

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

AB-8028

File: 20-215867 Reg: 02052824

7-ELEVEN, INC., CAROLEE DASMANN, and RICHARD DASMANN,
dba 7-Eleven # 2133-16777
701 South Elm, Arroyo Grande, CA 93420,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Samuel D. Reyes

Appeals Board Hearing: August 14, 2003
Los Angeles, CA

ISSUED OCTOBER 3, 2003

7-Eleven, Inc., Carolee Dasmann, and Richard Dasmann, doing business as 7-Eleven # 2133-16777 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days for their clerk selling an alcoholic beverage to an 18-year-old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Carolee Dasmann, and Richard Dasmann, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated September 19, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 20, 1988.

Thereafter, the Department instituted an accusation against appellants charging that, on February 18, 2002, appellants' clerk, Michelle Parker (the clerk), sold a six-pack of Mickey's Malt Liquor, an alcoholic beverage, to 18-year-old Zachary Spierling. Although not noted in the accusation, Spierling was working as a minor decoy for the Arroyo Grande Police Department.

An administrative hearing was held on July 11, 2002, at which time documentary evidence was received, and testimony concerning the violation charged was presented. Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged, and appellants had not established an affirmative defense.

Appellants filed a timely appeal in which they raise the following issue: The administrative law judge (ALJ) erred in finding that the appearance of the decoy complied with Department rule 141(b)(2). (4 Cal. Code Regs., § 141, subd. (b)(2).)

DISCUSSION

Appellants contend "the weight of the evidence presented at the hearing" established that the decoy had the maturity, size, and demeanor of an individual 21 years of age or older, thus violating rule 141(b)(2).² They base this contention on the decoy's size (six feet tall) and his experience as a police cadet. Appellants also contend that the ALJ erred in finding that Spierling's appearance complied with the rule,

²This rule provides: "The 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."

both because the decoy's appearance did not comply and because the ALJ based his finding on only the decoy's physical appearance. Appellants refer us to *Circle K Stores, Inc.* (1999) AB-7122, where the Board stated:

[W]hile an argument might be made that when the ALJ uses the term "physical appearance," he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what the ALJ did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.

It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.

The ALJ described the decoy's appearance in Finding of Fact 5:

5. Spierling appeared at the hearing essentially as he had on February 18, 2002. He was 6 feet tall and weighed approximately 140 pounds. His hair was cut short and he had no facial hair. He wore eyeglasses. He wore blue jean pants, a dark sweatshirt over a white tee shirt, and a baseball cap with the legend "Quicksilver."

The ALJ discussed the decoy's appearance in the context of rule 141(b)(2) in the second paragraph of Legal Conclusion 5:

Respondents state that Spierling demonstrated confidence, maturity and poise at the hearing uncharacteristic of a person under 21 years of age, which appearance they deem inconsistent with the requirements of Rule 141(b)(2). Despite these qualities at the hearing, which were indeed visible, and his training and experience as a police cadet, Spierling was still nervous while actually purchasing the alcoholic beverages on February 18, 2002. There is no evidence regarding Spierling's specific behavior or appearance at the licensed premises that would lead to a conclusion the he acted as someone older than 20. On

the contrary, his physical appearance and his clothes were those of a person under 21 years of age under the actual circumstances presented at the licensed premises.

The description of the decoy in Finding of Fact 5 is clearly limited to his physical appearance. In Legal Conclusion 5, the ALJ agreed with appellants that the decoy's "confidence, maturity and poise" were uncharacteristic of a person under the age of 21, and that those qualities "were indeed visible" at the hearing. With this statement, the ALJ appears to say that, at the hearing, the decoy did *not* display the appearance that could generally be expected of a person under the age of 21. The remainder of the paragraph deals with the decoy's appearance at appellants' premises, saying that the decoy was nervous while there, no evidence was presented that he had done anything there that made him appear to be 21 or over, and the decoy's physical appearance and clothes were those of a person under 21 years of age. In other words, Legal Conclusion 5 says that, at the hearing, the decoy's appearance was *not* that of a person under 21 years of age, but at appellants' premises his appearance was that of a person under 21 years of age.

In *The Southland Corporation/Kim* (2000) AB-7267 (ftnt. 2), this Board said:

We are well aware that the rule requires the ALJ to undertake the difficult task of assessing [the decoy's] appearance many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date. A specific finding by the ALJ to the effect that the minor's appearance was substantially the same at both times shows that the ALJ was aware of, and took into consideration, the rule's requirement that the minor's apparent age must be judged as of the time, and under the actual circumstances, of the alleged sale.

In the present case, the decoy's physical appearance and demeanor were substantially the same at the hearing and at appellants' premises. The ALJ found that the decoy appeared at the hearing essentially as he had at appellants' premises, at least with regard to his physical appearance. (Finding of Fact 5.) Although the ALJ notes in Legal Conclusion 5 that the decoy was nervous while at appellants' premises, the decoy testified that he was also nervous at the hearing. [RT 24.]

Just as in *Circle K Stores, Inc.* (1999) AB-7122, we see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy's appearance in reaching the conclusion that the decoy complied with rule 141(b)(2) while at appellants' premises. Given that the decoy did not display the appearance that could generally be expected of a person under the age of 21 at the hearing and that the decoy's appearance was substantially the same at the hearing and at appellants' premises, the logical conclusion is that the decoy did not comply with rule 141(b)(2) when he was at appellants' premises. Nothing in the decision leads us to believe otherwise. Therefore, the decision must be reversed.

ORDER

The decision of the Department is reversed.³

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.