

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

AB-7835

File: 20-298126 Reg: 00049821

7-ELEVEN, INC., and DIANNE CORPORATION dba 7-Eleven #2174-20679
1004 Long Beach Boulevard, Long Beach, CA 90813,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 4, 2001
Los Angeles, CA

ISSUED MAY 31, 2002

7-Eleven, Inc., and Dianne Corporation, doing business as 7-Eleven #2174-20679 (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 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 Dianne Corporation appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne Paige.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 13, 1994. Thereafter, the Department instituted an accusation against appellants charging that,

¹The decision of the Department, dated May 31, 2001, is set forth in the appendix.

on September 27, 2000, appellants' clerk, Moises Ramirez ("the clerk"), sold an alcoholic beverage to 19-year-old Phillip Dominguez. Dominguez was acting as a decoy for the Long Beach Police Department (LBPD) at the time of the sale.

An administrative hearing was held on April 20, 2001, at which time documentary evidence was received and testimony concerning the sale was presented for the Department by the decoy and by Long Beach police officers Richard Hieb and Dennis Zigrang, and for appellants by store clerks Moises Ramirez and Aphicaht ("Pete") Sinsomannant.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and determined that no defense had been established.

Appellants thereafter filed a timely notice of appeal in which they raise the following issues: (1) the decoy's appearance violated Rule 141(b)(2),² and (2) the decoy violated Rule 141(b)(4).

DISCUSSION

I

Appellants contend that the decoy did not present to the clerk an appearance that could generally be expected of a person under the age of 21 and, therefore, his appearance violated Rule 141(b)(2). They argue that the clerk would be the best judge of the decoy's apparent age at the time of the sale, and the clerk, who was 22, thought the decoy looked older than he was. In addition, they assert that the photographs of the decoy taken that evening (Exhibit B) show that the decoy looked "so clearly over the age of twenty-one (21) that to find otherwise should be embarrassing to a trier of fact."

²References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

Appellants also point out that this decoy was able to purchase alcoholic beverages in eight of the ten locations visited that evening. In none of the locations where he was able to purchase did anyone ask for his identification.

The Administrative Law Judge (ALJ) noted the decoy's "high 'success' rate" and stated that he considered it "as one indication of [the decoy's] appearance." (Finding V-A.) In Finding V-B, the ALJ noted that the decoy was 5'10" tall, weighed 185 pounds, and was clean shaven both at the time of the sale and at the hearing, but his hair and dress were different: at the time of the sale, he wore a T-shirt and jeans and his hair was short on the sides and spiked on top; at the time of the hearing, he wore a law enforcement uniform, a badge, and a sidearm, and his hair was short and combed smooth. The ALJ concluded that:

"If, while at [appellants'] store, the decoy wore the uniform, badge and sidearm which he wore at the hearing, he clearly would not have displayed the appearance which could generally be expected of someone under twenty-one years old. However, he did not wear these items at [appellants'] store."

This is an implicit finding that, at the hearing, the decoy, who was still just 19 years old, clearly had the appearance of a person over 21 years of age.

In Finding V-C the ALJ states that the photographs of the decoy taken just before the decoy operation "are the best evidence of how he appeared that day, [and] show that he displayed the physical appearance which could generally be expected of a person under twenty-one years old."

In Finding V-D, the ALJ described the decoy's former employment, from February 2000 to January 2001, as a security officer for the LBPD and his current employment as a Marine Patrol Officer with the LBPD. He surmised that the decoy may have been calm when in appellants' premises because of his experience working in law

enforcement, but concluded that "there is nothing about a decoy's calmness that inherently makes him appear older than his age."

The ALJ ultimately concluded, in Finding V-E, that:

"Based on the photographs of the decoy taken on September 27, 2000, and the Administrative Law Judge's observation of the decoy at the hearing, including the decoy's mannerism and demeanor, the Administrative Law Judge concludes the decoy displayed the physical and nonphysical appearance which could generally be expected of a person under twenty-one years old while purchasing the beer from [appellants'] clerk."

This Board will ordinarily defer to the judgment of the ALJ in making the finding as to apparent age, since the ALJ has the opportunity, which this Board does not, of observing the decoy in person. However, as we observed in Circle K Stores, Inc. (2001) AB-7762, "Occasionally . . . we see a case that raises such doubts about that judgment that we are compelled to re-examine the ALJ's finding regarding the decoy's appearance." The present appeal is such a case.

This decoy was able to purchase alcoholic beverages eight out of the ten times he tried on this night. This is a considerably higher "success rate" than in other cases where we have been made aware of the number of purchases and attempts.

