

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

AB-9169

File: 20-326883 Reg: 10073704

7-ELEVEN, INC., and ADNAN U. and TEHMINA ADNAN KHAN, dba 7-Eleven No.
2175-22943
1546 West Mission Boulevard, Pomona, CA 91766,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED FEBRUARY 29, 2012

7-Eleven, Inc., and Adnan U. and Tehmina Adnan Khan, doing business as 7-Eleven No. 2175-22943 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 12 days for their clerk, Tapankumar Patel, having sold an alcoholic beverage to Hunter I. M., 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 Adnan U. and Tehmina Adnan Khan, appearing through their counsel, Ralph Barat Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated April 21, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 10, 1997. On November 9, 2010, the Department instituted an accusation against appellants charging the sale by Patel of an alcoholic beverage to Hunter I. M., a 17-year-old minor decoy, on April 13, 2010.

At an administrative hearing held on February 16, 2011, documentary evidence was received and testimony concerning the violation charged was presented by Hunter, the decoy; by Eric Burlingame, a Department investigator; and by Edil Vasquez, a Pomona police officer. Adnan U. Khan testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved, and ordered the suspension which is the subject of this appeal.

Appellants have filed an appeal making the following contentions:

(1) Rule 141(b)(2) (4 Cal. Code Regs., §141, subd.(b)(2)) was violated by the use of a decoy who was six feet two inches tall, weighed 190 pounds, and had previous experience as a decoy; (2) Rule 141(b)(5) (4 Cal. Code Regs., §141, subd.(b)(5)) was violated by the issuance of the citation prior to the face to face identification required by that rule; and (3) the administrative law judge (ALJ) did not comply with Government Code section 11425.50, subdivision (b), when making credibility determinations about when the citation was issued. Issues II and III are related and will be discussed together.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but

is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.²

DISCUSSION

I

The ALJ made detailed factual findings regarding the decoy's appearance (Finding of Fact E):

E. The overall appearance of the decoy including his demeanor, his poise, his mannerisms, his size 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 was similar to his appearance on the day of the decoy operation except that he was approximately fifteen pounds heavier on the day of the hearing.

1. The decoy is a youthful looking male who was six feet two inches in height and who weighed one hundred ninety pounds on the day of the sale. His clothing consisted of dark gray jeans, a black, short sleeve T-shirt and black Converse athletic shoes. His hair was fairly short and he was clean shaven. The decoy testified that he does not have to shave every day and that he shaves once every week or every week and a half.

2. Exhibit 4 was taken at the premises and Exhibits 2 and 3 were taken prior to going out on the decoy operation. All three of these photographs show what the decoy was wearing and how he appeared at the premises on the day of the sale.

3. The decoy was not an Explorer or a cadet on the day of the sale, he was not paid to be a decoy, he had participated in one prior

²The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

decoy operation and his father works for the Pomona Police Department.

4. The decoy was soft spoken and he appeared somewhat nervous while testifying. Furthermore, the decoy testified that he was in fact nervous when he entered the premises. There was nothing about the decoy's physical or non-physical appearance that made the decoy look older than his actual age of seventeen. He has a very youthful looking face and demeanor.

5. After considering the photographs depicted in Exhibits 2, 3 and 4, the overall appearance of the decoy when he testified and the way he conducted himself at the hearing, a finding is made that the decoy did display an overall appearance that 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.

Appellants contend that, because of his size and prior experience as a decoy, the decoy did not display the appearance required by Rule 141(b)(2), i.e., that he 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 argue that the Department's use of a decoy six feet two inches tall and weighing 190 pounds was a "blatant violation of its own duly adopted Rules," and "outrageous and wholly inappropriate." (App. Br., p.1). They describe the decoy's stature as "overly large," citing an early Appeals Board decision (*Southland Corporation/Chawla and Kaur* (2001) AB-7603) which reversed a Department decision which had rejected an ALJ's determination that police use of a six feet four inches tall, 250 pound decoy was inconsistent with the requirement of Rule 141(a) that a decoy operation be conducted in a manner which promotes fairness. Oddly, appellants also cite *Lucky Stores, Inc.* (1999) AB-7028, where the Board sustained the use of a decoy who was five feet 11 inches tall and weighed 220 pounds.

