

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

AB-8141

File: 20-214405 Reg: 02053855

7-ELEVEN, INC., CHANDER ALAGH, and PUSHPA ALAGH
dba 7-Eleven #2175-19985
4220 Eagle Rock Blvd., Los Angeles, CA 90065,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: February 19, 2004
Los Angeles, CA

ISSUED MAY 17, 2004

7-Eleven, Inc., Chander Alagh, and Pushpa Alagh, doing business as 7-Eleven #2175-19985 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days for their clerk, Rehana Rahman, having sold a 24-ounce can of Budweiser beer to Joanna Law, a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Chander Alagh, and Pushpa Alagh, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Jessica Brown, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988.

¹The decision of the Department, dated May 1, 2003, is set forth in the appendix.

Thereafter, on October 15, 2002, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor. The accusation did not disclose that the minor had been acting as a decoy for the Los Angeles Police Department.

An administrative hearing was held on April 4, 2003, at which time oral and documentary evidence was received. At that hearing, both David Gomez, the Los Angeles police officer who observed the transaction, and the decoy, testified that the clerk first asked the decoy her age and was told she was 18. The clerk then asked for identification and was shown the decoy's California driver's license. The license showed the decoy's date of birth and contained a red stripe with the legend "21 in 2005."

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) there was no compliance with Rule 141(b)(2); (2) there was no compliance with Rule 141(b)(5); and (3) the decision states, and relies on, facts not established by the record.

DISCUSSION

I

Appellants contend that there was no compliance with Rule 141(b)(2), which requires that a decoy "shall display the appearance which could generally be expected of a person under 21 years of age." Appellants contend that the decoy's experience in at least 50 other decoy operations, her experience as, and the training she received as, a police Explorer, and her calm demeanor gave her an appearance of someone over

the age of 21.

The ALJ made the following findings (Findings of Fact V - VIII) with respect to the appearance of the decoy:

The decoy had been an explorer with the Los Angeles Police Department since November 2000. Prior to May 30, 2002, the decoy had participated in five to ten decoy operations, each time visiting approximately ten licensed premises. There is no evidence that the decoy's experience as an explorer, or as a decoy, made her appear either older or younger, than her age of eighteen when she purchased the beer at Respondents' store.

The decoy was 5'2" tall and weighed 130 pounds on May 30, 2003. She wore a blue short-sleeve shirt, gray jeans, tennis shoes, no jewelry except a watch, and no make-up. A photograph (Exhibit 2) was taken of the decoy and Ms. Rahman that day. The photograph shows that the decoy displayed the physical appearance which could generally be expected of a person under twenty-one years old.

The decoy was 5'2" tall and weighed 130 pounds on the day of the hearing. She appeared very similar to the photograph of her taken on May 30, 2002. While testifying, the decoy spoke softly and appeared a little nervous. She was not nervous while purchasing the beer at Respondents' 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 photograph, the Administrative Law Judge finds that the decoy displayed the appearance which could generally be expected of a person under twenty-one years old when she purchased the beer from Ms. Rahman.

The ALJ observed the decoy as she testified, and, as is apparent from his findings, carefully considered the criteria this Board has said are important in assessing the apparent age displayed by the decoy. (See, e.g., *Circle K Stores, Inc.* (1999) AB-7122.) There is no reason this Board, which has seen only a photograph of the decoy, should attempt to second-guess the trier of fact on an issue where the opportunity to see and hear the person is critical in the application of the rule.

We note in passing that the clerk made the sale only after the decoy told her she was 18, and only after the decoy displayed a driver's license which also showed that

she was only 18. The clerk did not testify, so we can only speculate on why she acted as she did.

II

Appellants contend that there was no compliance with Rule 141(b)(5), claiming that, as the decoy identified the clerk as the seller, the clerk's attention was focused on the police officer who was questioning her. Thus, assert appellants, the identification did not meet the standard set by the Board in its decision in *Chun* ((1999) AB-7287.

Rule 141(b)(5) requires that, following a completed sale to a decoy, the police officer directing the decoy "shall 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."

In *Chun, supra*, the Board offered a definition of "face to face," as used in Rule 141(b)(5):

The phrase "face to face" means that the two, 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.