In 7-Eleven and Williams (2001) AB-7591, the decoy, who was 6'2" tall and weighed 180 pounds, was found by the ALJ to be "youthful looking," and displaying "the appearance and demeanor of a person which could generally be expected of a person under 21 years of age." This decoy was able to purchase alcoholic beverages in seven out of thirteen attempts. In sustaining the decision of the Department, the Board observed that while not everyone will believe that a particular decoy appears to be under 21, "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." (Emphasis in original.)

The Board also said,

"We do not ignore the evidence in this case that the decoy was able to purchase alcoholic beverages in more than half - seven of thirteen - of the establishments he visited. While this suggests that he presented a more mature appearance to some sellers than he did to others, we can only assume the ALJ took this into consideration in his deliberations."

In Southland/Chawla and Kaur (2001) AB-7603, the 6'4", 250-pound decoy was able to purchase in five out of thirteen attempts. The ALJ, in his proposed decision, determined that "although the appearance of the decoy was that of a person under the age of 21, his large physical stature lulled the clerk into a false sense of security, such that the decoy operation violated the fairness requirement of Rule 141(a). [Fn. omitted.]" The Department issued a decision under Government Code §11517, subdivision (c), rejecting that part of the ALJ's proposed decision finding that Rule 141(a) was violated by the police using this large decoy.

On appeal, the Board noted its impression (having no statistical data to this effect) that this decoy's ratio of purchases to attempts was "considerably above the norm." The Board reversed the decision of the Department based on the combination of the decoy's large physical stature, the high "success rate," and the ALJ's obvious concern over the possible unfairness caused by the decoy's large size.

The extremely high (80 percent) purchase rate in the present case (including the fact that the decoy was not even asked for identification in any of the premises that sold to him) is a very strong indication that this decoy did not display the appearance that could generally be expected of a person under the age of 21 when he purchased an alcoholic beverage from appellants' clerk. We have in previous cases (see, e.g., 7-Eleven and Williams, *supra*) noted that the decoy need only have an appearance that

could generally be expected of a person under 21 years of age. That does not mean, however, that the word "generally" can be ignored.

The word "generally" is variously defined as "in a reasonably inclusive manner," "on the whole," "as a rule" (Webster's Third New Internat. Dict. (1986)); "In general; commonly; extensively, though not universally; most frequently" (Webster's Rev. Unabridged Dict., (1998)); and "As a rule; usually" (The American Heritage Dict. of the Eng. Lang., (2d ed. 2000)).

The phrase "could generally be expected" clearly implies, as this board has said, that *not everyone* will necessarily believe that a particular decoy appears to be under 21,³ but it also means that *most* people will believe that the decoy appears to be under 21. Of those who saw the decoy on September 27, 2000, most – eight out of ten – apparently thought the decoy looked as if he were over 21 years of age. This indicates that this decoy did *not* display an appearance that could *generally* be expected of a person under the age of 21 during the decoy operation. Under these circumstances, the reasonableness of the ALJ's conclusion to the contrary is, at the very least, suspect.

The ALJ believed that the photographs of the decoy were the "best evidence" of the decoy's appearance on September 27, 2000, and on that basis found that the decoy's physical appearance was that which could generally be expected of a person under the age of 21. We regard the ALJ's finding based on the photographs to be seriously undermined in light of the apparent contrary belief by 80 percent of the clerks who actually saw the decoy in person.

³See, e.g., 7-Eleven, Inc. & Grewal (2001) AB-7602 and Prestige Stations, Inc. (2000) AB-7248 [fn.2].

But it is not only the exceedingly high "success rate" that casts doubt on the ALJ's determination of the decoy's apparent age; the ALJ's analysis itself is flawed. The ALJ found that, except for his height, weight, and being clean-shaven, the decoy's physical appearance at the hearing was "not similar at all" to his physical appearance at the time of the sale. (Finding V-B.) He also found that, had the decoy been dressed at the time of the sale as he was at the hearing, "he clearly would not have displayed the appearance which could generally be expected of someone under twenty-one years old." (*Ibid.*) Besides the physical differences noted by the ALJ, the decoy testified to being calm at the time of the sale, but nervous at the hearing [RT 26]. In other words, the decoy did not look substantially the same at the hearing as he did at the time of the sale. In Circle K Stores, Inc. (2001) AB-7762, we explained that deference could not be automatically accorded to an ALJ's determination of the apparent age of a minor decoy under these circumstances:

"Our deference to the ALJ's findings is due to their ability to see the decoy in person at the hearing and to extrapolate that appearance, which ordinarily has not changed in any significant way, back to the time of the decoy operation. A crucial factor in that deference is evidence that the appearance of the decoy had not changed substantially between the time of the decoy operation and the time of the hearing. In [footnote 2 of Circle K Stores, Inc. (2000) AB-7265], we recognized that a 'discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing,' might make it impossible for the ALJ reasonably to assume that the minor would have displayed the same apparent age at the time of the decoy operation as he or she did in person at the hearing. Where the evidence clearly shows that there was a significant discernible change in the decoy's appearance, a finding that the decoy's appearance was substantially the same at both times is not entitled to the deference we would normally accord the ALJ's findings on appearance."