Appellants' argument makes little sense. A decoy's height and weight are

factors to be considered, of course, but size by itself cannot be controlling, as appellants even seem to acknowledge. The very cases they cite refute such a notion.

The ALJ clearly took into account Hunter's height and weight, just as he took into account Hunter's clothing and his clean shaven and "very youthful looking face and demeanor." (See Finding of Fact E-5, *supra*.)

As the Board has said many times, it will not substitute its judgment for that of the ALJ in the absence of compelling circumstances. Where there is factual support for his findings, his decision will stand.

II

Rule 141(b)(5) requires, following a completed sale, and prior to the issuance of a citation, that the peace officer conducting the decoy operation make a reasonable attempt to reenter the premises and have the decoy make a face to face identification of the alleged seller of alcoholic beverages. Appellants contend there was no compliance with this rule because, even though such an identification took place, it was preceded by the issuance of a citation, and thus not in conformity with the rule. They further contend that the ALJ did not comply with Government Code section 11425.50, subdivision (b), when making his credibility determination as to when the face to face identification took place.³

³ Section 11425.50, subdivision (b), states, in pertinent part:

If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

Appellants are wrong in their thinking that the ALJ based his determination as to when the citation was issued on credibility issues. He did not. His findings on the issue are set forth in Finding of Fact paragraph D and sub-section D-3, and reflect a basic resolution of conflicting evidence:

D. The evidence established that a face to face identification of the seller of the beer did in fact take place and that the identification complied with the Department's Rule 141.

...

3. The preponderance of the evidence established that a citation was issued to the clerk after the decoy had identified the clerk who had sold beer to him. Although the decoy testified that he recalled that the citation was issued before he identified the clerk, the testimony of Sergeant Vasquez and Investigator Burlingame established that the citation was issued at the end of the investigation before they exited the premises and after the decoy had identified the clerk who had sold him the beer.

Our review of the testimony on the question concerning when the citation issued (see RT 28, lines 1-14; RT 34, lines 3-8; RT 41-42, lines 24-25, 1-9; RT 46, lines 3-19; RT 54, lines 1-24; and RT 57, lines 2-18) convinces us that the ALJ's determination that the preponderance of evidence established that the identification preceded the issuance of the citation was correct. While it is true that the decoy testified that the citation issued before he had identified the clerk (RT 34), this testimony must be read in the context of his earlier testimony (at RT 28), and whether he understood what "issued" meant:

Q. And at any time prior to recontacting the clerk, did the officers have any discussions with the clerk?

A. Yes.

Q. Do you remember what they said?

A. Just that he was being cited for selling alcohol to a minor.

Q. Okay. And then did they identify themselves as police officers?

A. Yes.

Q. Did they identify you as the minor?

A. I don't recall.

Q. Once they identified themselves and told him he was being cited, is that when the face-to-face was conducted?

A. Yes.

It appears that the decoy could well have been of the impression that a citation issued when the clerk was told he would be cited. But until a citation form is completed and signed by the officer, no citation has issued. The decoy's relative inexperience as a decoy (this was the only the third store he visited on the night in question, and only his second decoy operation), coupled with the total absence of any evidence that he was at all familiar with the process involved in the issuance of a citation, substantially detracts from the weight of his testimony.

But even accepting appellants' claim that the ALJ made credibility determinations and did not articulate the factors set forth in Government Code section 11425.50, their argument fails. As the Board said in *7-Eleven/Lopez* (2009) AB-8815, it does not follow from the failure to set forth such factors that the testimony of the police officer and investigator is of no weight at all. Clearly their testimony has some weight. The ALJ simply weighed all the testimony and decided the preponderance of the evidence supported the Department's position.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.