against appellants charging the sale-to-minor violation noted above. An administrative hearing was held on February 14, 2001, at which time oral and documentary evidence was received. At that hearing, testimony concerning the transaction was presented by Apgar, who was acting as a minor decoy for the San Diego County Sheriff's Department at the time of the transaction, and by Deputy Sheriff Kevin Menzies. The testimony established that Apgar was asked for, and presented to the clerk, her valid California Driver's License, showing her correct date of birth and a red stripe with white letters saying "AGE 21 IN 2004" before a six-pack of Budweiser beer was sold to her.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged in the accusation and no defense had been established.

Appellants thereafter filed a timely appeal in which they contend the Department violated Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)).

DISCUSSION

Appellants contend Rule 141(b)(2) was violated because the Administrative Law Judge (ALJ) did not consider the decoy's apparent age under the circumstances presented to the seller of the alcoholic beverage. They state that the ALJ relied for his finding that the decoy's appearance complied with Rule 141(b)(2) on two circumstances not present during the transaction – the ALJ found that the decoy appeared nervous because she was soft spoken, but the decoy had no conversation with the seller, and

the decoy had blond highlights in her hair at the time of the decoy operation but not at the time of the hearing – and excluded a factor he should have considered – the state of mind of the seller at the time of the sale.

The ALJ, as the trier of fact, has the opportunity to observe the decoy in person at the hearing and is in a far better position than this Board to evaluate the apparent age of a minor decoy. Therefore, we will ordinarily defer to the ALJ's findings unless they appear to be clearly erroneous or unreasonable. The first two bases for appellants' argument simply do not provide any reason for us to look behind the ALJ's finding.

Appellants contend that the ALJ excluded from his consideration the "state of mind" of the clerk. What they really mean is that he erred in finding that there was no evidence the clerk thought the decoy looked over 21. They base this on the ALJ's finding that the clerk told the deputy that "she looked at Apgar's identification and it made her over the age of 21 years. The evidence did not show that [the clerk] told anyone she thought Apgar appeared to be over 21 years of age." (Finding VII.) The deputy testified that the clerk "made a quick statement that she had looked at the identification and that the juvenile appeared – that the juvenile presented an ID to her that showed that she was over 21" [RT 45]. We cannot say that the ALJ erred in his finding.

In any case, it is not the belief of the clerk that is controlling, it the ALJ's reasonable determination of the decoy's apparent age based upon the evidence and his observation of the decoy at the hearing. As this Board has said before, Rule 141(b)(2),

"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."

(7-Eleven, Inc. & Grewal (2001) AB-7602.)

In another case, the Board expressed the same idea:

"The decoy must only present an appearance which could generally be expected of a person under the age of 21 years. If the clerk, observing a decoy who presents such appearance generally, perceives the decoy to be older than 21, he does so at his peril. A licensee cannot escape liability by employing clerks unable to make a reasonable judgment as to a buyer's age."

(Prestige Stations, Inc. (2000) AB-7248 [ftnt.2])

Whether or not the ALJ excluded consideration of the clerk's "state of mind" is irrelevant. Therefore, the premise of appellants' argument is defective and their contention must be rejected.

ORDER

The decision of the Department is affirmed.²

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

²This 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.