

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

AB-8980

File: 20-214961 Reg: 07065403

7-ELEVEN, INC., and USMAN AZIZ, dba 7-Eleven # 2171-17642
65971 Pierson Drive, Desert Hot Springs, CA 92240,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: November 4, 2010
Los Angeles, CA

ISSUED DECEMBER 9, 2010

7-Eleven, Inc., and Usman Aziz, doing business as 7-Eleven # 2171-17642 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, with all 10 days stayed pending completion of a one-year probationary period, 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 Usman Aziz, appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

¹The decision of the Department, dated December 3, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 6, 1988. On March 29, 2007, the Department filed an accusation against appellants charging that their clerk sold an alcoholic beverage to 18-year-old Brittany Henson on December 29, 2006. Although not noted in the accusation, Henson was working as a minor decoy for the Desert Hot Springs Police Department at the time.

At the administrative hearing held on September 30, 2008, documentary evidence was received and testimony concerning the sale was presented by Henson (the decoy) and by the clerk. Appellants requested a continuance because the Department's District Administrator did not appear at the hearing in spite of being subpoenaed. The Department moved to quash the subpoena. The administrative law judge (ALJ) denied the continuance and quashed the subpoena.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. Appellants then filed an appeal contending: (1) The ALJ erroneously prevented appellants from presenting evidence that the Department used a prohibited underground regulation in determining the penalty to be imposed, and (2) the decision failed to analyze the decoy's "success rate" with regard to its effect on her apparent age.

DISCUSSION

I

Appellants contend that they were prevented from presenting evidence regarding the Department's use of an underground regulation in determining the penalty because the ALJ granted the Department's motion to quash the subpoena served on the District Administrator.

The Board has addressed and rejected this argument before. (See, e.g., *Yummy Foods LLC* (2010) AB-8950; *Randhawa* (2010) AB-8973; *Chevron Stations, Inc.* (2010) AB-8974; *7-Eleven, Inc./ Wong* (2010) AB-8991; *7-Eleven, Inc./ Solanki* (2010) AB-9019.) Even if the District Administrator testified as the offer of proof said he would, that testimony would not establish that an underground regulation existed. The ALJ was entitled to exclude this evidence, as its probative value would undoubtedly be outweighed by the undue consumption of time. (Gov. Code, § 11513, subd. (f); Code Civ. Proc., § 352.)

II

Appellants contend that the ALJ committed reversible error by failing to discuss the decoy's ability to purchase alcohol in three of the four licensed premises she visited during the decoy operation. The decoy's "success rate," appellants argue, must be included in the ALJ's determination of the decoy's apparent age at the time of the illegal sale.

Appellants rely on the Board's decision in *7-Eleven, Inc./Dianne Corporation* (2002) AB-7835 (*Dianne*), in which the Board said that the decoy's 80-percent purchase rate was a "strong indication" that the decoy's appearance did not comply with rule 141(b)(2). However, they neglect to consider the Board's more recent decision in *7-Eleven/Jain* (2004) AB-8082, in which the Board made clear that *Dianne, supra*, did not signify that an 80-percent purchase rate would inevitably result in finding noncompliance with rule 141(b)(2). "Such a per se rule would be inappropriate, since the sales could be attributable to a number of reasons other than a belief that the decoy appeared to be over the age of 21." (*Ibid.*)

The failure to discuss this contention would not constitute error, much less reversible error, if there had been such a failure.

[A]n opinion is not a brief in reply to counsel's arguments. (*Holmes v. Rogers* [(1859)] 13 Cal. [191] at p. 202.) In order to state the reasons, grounds, or principles upon which a decision is based, the court need not discuss every case or fact raised by counsel in support of the parties' positions.

(*Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1263 [970 P.2d 872; 82 Cal.Rptr.2d 85].)

However, contrary to appellants' contention, the ALJ did discuss this argument in

Conclusions of Law 5:

Respondent[s] argued that the accusation should be dismissed because the decoy appeared to be over the age of 21 in violation of Rule 141 (b) (2). As support to [their] argument Respondent[s] point] to the fact that decoy Henson was able to purchase beer at three of the four stores she visited. This argument is rejected. Henson appeared her true age. (Findings of Fact, ¶¶ 4 through 10.) The "success rate" or "hit rate" of 75 per cent is a factor to be considered when determining the apparent age of the decoy. In this instance the number of stores visited is very small. The "success rate" was given due consideration but it does not outweigh all of the other evidence in this case which clearly indicate[s] that Henson appears her true age.

In the present case, the clerk said to the decoy, "I should ask you for ID but I'm not going to." (Findings of Fact 6.) The reasonable inference from this statement is that the clerk believed the decoy to be under the age of 21, but chose to sell her alcohol regardless of that belief.

After observing the decoy at the hearing, the ALJ determined that she appeared to be under the age of 21, and appellants have not shown any reason why this Board should question that determination.

ORDER

The decision of the Department is affirmed.²

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

²This 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.