

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

AB-9118

File: 20-353475 Reg: 09072010

7-ELEVEN, INC. and ADAM ALI SAID, dba 7-Eleven No. 2121-13659F
5202 El Cajon Boulevard, San Diego, CA 92115,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 5, 2011
Los Angeles, CA

ISSUED JUNE 15, 2011

7-Eleven, Inc. and Adam Ali Said, doing business as 7-Eleven No. 2121-13659F (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, all of which were stayed on the condition that appellants complete one year of discipline-free operation, for their clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Adam Ali Said, appearing through their counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated June 3, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 8, 1999. The Department filed an accusation charging that appellants' clerk sold an alcoholic beverage to 19-year-old Janetnely Filares on May 28, 2009. Although not noted in the accusation, Filares was working as a minor decoy for the Department at the time.

At the administrative hearing held on April 7, 2010, documentary evidence was received and testimony concerning the sale was presented by Filares (the decoy) and by Department investigator Earle Lyons.

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 that rules 141(a) and 141(b)(2)² were violated.

DISCUSSION

In their brief, appellants contend the decoy operation did not comply with rule 141(a), which requires that decoy operations be conducted "in a fashion that promotes fairness," because the decoy's appearance violated rule 141(b)(2)," and thus "could have misled any reasonable clerk." (App. Opening Br. at p. 6.)

Rule 141(a) states:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Rule 141(b)(2) requires that a decoy "display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented

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.

to the seller of alcoholic beverages at the time of the alleged offense." Rule 141(c) provides that "[f]ailure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code Section 25658."

In their brief, appellants pointed out the decoy's use of eyeliner, mascara, and eye shadow and the wearing of a ring on her right ring finger, "features and attributes" they asserted, which "would be expected of a mature, adult woman, not a minor." (App. Opening Br. at p. 5.) They also cited the decoy's participation in one prior decoy operation which, they say, gave the decoy "an unusual degree of confidence." (*Ibid.*) Finally, they asserted that the decoy, who was only 5 feet tall and weighed 150 pounds, "had a larger stature one would expect of a fully matured female adult, not a youthful teenager." (*Ibid.*) They concluded that "it is very likely that a clerk would be led to believe that a decoy with Filares['] experience, general physical appearance, demeanor, and confidence was older than her actual age." (*Ibid.*)

However, at oral argument before the Board, appellants' counsel stated that they were *not* arguing that rule 141(b)(2) was violated, but that the fairness requirement of rule 141(a) was. Counsel asserted that rule 141(a), which states that decoy operations must be conducted "in a fashion that promotes fairness," means that law enforcement agencies must "go out of their way to be fair." In this case, counsel argued, the Department allowed the decoy to "enhance her appearance" by wearing make-up. Allowing *any* "enhancement," counsel insisted, even if it did not make the decoy appear older, violates the fairness requirement and the Department's decoy guidelines.³

³The decoy guidelines, developed before the promulgation of rule 141, attempted to provide guidance to law enforcement agencies conducting decoy operations. The guidelines set out Department recommendation with regard to the appearance of a decoy and the manner of conducting a decoy operation.

Counsel referred to a Board decision, *The Southland Corporation/ Francisco* (2001) AB-7477, asserting that this decision acknowledged the existence of decoy guidelines and that make-up could affect a decoy's appearance. In that appeal, the licensees argued that rule 141(b)(2) had been violated because "the decoy wore makeup (mascara and lipstick) which would have made her look older than her true age." The Appeals Board, however, agreed with the determination of the administrative law judge (ALJ) that rule 141(b)(2) was not violated. After quoting the part of the Department's decision which rejected the licensees' argument, the Board's entire discussion of this issue was contained in the following paragraph:

We have no problem with Determination B. The rule does not prohibit a decoy's use of makeup. There is no mention of makeup in the rule. While the Department's guidelines discourage the use of makeup, it does not follow that, because a guideline may have been ignored or violated, Rule 141 has necessarily been violated.

The decision in AB-7477 does not aid appellant's cause. First, in that case the licensees alleged violation of rule 141(b)(2), a contention which counsel disavowed at oral argument. Secondly, while it is true that the decision can be said to have acknowledged the existence of decoy guidelines, they were only guidelines, not rules; they were superceded by the adoption of rule 141; appellants presented no evidence that they are still in use; and, as the Board explained in the language quoted above, violating a guideline is not the same as violating rule 141. (See also the discussion below (p. 6) regarding make-up.)

In any case, appellants did not raise the issue of fairness or rule 141(a) at the hearing, so the ALJ and the Department had no opportunity to address that as an issue. This alone is sufficient reason to reject appellants' contention. However, we wish to make clear that both parts of appellants' argument made before this Board – that use of

the phrase "promotes fairness" in rule 141(a) means that law enforcement must "go out of their way to be fair" and that any "enhancement" violates the fairness requirement – are clearly erroneous. Both are totally unsupported by any authority and are so broad that they provide no standards at all. Such an unwarranted expansion of rule 141(a) would seriously undermine the purpose and usefulness of decoy operations, and we unequivocally reject this argument.

With regard to the rule 141(b)(2) argument in appellants' brief, the ALJ made an express finding that "the decoy displayed the appearance and demeanor of a person which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller. (Find. of Fact B.) He made this finding after having observed the decoy as she testified, and having been made aware of the matters relied upon by appellants.

Unless there is a clear abuse of discretion shown, the Board is bound by the factual findings of the Department:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*)). The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*

(*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Even if the Board had some power to exercise independent judgment with regard to the facts, it is the ALJ, and not this Board, who had the opportunity to view the decoy, hear her, and question her. The Board is not in a position to second-guess the trier of fact, and we decline to do so, having been shown nothing that justifies intrusion into the fact-finding process.

The assertion that a decoy looked over the age of 21 simply because of prior experience as a decoy or a police Explorer has been rejected by this Board *ad nauseam*.⁴ We reject this argument again in this appeal, having been given no reason to reach a different conclusion.

Similar to the contention that the decoy appeared to be over 21 because she had previous experience as a decoy is appellants' characterization of the decoy as a "mature, adult female, not a minor" because she wore some makeup and had a "larger stature." Anyone who has walked around with eyes open would know that the use of makeup is not restricted to women over 21 years of age, nor is the circumstance of being overweight for one's height. The Board addressed a similar argument a number of years ago and said:

Appellant appears to assert that a decoy violates the rule by the mere fact of wearing make-up during a decoy operation. Make-up only has significance in this context, however, if it makes the decoy appear to be older, specifically, over the age of 21. Whether it is light or heavy is really irrelevant. It is the impact on a decoy's apparent age that matters. Appellant has made no showing that this decoy's make-up made her appear older than 21.

(Circle K Stores, Inc. (2001) AB-7677.)

It should also be noted that appellants do not assert that this clerk actually perceived this decoy to be over the age of 21 because of her experience, makeup, and

⁴See *Azzam* (2001) AB-7631, and at least 50 cases citing it to date.

weight. Rather, appellants surmise it is "*likely* that **a** [hypothetical] clerk would be led to believe that **a** [hypothetical] decoy" with those attributes would be old enough to legally purchase alcoholic beverages. They are unable to make an assertion about what the clerk involved here believed, because the clerk did not testify.

Appellants have presented no valid reason for the Board to question the ALJ's determination of the decoy's apparent age.

ORDER

The decision of the Department is affirmed.⁵

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵This 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.