In Circle K Stores, Inc., *supra*, this Board rejected the ALJ's finding as to the decoy's apparent age, where that determination was based on a photograph of the decoy at the time of the sale and the ALJ's observations of the decoy at the hearing,

because of the significant changes in the decoy's appearance and demeanor in the time between the sale and the hearing. In the present case, the ALJ based his finding that the decoy appeared to be under 21 at the time of the sale on photographs of the decoy and on the decoy's mannerisms and demeanor at the hearing. He did so even though the physical and non-physical appearance of the decoy at the hearing was not comparable to his physical and non-physical appearance at the time of the sale. We cannot say that this finding has a reasonable basis.

The highly suggestive "success rate" of this decoy and the unreliable basis used to find the decoy's apparent age, leads us to conclude that the ALJ's finding that this decoy complied with Rule 141(b)(2) was unreasonable and an abuse of discretion. Therefore, we must reverse the Department's decision.

II

Appellants contend that the decoy did not answer truthfully questions about his age, in violation of Rule 141(b)(4), which states that "A decoy shall answer truthfully any questions about his or her age." They argue that the ALJ should have believed the testimony of the clerks rather than the testimony of the decoy.

Two clerks were at the counter when the decoy brought the beer there, one working the cash register, the other bagging. The cashier, Ramirez, testified that, after receiving no response to his question, "How are you doing today, sir?" he asked the decoy "Are you 21 or older?" The decoy responded "Yes," very loudly, according to Ramirez [RT 44-45]. The other clerk, Sinsomannant, testified he heard Ramirez ask the decoy "Are you 21?" but did not hear any response from the decoy. Sinsomannant stated he put the beer in a bag, but before giving it to the decoy, he asked the decoy "Are you 21?" to which the decoy responded, in a soft voice, "Yes." [RT 59-60, 61-63.]

The decoy testified that the cashier told him the price of the beer when he came to the counter, but neither clerk asked him about his age. [RT 13-14, 25.]

The decoy wore a "wire" or transmitter while he was in appellants' store, and Detective Zigrang, in the car outside, listened to what was going on inside the store [RT 71, 73]. Zigrang testified that he heard no voices or conversation while the decoy was in the store, only "background noise like the cooler opening and the cash register going on" [RT 75]. He also said "I don't have a recollection of hearing inaudible [sic] voices. But I remember specifically I did not hear [the decoy's] voice, which I can always hear his voice clearly because he's so close to it. I didn't hear his" [RT 79].

The ALJ summarized the testimony of the clerks, the decoy, and Zigrang, in Findings III-A through III-D. In Findings III-E through III-H, the ALJ found:

"[III-E] Ramirez's testimony is not credible. If, as Ramirez testified, the decoy was 'very loud' when he answered 'Yes' to Ramirez's question, it is difficult to understand how [Sinsomannant], who was behind the counter with Ramirez, and the police officer, who was monitoring the decoy's conversation, did not hear the decoy's alleged response. ¶ [III-F] It is also difficult to understand why the decoy would lie about his age. There was no incentive for him to lie. Moreover, the decoy knew that he was 'wired', and that a police officer could hear any conversation between him and the clerks. The likelihood that the decoy, under these circumstances, would twice lie about his age, once in a 'very loud' manner, is almost nil. ¶ [III-G] And, it is very unlikely that either clerk asked the decoy regarding his age without the police officer hearing it. ¶ [III-H] Therefore, the Administrative Law Judge finds that the neither clerk asked the decoy any question about his age, and that the decoy did not give any answer regarding his age."

Appellants' argument is based entirely on a rejection of the ALJ's credibility determinations. However, the credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The ALJ has the

opportunity to see and hear the witnesses as they testify, and is in a much better position than is this Board to determine whether a witness is credible or not. We will not disturb an ALJ's credibility determination absent a strong showing of abuse of discretion or some other error.

In any case, we believe the record supports the ALJ's determinations. Appellants contend that Zigrang's testimony does not prove anything and should be disregarded. However, Zigrang's testimony that he did not hear the decoy's voice at all and heard no conversation at all, far from being neutral, supports the decoy's testimony. The decoy never said anything to the clerks, so there was nothing for Zigrang to hear.

We agree with the ALJ's reasoning that the decoy had no discernable incentive to lie and, in fact, had a disincentive to lie, since he knew Zigrang was listening.

There is no credible evidence that the decoy answered untruthfully a question about his age, because there is no credible evidence that he was ever asked a question, much less a question about his age.

ORDER

The decision of the Department is reversed.⁴

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

⁴This 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.