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

AB-8251
File: 20-379957 Reg: 02053185

7-ELEVEN, INC., and CONVENIENCE GROUP, INC. dba 7-Eleven Store #2173-24078
1699 West Carson Street, Los Angeles, CA 90019,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 2, 2004
Los Angeles

ISSUED JANUARY 28, 2005

7-Eleven, Inc., and Convenience Group, Inc., doing business as 7-Eleven Store #2173-24078 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Mohammad Rahman, having sold a can of Budweiser beer to Matthew Phelps, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Convenience Group, Inc., appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

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[1]The decision of the Department, dated February 11, 2004, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 19, 2001. The Department instituted an accusation against appellants on June 20, 2002, charging the sale of an alcoholic beverage to a minor on May 8, 2002.

An administrative hearing was held on December 30, 2003. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellants failed to establish any defense to the charge.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) there was no compliance with Rule 141(b)(2)[2]; (2) there was no compliance with Rule 141(b)(5).[3]

DISCUSSION

I

Appellants contend that the decoy displayed an appearance of a person over 21 years of age. They point to what they call "his considerable law enforcement experience" (he served as an Explorer Scout beginning when he was 14 and continuing

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[2] Rule 141(b)(2) 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.

[3] Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace 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 alcoholic beverages.

until he was 18), and they argue that the maturity he acquired in that capacity was that of a "sworn law enforcement officer" at the time of the incident.

This is another of the so many cases that have been brought to the Appeals Board by licensees asking this Board to substitute its judgment for that of the administrative law judge (ALJ) as to whether the decoy displayed the appearance required by Rule 141(b)(2). With rare exception, the Board has declined to do so. The Board never sees the decoy, except, perhaps, in a photograph, and has only the cold record upon which to assess his appearance. On the other hand, the ALJ sees the decoy in the flesh for more than a few minutes, hears his testimony, and gauges how he handles cross-examination, so is in a far superior position to determine whether he meets the standard of the rule.

Judge Lo described the decoy in considerable detail (see Finding of Fact VI):

> The decoy was 5' 8" and weighed 180 pounds on May 8, 2002. He wore a blue T-shirt, blue jeans, and no jewelry. He was clean-shaven. His hair was cut short. A photograph (State's Exhibit 2) of the decoy with Rahman, taken on May 8, 2002, shows that the decoy appeared under twenty-one years old.
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> The decoy was not nervous while in Respondents' store. Contrary to Respondents' argument, there is no evidence that this lack of nervousness made the decoy appear twenty-one years old, three years older than his actual age. If anything, the decoy on May 8, 2002 appeared like an eighteen-year old young man who was not nervous while buying a can of beer.
>
> The decoy had been a police explorer since he was fourteen years old. It is his dream to be a Los Angeles police officer.
>
> The decoy was 5' 8" and weighed 170 pounds on the day of the hearing. He had some facial hair. Despite the facial hair, and the fact that more than nineteen months had passed since the evening of the decoy operation, the decoy at the hearing appeared very similar to the photograph of him taken on May 8, 2002. The ten-pound difference was not noticeable.
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> The Administrative Law Judge observed the decoy's demeanor, mannerism, and poise while the decoy testified. Taking into consideration that observation, the photograph of the decoy with Rahman, and the testimony about the decoy's

> appearance on May 8, 2002, 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 he purchased the beer from Rahman.

Appellants do not identify what about the decoy's "law enforcement experience" it was which would have led the clerk to believe it was unnecessary to ask his age or for identification. The decoy testified that, as an Explorer Scout, he did such things as attend an academy, learn radio codes and an "alpha/kinetic alphabet," close off streets for parades, and go on more than 20 ride-alongs. Although the ALJ did not specifically address these things, we cannot assume he did not consider them.

We see no reason to disagree with Judge Lo's finding that there was compliance with Rule 141(b)(2)

II

Appellants premise their challenge to the finding that there was compliance with Rule 141(b)(5) on the assertion that the ALJ failed to explain how he determined that the clerk reasonably knew he was being accused and pointed out as the seller. Appellants quote from *Chun* (1999) AB-7287, where the Board stated:

> 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.

Appellants point to the decoy's testimony that the clerk appeared stunned, and did not appear to recognize him. They say the clerk's behavior was not consistent with that of an individual who knows he is being accused and pointed out as the seller. They assert that there is no logical explanation for the ALJ's conclusion that the clerk knew the decoy identified him as the seller.

We think appellants have placed far too much weight on the decoy's impression of what the clerk may have been feeling as he was identified. No doubt, the emergence of two police officers accompanied by the decoy may have startled the clerk, but it is mere speculation that the clerk would not have known that he had been accused of selling beer to a minor.

The decoy testified that he first identified the clerk as the seller from a distance of eight or ten feet. He further testified that he identified him a second time as the two posed for a photograph (Exhibit 2), the decoy holding the beer he had purchased. We are not persuaded that the clerk, who did not testify, could have been unaware that he had been accused of selling to a minor.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] 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.