

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

AB-8059

File: 20-267974 Reg: 02053082

7-ELEVEN, INC., and MOHINDER SINGH JOHAL dba 7-Eleven #2135-21483
14104 Foothill Boulevard, Sylmar, CA 91342,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Richard J. Lopez

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED JANUARY 21, 2004

7-Eleven, Inc., and Mohinder Singh Johal, doing business as 7-Eleven #2135-21483 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days for their clerk having sold a 24-ounce can of Budweiser beer to a 19-year-old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Mohinder Singh Johal, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 10, 1992. On

¹The decision of the Department, dated November 14, 2002, is set forth in the appendix.

June 5, 2002, the Department instituted an accusation against appellants charging that, on or about February 1, 2002, their agent, employee, or servant, Dilawer Singh, sold beer to Eric Ivan Herrera, a person then approximately 19 years of age.

An administrative hearing was held on September 25, 2002, at which time oral and documentary evidence was received. The evidence disclosed, among other things, that Herrera was acting as a decoy for the Los Angeles Police Department. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellants had failed to establish any affirmative defense.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(5) was violated; and (2) Rule 141 (b)(2) was violated.

DISCUSSION

I

Department Rule 141(b)(5) (4 Cal. Code Regs., §141(b)(5)) requires that, following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy must make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages. The failure to do so gives rise to a defense under Rule 141.

Appellants claim there was such a failure in this case. They argue that there was no evidence that the clerk ever reasonably knew or should have known that an identification was taking place. Citing the testimony of Los Angeles police officer Gerald Wert, appellants assert that the clerk was busy talking to Wert's partners at the time of the identification by the decoy, and that the later taking of a photograph of the

decoy and the clerk did not satisfy the requirements of the Board's decision in *Chun* (1999) AB-7287, that "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."

Officer Wert testified that "when we all walked back into the store I asked him ... 'who sold you the beer?' And he pointed at – at the clerk that I had observed through the window sell him the beer." Herrera, the decoy, was 10 to 15 feet from the clerk. The clerk had "probably" started talking to Wert's partners.

Herrera testified that, as he left the store, he was pulled back in and went directly to the counter. One of the officers had just advised the clerk that the person to whom he had just sold the beer was under 21 years of age. Officer Wert then asked Herrera to identify the person who had sold him the beer. Herrera testified that he identified the clerk, and was about five feet away when he did so. A photograph (Exhibit 3) was taken of Herrera and the clerk. Herrera is holding the can of Budweiser and pointing to the clerk.

The clerk did not testify, so appellants' contention that he was unaware he was being identified as the seller because he was talking to police officers is but surmise. When the decoy pointed to the clerk, the two were only five feet apart by the decoy's estimate, and as much as 15 feet according to officer Wert. Given this proximity, we find it difficult to believe the clerk would have been unaware he was being accused as a seller of alcoholic beverages to a minor.

In any event, there was a second identification, and the clerk clearly was not talking to police officers when he was photographed with the decoy. Although

appellants say this identification does not satisfy the requirements of *Chun*, they do not explain why it does not.

The facts of this case are quite similar to those in *Prestige Stations, Inc.* (2001) AB-7764, where the Board rejected an argument much like that made here:

There is no question that the decoy made the identification while within reasonable proximity to the clerk. Her awareness, only minutes earlier, that she had made an unlawful sale, followed by the appearance of the decoy to within six feet of her, is probably sufficient, given her proximity to the decoy, to satisfy both the rule and the Board's interpretation of "face-to-face" in *Chun*.

In *Prestige Stations, Inc., supra*, the Board examined a number of its decisions which addressed the adequacy of the face to face identification, and concluded:

It is clear that the Board believes that the focus must be on the decoy's identification of the seller. That approach reduces to an absolute minimum the possibility that an innocent clerk, one who had no involvement in the transaction, will be falsely accused. And, since the practical requirement of the identification process is to return the decoy to the store shortly after his or her purchase, the likelihood that his or her renewed presence, accompanied by police officers, will go unnoticed by the selling clerk is virtually non-existent.

We believe the statement of the Board in *Greer* (2000) AB-7403 applies equally to this case:

Appellant's argument turns the rule on its head. The minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to be actually aware that the identification is taking place.

II

Appellants assert that the decoy lacked the appearance required by Rule 141(b)(2), i.e., that he 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." Appellants point to the decoy's height and weight (5' 6" and 170 pounds), his prior experience as a decoy (visiting 200 locations, his experience as a

student worker for the City of Los Angeles, and his work in the Captain's office.) They argue that his varied experiences reduced any fear and apprehension he might otherwise have felt, and this lack of nervousness combined with his size and weight would support a conclusion that he appeared to be over 21 years of age at the time of the purchase.

The ALJ considered the same factors as did appellants and reached a conclusion opposite theirs:

On February 1, 2002, Herrera wore blue jeans, running shoes and an oversized sport shirt with a classic *New York Yankees* logo. He then weighed 170 pounds. He is five feet six inches tall. He then had short hair, was clean shaven, wore no jewelry and had no visible tattoos. His appearance was inspected by LAPD Sergeant Younger prior to the operation. At the time of the transaction set forth in Finding 4 Herrera wore a jacket over the sports shirt.

Herrera appeared at the hearing essentially as he appeared on February 1, 2002. He wore blue jeans, running shoes and a *Cardinal (Stanford)* T-shirt. He weighed 165 pounds. He was clean shaven, had short hair, wore no jewelry, and had no visible tattoos.

Prior to February 1, 2002, Herrera had previous experience as a decoy in attempting alcohol purchases in numerous locations. Also prior to that date he had taken courses in the Administration of Justice. Despite that experience and training Herrera, at the hearing, retained the mien and demeanor of a minor. At the hearing he used language and colloquialisms common to his age and he had facial expressions, hand gestures and a gait common to his age. In sum, he displayed the appearance which could generally be expected of a nineteen year old when the transaction occurred.

Appellants are asking the Board to make a factual determination that the decoy lacked the appearance which could generally be expected of a person under the age of 21. They misperceive the Board's role in this appeal. The Board is not a finder of fact. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial

evidence in light of the whole record, and whether the Department's decision is supported by the findings.

The administrative law judge considered relevant factors bearing on the decoy's apparent age, and concluded that Rule 141(b)(2) had been satisfied. Appellants have not persuaded us that he erred in so doing.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
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.