The record in *Chun* was less than clear in establishing the circumstances of the identification process, and there was considerable uncertainty as to where the decoy had been when he pointed out the alleged seller. In this case, the opposite is true.

We do not read the phrase "acknowledging each other's presence" to require some affirmative manifestation by the seller that he or she is aware that the decoy is accusing them of having made the sale in question. Instead, we think it sufficient that the circumstances of the identification process be such as to lead an objective observer to conclude that the two parties to the identification knew or should reasonably have

known what was occurring. The facts of this case clearly meet that standard.

In this case, David Gomez, one of the police officers present when the identification was made, testified that the decoy pointed to the clerk as the seller from a distance of only five or six feet. The decoy and the clerk were facing each other, as the questioning of Gomez by the ALJ [RT 30-31] reveals:

The Court: Now, this face to face identification of the seller, did it take place at the counter?

The Witness: Yes.

The Court: Was the clerk on the clerk side of the counter – well, tell me where each one was, and how they were standing in relation to each other?

The Witness: I can't recall if she was behind the counter or in front of the counter. I do know the male clerk was behind the counter, because that was the first time I had seen him. And I know Joanna Law [the decoy] was standing in front of me. I can't recall if she's standing on the inside or the outside of the counter.

The Court: All right. In what direction was the clerk facing?

The Witness: Facing the front door.

The Court: What direction was the decoy facing when she made the identification?

The Witness: She had just walked in the door and was facing the clerk.

Appellants argue that there is no evidence that the clerk was aware of any identification. The clerk did not testify, so appellants' contention is, itself, unsupported by any evidence. Given uncontradicted testimony that the identification took place from a distance of five or six feet while the decoy and the clerk were facing each other, we find the likelihood that it would have escaped the attention of the clerk virtually non-existent.

Appellants' argument that there is no evidence the clerk was aware she was

being accused ignores the testimony of the decoy [RT 38-39] describing the interchange between her and the clerk as the identification process was occurring:

Q. What happened when you got back in there.?

A. Officer Thompson asked who the person was who sold me the beer. And I said it was her.

Q. What happened after you pointed to the lady?

A. I was asked to go to the side to get my picture taken with her along with the beer.

Q. How far away from the clerk were you when you pointed at her?

A. About five to six feet.

Q. What was the clerk doing when you pointed at her?

A. She actually looked over when I pointed at her and said that was her. And then she said – as soon as I said that she – and I quote her – she said “She is 18.

Realizing that she said I was 18, she said, “No, no, I meant she’s 20.” So – actually she said, “She’s 21.” That’s when she said that.

Q. So she made those statements when you pointed at her?

A. Yes.

It is overwhelmingly clear that the clerk knew she was being accused of having sold to a minor and knew who the minor was. Any contention to the contrary is lacking in merit.

III

Appellants’ final contention is that there is no evidence in the record to support Finding of Fact IV that the decoy and the clerk were facing each other.

Finding IV, in its entirety, reads as follows:

After paying for the beer, the decoy exited the store with it. She then reentered the store and was asked by Los Angeles Police Officer Lawrence Thompson to

identify the person who sold the beer to her. The decoy pointed to Ms. Rahman and said, "She's the one who sold me the beer," or words to that effect. During the identification the decoy stood approximately five to six feet from the clerk, separated by the counter. The two were facing each other. The decoy's identification of Ms. Rahman as the seller of the beer was in compliance with the Department's Rule 141(b)(5). After the identification was made, a citation was issued to Ms. Rahman.

We disagree with appellant's contention that there is no evidence the decoy and the clerk were facing each other when the decoy identified her as the seller.

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The rule just stated is equally applicable where, as here, the evidence is not in conflict. Officer Gomez testified that the clerk was facing the door to the premises, and the decoy had just walked in the door and was facing the clerk. Further, the decoy herself testified that, when she pointed to the clerk, the clerk "looked over," and then attempted, somewhat awkwardly, to claim the decoy was 21. The testimony of either the officer or the decoy by itself is sufficient to support the challenged finding. In combination, they demonstrate that appellants' contention borders on the frivolous.

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.