

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

AB-8831

File: 20-284495 Reg: 07066303

7-ELEVEN, INC., and RIGA and TAWAB AMIR, dba 7-Eleven #2111-21795
1595 East Vista Way, Vista, CA 92084,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 3, 2009
Los Angeles, CA

ISSUED NOVEMBER 23, 2009

7-Eleven, Inc., and Riga and Tawab Amir, doing business as 7-Eleven #2111-21795 (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 Coors Light beer to Sarah Raifsnider, a 17-year-old sheriff's decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Riga and Tawab Amir, appearing through their counsel, Ralph B. Saltsman, Steven W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

¹The decision of the Department, dated February 11, 2008, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1994.

Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage by an employee to Sarah Raifsnider, a person under the age of 21. Although not stated in the accusation, Raifsnider was acting as a decoy for the San Diego County Sheriff's Department.

An administrative hearing was held on October 4, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented. Subsequent to the hearing, the administrative law judge (ALJ) found that the violation had been proved, and that appellants had failed to establish any affirmative defense. The proposed decision was adopted by operation of law after the Department failed to take any action with respect to that decision within 100 days of its delivery.

Appellants filed a timely notice of appeal in which they contend that the ALJ relied on a factor not presented to the seller in determining that the decoy displayed the appearance required by Rule 141(b)(2).²

DISCUSSION

Appellants contend that the ALJ, in assessing the decoy's appearance, concluded that she appeared young because "she was *soft-spoken* and looked and *sounded* like a typical teenager." This was improper, they say, because the evidence establishes that she never spoke to the clerk. Therefore, the clerk would not have known she was soft-spoken, and it was error to consider it as an aspect of her

² 4 Cal. Code Regs. §141, subd. (b)(2)

appearance in determining whether there was compliance with Department Rule 141(b)(2).

The Department contends that the ALJ considered a number of factors relating to the decoy's physical appearance and demeanor, and his reference to the fact she was soft-spoken is irrelevant.

Although we cannot agree with the Department that reference to the decoy's manner of speaking is irrelevant, we do agree that the ALJ did not commit error by referring to it. A person's manner of speaking is an aspect of the appearance that person projects, and it is no surprise that the ALJ would have referred to it after he heard her testimony. As we read his findings, however, we cannot agree with appellants that he placed any significant weight on the decoy's manner of speaking, enough to tip the balance on his overall assessment.

The ALJ described the decoy in Finding II-D:

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

1. The decoy is a youthful looking young lady who is five feet seven and one half inches in height and who weighs one hundred thirty-five pounds. On the day of the sale, the decoy was not wearing any makeup and the only jewelry she was wearing consisted of a Llama hair bracelet. Her clothing consisted of blue jeans, a black short sleeve T-shirt with a colorful design on it, a green long sleeve shirt under the T-shirt and casual shoes. The photograph depicted in Exhibit 5 was taken at the premises and the photographs in Exhibits 2 and 3 were taken before going out on the decoy operation. These photographs show how the decoy looked and what she was wearing on the day of the sale.

2. The decoy had participated in approximately three to four prior decoy operations. The decoy testified that she volunteered to be a decoy, that she was not paid to be a decoy, that she felt comfortable performing her duties as a decoy and that she was not nervous when she was [] at the premises.

3. The decoy was soft-spoken and she looked and sounded like a typical teenager.

4. After considering the photographs depicted in Exhibits 2, 3 and 5, the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the exact circumstances presented to the seller at the time of the alleged offense.

As is apparent, the decoy's manner of speaking was only one facet of the decoy's appearance considered by the ALJ. But even if viewed as if it were given weight, the ALJ did not commit error. The appellants' position is premised on their contention that the evidence shows she never talked to the clerk. We reach a conclusion opposite that in our reading of the record.

Two questions asked the decoy on direct examination bear on whether the decoy spoke to the clerk. All they show is that the clerk did not ask the decoy any questions about her age or for her date of birth. (R.T. 15.) Nowhere in the transcript is there definitive evidence that the decoy said nothing at all to the clerk in the course of the transaction. If appellants are to establish the affirmative defense provided by Rule 141(b)(2), they must have some evidence to support the premise on which that defense is based. They had none.

It is not enough to say, as did appellants, that "there is no evidence that the minor decoy ever spoke to the clerk." One could also say, "where is the evidence the decoy did not speak to the clerk?" We would be, and are, unwilling to reverse a decision where the question whether the decoy spoke or did not speak to the clerk so that he could have heard her voice cannot be answered. Proof that the decoy did not speak was part of appellants' burden, and that burden was not met.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ 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.