

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

AB-8216

File: 20-225864 Reg: 03055279

7-ELEVEN, INC., MYUNG S. BYUN, and TAI Y. BYUN
dba 7-Eleven Store 2171-29685
1845 Hamner Avenue PE, Norco, CA 92860,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 4, 2004
Los Angeles, CA

ISSUED JANUARY 7, 2005

7-Eleven, Inc., Myung S. Byun, and Tai Y. Byun, doing business as 7-Eleven Store #2171-29685 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days for their clerk, Yong Un Lee, having sold a 16-ounce can of Budweiser beer to Nicholas Hutchins, an 18-year-old minor decoy working with the Riverside County Sheriff's Department, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Myung S. Byun, and Tai Y. Byun, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated December 4, 2003, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 24, 1989. The Department instituted an accusation against appellants on June 24, 2003, charging the unlawful sale on February 21, 2003, of an alcoholic beverage to a minor.

An administrative hearing was held on October 17, 2003. 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 an affirmative defense under Rule 141.

Appellants have filed a timely appeal, contending that there was no compliance with Rule 141(b)(2).

DISCUSSION

Rule 141 (b)(2) requires that a decoy display an appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller. Appellant questions the administrative law judge's (ALJ's) finding that the decoy displayed such an appearance, and argues that the decoy's training, experience, and size (5' 11" tall and weighing 200 pounds) would have made him appear to the clerk at the time of the sale differently than to the ALJ at the time of the hearing. Thus, argues appellant, the ALJ should have acknowledged in his finding the distinction between the apparent age of the decoy at the time of the decoy operation in contrast to the decoy's appearance at the hearing.

The ALJ found as follows with regard to the apparent age of the decoy:

D. The overall appearance of the decoy, including his demeanor, his poise, his size, his mannerisms and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation.

1. *The decoy is a youthful and chubby looking male who has a baby face. On the day of the sale he was approximately five feet eleven inches in height and he weighed two hundred pounds. On that date he was essentially clean-shaven even though he may have had some slight facial hair and his clothing consisted of blue jeans and a green pullover shirt with long sleeves.*
2. *The decoy testified that he has been an Explorer with the Riverside County Sheriff's Department since December of 1998, that he attended a one-week Explorer academy, that he had participated in one prior decoy operation and one prior shoulder tap operation and that he was not nervous at the time of the sale.*
3. *The photograph depicted in Exhibit 2 was taken inside the premises on the night of the sale and it depicts how the decoy appeared and what he was wearing when he was at the premises.*
4. *After considering the photograph taken inside the premises (Exhibit 2), the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.*

It is noteworthy that the ALJ believed the decoy was youthful and chubby in appearance, and had a "baby face." While a decoy's physical appearance is not controlling, it may, in certain cases, weigh heavily in an ALJ's evaluation of his or her apparent age. This appears to be a case where some of the decoy's physical features outweighed others.

7-Eleven, Inc./Dianne Corporation (2002) AB-7835, cited by appellant, is nothing like this case. There, the decoy succeeded in purchasing an alcoholic beverage in eight of the ten premises he visited, and that degree of success, combined with other aspects of the decoy's appearance, led the Board to fault the Department's decision.

The ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies. We are not in a position to second-guess his evaluation of the decoy.

From all we can tell, this is a typical Rule 141(b)(2) case. The clerk chose not to ask for identification, and his mistake was costly. As this Board noted in *Prestige Stations, Inc.* (2000) AB-7248, “ A buyer cannot escape liability by employing clerks unable to make a reasonable judgment as to a buyer’s age.”

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.