

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

AB-8970

File: 20-394384 Reg: 08068688

7-ELEVEN, INC. and RAMNEEK SINGH TUNG,
dba 7-Eleven #13647
8300 Parkway Drive, La Mesa, CA 91942,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: March 3, 2011
Los Angeles, CA

ISSUED APRIL 26, 2011

7-Eleven, Inc. and Ramneek Singh Tung, doing business as 7-Eleven #13647 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Ramneek Singh Tung, appearing through their counsel, Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

¹The decision of the Department, dated November 13, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 6, 2003. On May 15, 2008, the Department filed an accusation against appellants charging that, on November 16, 2007, appellants' clerk, Dalbir Singh Tung (the clerk), sold an alcoholic beverage to 19-year-old Trevor Spencer Davies. Although not noted in the accusation, Davies was working as a minor decoy for the La Mesa Police Department at the time.

At the administrative hearing held on September 11, 2008, documentary evidence was received and testimony concerning the sale was presented by Davies (the decoy) and by Claudia McDaniel, a La Mesa police officer. Miguel A. Rios, a Department Investigator, and Ramneek Singh Tung, one of the licensees, also testified.

The Department's decision determined that the violation charged was proven and no defense to the charge was established.

Appellants then filed an appeal contending: (1) They were prevented from introducing evidence that would show that the decision is the product of an underground regulation, and (2) the decoy did not display the appearance required by Rule 141(b)(2).²

DISCUSSION

I

Appellants contend that the decision is the product of an underground regulation, a policy governing discipline in first strike minor cases, and that they were prevented from introducing evidence that would show that such an underground regulation existed.

²References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations and to the various subdivisions of that section.

The issue raised by appellant is no stranger to this Board. In fact, since it was raised in embryonic form in 2009 (see *Cirrus Investments* (2009) AB-8766), it has been addressed by the Board at least 16 times,³ and rejected each time.

There is nothing said in appellants' brief, and nothing raised in oral argument, that has not been said in one form or another in the matters cited in the footnote. This appeal is equally lacking in merit.

II

Appellants contend secondly that the decoy did not display the appearance required by Rule 141(b)(2) which dictates: “[t]he 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.”

In the instant case, the administrative law judge (ALJ) made the following findings of fact about the decoy's appearance (FF-D):

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 and on the day of the decoy operation was similar except that he was approximately ten pounds heavier, his hair was a little shorter and he had not shaved on the day of

³ *Cirrus Investments* (March 12, 2009) AB-8766; *Randhawa* (May 19, 2010) AB-8973; *Yummy Foods LLC* (July 22, 2010) AB-8950; *7-Eleven, Inc./Del Rosario* (August 4, 2010) AB-8786; *7-Eleven, Inc./Raqba, Inc.* (August 5, 2010) AB-8988; *Chevron Stations, Inc.* (August 9, 2010) AB-8996; *7-Eleven, Inc./Solanki* (August 9, 2010) AB-9019; *Murshed (August 9, 2010) AB-9073; Wong* (August 18, 2010) AB-8991; *7-Eleven, Inc./Triplett* (September 15, 2010) AB-8864; *7-Eleven, Inc./Salem Enterprises* (September 21, 2010) AB-8965; *Sharmeens Enterprises, Inc.* (October 25, 2010) AB-8782 (review denied November 5, 2010); *7-Eleven, Inc./Maldiv Associates* (December 7, 2010) AB-8951; *7-Eleven, Inc./Aziz* (December 9, 2010) AB-8980; *7-Eleven, Inc./Ghuman & Sons, Inc.* (December 9, 2010) AB-8910; *Sharmeens Enterprises, Inc.* (December 9, 2010) AB-8781.

the hearing.

1. The decoy is a youthful looking male who is tall and lanky. He is five feet eleven inches in height and he weighed between one hundred forty and one hundred fifty pounds on the day of the sale. On that day, he was clean-shaven, his hair was short and his clothing consisted of blue jeans, a brown T-shirt and black shoes. He was also wearing glasses which were very similar to the glasses he wore to the hearing.

2. The decoy testified that he had not participated in any prior decoy operations, that he is not a cadet or an Explorer, that he volunteered to be a decoy and that he was nervous at the premises because it was his first decoy operation.

3. The decoy was soft-spoken, he swivelled in his chair while testifying and he appeared to be nervous.

4. The photograph depicted in Exhibit 2 was taken inside the premises on the day of the sale and the photographs depicted in Exhibits 3 and 4 were taken at the La Mesa Police Department before going out on the decoy operation. These photographs depict how the decoy appeared and what he was wearing when he was at the premises.

5. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him appear older than his actual age.

6. After considering the photographs depicted in Exhibits 2, 3 and 4, 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.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he possessed 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.

We are not in a position to second-guess the trier of fact, especially where all we

have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

The fact that this decoy was a few months shy of his 20th birthday, and that a 20-year-old individual “can and often does look older than the age of 21” (AOB p. 14) does not convince us that *this* decoy’s appearance failed to comport with the requirements of rule 141.

The rule, through its use of the phrase “could generally be expected” implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy’s appearance is one which *could* generally be expected of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age.

The factual determination of the ALJ is determinative in this case.

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.