

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

AB-9199

File: 20-462719 Reg: 11074993

7-ELEVEN, INC., and ANDREW S. and CAROLINE PIERRE TERO,
dba 7-Eleven #33971
696 West San Marcos Boulevard, San Marcos, CA 92078-1220,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 16, 2012
Los Angeles, CA

ISSUED SEPTEMBER 26, 2012

7-Eleven, Inc., and Andrew S. and Caroline Pierre Tero, doing business as 7-Eleven 33971 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a), and for violating a condition on their license, a violation of Business and Professions Code section 23804.

Appearances on appeal include appellants 7-Eleven, Inc., and Andrew S. and Caroline Pierre Tero, appearing through their counsel, Ralph Barat Saltsman and

¹The decision of the Department, dated October 11, 2011, is set forth in the appendix.

Stephen R. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 15, 2008. In May 2011, the Department instituted an accusation against appellants charging that, on November 12, 2010, appellants' clerk, Rimon Dankha (the clerk), sold an alcoholic beverage to 18-year-old Valentine Pfaffman. Although not noted in the accusation, Pfaffman was working as a minor decoy for the Department at the time.

An administrative hearing was held on August 11, 2011, at which time documentary evidence was received, and testimony concerning the sale was presented by Pfaffman (the decoy) and by Matthew Hydar, a Department supervising investigator.

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

Appellants filed an appeal making the following contentions: (1) Rule 141(b)(5)² was violated, and 2) the determination that a condition on the license was violated is not supported by substantial evidence.

DISCUSSION

I

Appellants contend the conduct of the face-to-face identification was unduly suggestive. They argue that investigator Hydar and accompanying officers informed the clerk he had just sold an alcoholic beverage to a minor while the decoy was

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.

standing close enough behind to overhear. Thus, appellants contend, when the decoy was “asked” who had sold her the alcoholic beverage, she had already been told who made the sale. This, appellants say, was an unduly suggestive one-person show-up of the kind said to be impermissible in *Department of Alcoholic Beverage v. Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339] (*Keller*).

In *Keller, supra*, the court upheld a Rule 141(b)(5) face-to face identification where police officers had removed the clerk from the premises and then asked the decoy to identify the person who had sold to him. That the decoy would obviously have observed the attention paid to the clerk he was then asked to identify as the seller was of no concern to the court.

While an unduly suggestive one-person show-up is impermissible ..., in the context of a decoy buy operations [*sic*] there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

We conclude that while the identification of the seller is of obvious importance, Regulations section 141, subdivision (b)(5), was primarily designed to deal with a different issue. The core rationale for the creation of binding sections concerning the conduct of buy operations was to allow such buys in a manner fair to sellers. Regulations section 141, subdivisions (b)(1-3) requires that the decoy reasonably appear to be underage and act in a manner consistent with that appearance. Regulation section 141, subdivision (b)(5) ensures - admittedly not as artfully as it might - that the seller will be given the opportunity, soon after the sale, to come “face to face” with the decoy.

(*Department of Alcoholic Beverage v. Alcoholic Beverage Control Appeals Board, supra*, 109 Cal.App.4th at 1698.)

Appellants do not claim their clerk was denied the opportunity to come face-to-face with the decoy. Their speculative suggestion that the decoy might have been sufficiently influenced by what she might have overheard to cause her to mistakenly

identify a person who, only moments before, had sold her an alcoholic beverage, is unpersuasive at best.

Rare is the issue in decoy operations as to who it was who sold an alcoholic beverage to a minor. Also, it is rare when the face-to face identification does not take place within minutes following the sale transaction. Viewed as affording the seller an opportunity to come face to face with the decoy, as *Keller* suggests is the primary purpose of Rule 141(b)(5), the sooner the identification takes place, the less likely it is that there will be any controversy. But where there is no proof or suggestion that the person who was identified as the seller was **not** the seller, more is required than speculation that the identification might be flawed.

II

Business and Professions Code section 23800 empowers the Department to place reasonable conditions upon retail licenses in certain situations, one of which is where grounds for the denial of an application for a license may be removed by the imposition of such a condition. Section 23804 provides that the violation of a condition shall be grounds for the suspension or revocation of a license.

Condition D on Respondent's license states:

There shall be no exterior advertising or signs of any kind or type, including advertising directed to the exterior from within, promoting or indicating the availability of alcoholic beverages. Interior displays of alcoholic beverage or signs which are clearly visible to the exterior shall constitute a violation of this condition.

Investigator Hydar testified that he saw numerous posters facing toward the parking lot and a gas station that were advertising beer for sale, and identified photographs (Exhibits 7-A and -B and 8-A and -B) taken of the advertisements on the date of the decoy operation.

Appellants assert that the ALJ's finding that this condition was violated is not supported by substantial evidence, the photograph exhibits were not sufficiently authenticated as reliable evidence, there was no testimony regarding who took the photographs, and imply that the photographs could have been taken at some other premises.³

Appellants did not raise at the hearing any issue relating to the charge that a condition was violated. Their counsel did not even cross-examination Investigator Hydar regarding his testimony about the posters in question.⁴ His testimony that the photographs were taken during the decoy operation is sufficient authentication absent any evidence questioning their authenticity. Hydar's testimony that he personally observed the signs and posters was unrefuted.

It is well-settled that the failure to raise an issue at the administrative hearing precludes it from being raised as an issue on appeal. (See, e.g., *Hooks v. California Personnel Board* (1980) 111 Cal.3d 572, 577 [168 Cal.Rptr. 822]; *Wilke & Holzheiser v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653] *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182 [197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

Despite its well-settled character, this rule is ignored in many appeals heard by

³ "Additionally, testimony of the minor decoy established that the decoy and the accompanying peace officers visited multiple 7-Eleven locations during the decoy operation." (App. Br., p. 4.)

⁴ The only reference to the posters during counsel's cross-examination was whether they obstructed his view into the premises.

this Board, this appeal included. (See, e.g., *7-Eleven, Inc./Hauser* (2012) AB-9162; *Theodore Neubauer* (2012) AB-9160; *Harbor Mini Mart* (2010) AB-9069; *Kabiruddin K. Hirani* (2010) AB-9036; *7-Eleven, Inc./Twomey et al.* (2003) AB-8030; *7-Eleven, Inc./Singh* (2001) AB-7559; *Amirul Islam* (2000) AB-7442.)

The rule is grounded in fairness. An issue raised at the administrative hearing level puts an opposing party on notice of the issue, and, importantly, puts the administrative law judge on notice that the issue is in contention and will need to be addressed in his or her decision.

In any event, both testimony and photographic evidence clearly demonstrated that the condition had been violated. Investigator Hydar testified that he took the photos, and no one challenged his testimony. The photos corroborate his testimony as to the improper advertising which violated the condition. (See *People v. Jones* (1970) 7 Cal.App.3d 48, 52-53 [86 Cal.Rptr.717].)

ORDER

The decision of the Department is affirmed.⁵

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ 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.