

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

AB-9109

File: 21-215343 Reg: 09071905

7-ELEVEN, INC., and BROWN & ASSOCIATES, INC.,
dba 7-Eleven #2173-16226
1400 Westwood Boulevard, Los Angeles, CA 90024,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: June 2, 2011
Los Angeles, CA

ISSUED JULY 19, 2011

7-Eleven, Inc., and Brown & Associates, Inc., doing business as 7-Eleven (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, all stayed, 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 Brown & Associates, Inc., appearing through their counsel, Ralph B. Saltsman and Sohey! Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on July 1, 1988. The Department

¹The decision of the Department, dated April 21, 2010, is set forth in the appendix.

instituted an accusation against appellants on September 23, 2009, charging that on July 17, 2009, appellants' clerk, Gildardo Maldonado (the clerk), sold an alcoholic beverage to 18-year-old Salvador Sanchez. Although not noted in the accusation, Sanchez was working as a minor decoy for the Los Angeles Police Department at the time.

An administrative hearing was held on March 3, 2010, at which time documentary evidence was received, and testimony concerning the sale was presented by Sanchez (the decoy) and by Thomas Datro, a Los Angeles police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal making the following contentions: (1) Rule 141(b)(2)² was violated; and (2) the Department failed to account for all mitigating evidence presented at the hearing.

DISCUSSION

I

Appellants contend that decoy Sanchez lacked the appearance required by Rule 141(b)(2).

Rule 141(b)(2) requires that a law enforcement 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."

Appellants say that decoy Sanchez had the physical appearance and demeanor of a man well above his actual age, with a very adult and militaristic appearance and a

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.

mature demeanor. They attribute his adult-like demeanor to training he supposedly received as a police Explorer. Although it is true that Sanchez testified that he was an Explorer, he did not say how long he had been one, nor what training he received.

The administrative law judge (ALJ) addressed the decoy's appearance in Findings of Fact 5 and 8, and Conclusion of Law 5:

- FF 5. Sanchez appeared and testified at the hearing. When he visited the Licensed Premises he was 5 feet, 8 inches tall and weighed 160 pounds. His height and weight on the day of the hearing were the same. At the time of the sale he was wearing a gray New York t-shirt, black pants which came to a point slightly below his knee, and tennis shoes. His hair was short, having been cut with a number zero blade, and he was clean shaven. At the hearing his hair was only slightly longer, having been cut with a number one blade. (Exhibits 2-3.)
- FF 8. Sanchez appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Maldonado at the Licensed Premises on July 17, 2009, Sanchez displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Maldonado.
- CL 5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2) ... As such, rule 141(c) should apply and the accusation should be dismissed. Specifically, the Respondents argued that, although Sanchez was youthful in speech, his physical appearance was that of a more mature person. This argument is rejected. As set forth above, Sanchez had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶ 8.)

As we have observed many times, the ALJ has the opportunity to view the decoy while he testifies, and this Board does not. The ALJ's determination is one of fact, and in the absence of any evidence that the ALJ utilized an improper standard, we must affirm.

II

Appellants contend that the ALJ failed to account for all the mitigating evidence presented at the hearing. They say that the Department did not consider their success in prior decoy operations.

The ALJ imposed a suspension of 10 days, and stayed all ten days of the suspension, acknowledging appellants' arguments for an all-stayed penalty based on the training provided their employees and their 21 years of discipline-free license history.

Appellants' success in prior decoy operations is really a product of the training provided by appellants. Rewarding this as a separate mitigating factor would appear to be redundant.

At the close of the hearing, the Department asked for a 15-day suspension. Appellants argued that, if the ALJ found a violation, the evidence in mitigation warranted an all-stayed penalty. That is what they got.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
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.