

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

AB-8871

File: 20-436960 Reg: 07066295

7-ELEVEN, INC., and SATWANT SINGH DHAMI, dba 7-Eleven 2237-18872D
1784 West Shaw Avenue, Fresno, CA 93711,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 2, 2009
San Francisco, CA

ISSUED: DECEMBER 1, 2009

7-Eleven, Inc., and Satwant Singh Dhami, doing business as 7-Eleven 2237-18872D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold an alcoholic beverage to a 17-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 Satwant Singh Dhami, appearing through their counsel, Ralph B. Saltsman, Steven W. Solomon, and Alicia Ekland, and the Department of Alcoholic Beverage Control, appearing through its

¹The decision of the Department, dated April 4, 2008, is set forth in the appendix.

counsel, Heather Hoganson.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 27, 2004. The Department instituted an accusation against appellants on July 13, 2007, charging the sale of an alcoholic beverage to a minor on June 14, 2007.

An administrative hearing was held on March 11, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented. The decoy was the only witness. She testified that she selected a six-pack of Coors Light beer and took it to the counter. When asked for identification, she handed the clerk her ID, which showed her true date of birth. The clerk scanned the ID through the register several times, then pressed buttons on the register and sold her the beer.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged, and appellants had failed to establish any affirmative defenses under Rule 141.

Appellants filed a timely notice of appeal in which they contend there was no compliance with Rule 141(b)(5), and that the decision lacks a factual basis for its finding that Rule 141(b)(5) was not violated. These two contentions are related, and will be addressed as a single issue.

DISCUSSION

Where there is no evidence in the record as to whether there was a face-to-face identification following the sale, has a violation of Rule 141(b)(5) been established?

The answer is no.

The decoy was not asked by either the Department's or the licensee's counsel whether there was such an identification, and the decoy did not say whether or not she had identified the clerk after the sale. She did testify, however, that after leaving the store with her purchase, she reentered the store accompanied by one of the police officers.

The Department's position, supported by a number of Board decisions, is that the rule establishes an affirmative defense, and the burden is on the licensee to prove that there was no face-to-face identification. (See, e.g. *7-Eleven, Inc./Gill* (2004) AB-8094; *Kang* (2005) AB-8265; and see *Chang* (2001) AB-7555.)

Appellants rely on *Acapulco Restaurants, Inc. v. Department of Alcoholic Beverage Control et al.* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126]. That case is readily distinguishable. There was no dispute there that a face-to-face identification by the decoy had not taken place. The court simply held that the Department was required to follow its own rules. The identification of the seller by one of the police officers did not comply with the rule's requirement that the face to face identification be made by the decoy. The court did not address the issue of whose burden it was to establish that a proper face-to-face identification had or had not been made.

In this case, there was evidence that the decoy reentered the premises after having made the purchase. However, the decoy was not asked whether a face to face identification was made. With the burden of proof on appellants, and no evidence on

the issue, it necessarily follows that appellants failed to establish the affirmative defense.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.