

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

AB-8043

File: 20-215007 Reg: 02053370

7-ELEVEN, INC., and MICA SHIM and WON P. SHIM, dba 7-Eleven #2173-18821
11079 West Olympic Boulevard, Los Angeles, CA 90025,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

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

ISSUED NOVEMBER 4, 2003

7-Eleven, Inc., Mica Shim, and Won P. Shim, doing business as 7-Eleven #2173-18821 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold a six-pack of Corona beer to an 18-year-old police decoy.

Appearances on appeal include appellants 7-Eleven, Inc., Mica Shim, and Won P. Shim, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its 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 an

¹The decision of the Department, dated November 7, 2002, is set forth in the appendix.

unlawful sale of an alcoholic beverage to a minor, a violation of Business and Professions Code section 25658, subdivision (a). An administrative hearing was held on October 3, 2002, at which time oral and documentary evidence was received.

Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale had occurred as alleged, and that appellants had failed to establish a defense under Rule 141.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) The administrative law judge (ALJ) erred in sustaining the Department's objections to questioning of other clerks who sold to the decoy on the night in question; and (2) the decoy lacked the appearance required by Rule 141(b)(2).

DISCUSSION

I

Appellants sought to elicit from another person who sold an alcoholic beverage to the decoy on the night in question his opinion as to the decoy's apparent age, but were prevented from doing so when the ALJ sustained the Department's objection on relevancy grounds. A similar objection was sustained when appellants' store manager was asked his opinion of the decoy's apparent age, and his answer was stricken.

Appellants cite the decision of the Appeals Board in *The Southland Corporation/Rogers* (2000) AB-7030a, in which the Board ruled that the identities of other persons who sold alcoholic beverages to the same decoy during that same decoy operation were properly discoverable. The Board's rationale was as follows:

There is implicit in appellants' argument a basic appeal to fairness in the application of Rule 141. They argue that knowledge of the decoy's experience and actions in other establishments is essential to a meaningful cross-examination, to ensure that the decoy has not confused the transaction in their premises with what occurred in another on the same night or other nights during

the period for which such information was requested.

For example, appellants point out (and the transcripts of almost every minor decoy case that has come to this board confirm) that a decoy will almost invariably visit a number of licensed premises on a single evening, and make purchases at several. The decoy's testimony regarding what occurred with the sellers at those locations where he or she was successful in purchasing an alcoholic beverage is, appellants assert, critical, and the ability to test the veracity and reliability of such testimony crucial. They argue that other clerks who sold to that decoy will be able to offer relevant and admissible evidence of such things as the decoy's physical appearance, mannerisms, demeanor, manner of dress, and as well as other circumstances of the decoy operation, such as timing and sequence, which would assist in their efforts to effect a full and fair cross-examination.

We find appellants' arguments persuasive up to a point. In certain situations we can see some potential value to appellants in the experience of other sellers with the same decoy. The relevance of these experiences, however, sharply dissipates as they become more removed in time from the transaction in question.

The focus of the appellants in that case was on their ability effectively to cross-examine the decoy. The argument did not address, and the Board did not address, the relevancy of the opinions of others concerning the apparent age of the decoy.

On each occasion where an ALJ is called upon to determine the apparent age of a decoy, he must exercise a judgment that necessarily is based upon his own experience. We do not believe the less-than-objective opinions of other sellers will be of such meaningful assistance to an ALJ in making his or her determination of the decoy's apparent age as to warrant the expenditure of time in exploring them or the time consumed in the cross-examination they are likely to provoke.

Appellants' contentions are also defective for other reasons. First, there was no offer of proof by appellants' counsel of what witness Puri's answer would have been, had he been permitted to venture his opinion of the decoy's apparent age, so we do not know what he might have said. Second, witness Shim's testimony, albeit stricken on

relevancy grounds, that he thought the decoy to be "about 20" [RT 74], would certainly not have been helpful to appellants. Thus, appellants cannot demonstrate any prejudice flowing from the ALJ's ruling.

Thus, it is our belief that there is no merit to appellants' claim that they were denied due process by the ALJ's evidentiary rulings.

II

Appellants contend that the decoy lacked the appearance required by Rule 141(b)(2), i.e., that she 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. Appellants say that the decoy's appearance had changed significantly from the night of the incident, and that at the time of the transaction she clearly displayed the appearance of someone over the age of 21.

The ALJ obviously disagreed. He wrote (Findings of Fact VI - X):

The decoy was 5' 2" tall and weighed 125 pounds on April 3, 2002. Her hair was long and combed down. She wore pants, a jacket, and no make-up. Photographs (Exhibits 3 and 4) taken of the decoy on April 3, 2002 show that she displayed the physical appearance which could generally be expected of a person under twenty-one years old.

The decoy was 5'3" tall and weighed 140 pounds on the day of the hearing. Her increases in height and weight, and her shorter hair combed in a bun, did not make her look older or younger. The decoy displayed the physical appearance which could generally be expected of a person under twenty-one years old while she testified.

The decoy spoke softly when she testified, answering many questions with very brief answers. She did not appear nervous, just as she also was not nervous while purchasing the beer at Respondent's store.

The Administrative Law Judge observed the decoy's mannerism, demeanor, poise, and maturity while she testified. Based on this observation, the testimony about the decoy's appearance, and the photographs, the Administrative Law

Judge finds that the decoy displayed the physical appearance which could generally be expected of a person under twenty-one years old when she purchased the beer from Weezer.

The Appeals Board, on too many occasions to count, has said that it will not, in the absence of extraordinary circumstances, question the judgment of the ALJ that the decoy displayed the appearance of a person under 21 years of age. There is no persuasive reason for it to do so here.

The record discloses that when the decoy was asked for identification, she handed the clerk her California driver's license. The license clearly communicated the fact that she was an 18-year-old minor who would not be 21 until 2004. Since the clerk did not testify, we do not know what was in his mind when he sold to her.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.