

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

AB-9201

File: 20-215302 Reg: 11074689

7-ELEVEN, INC., JAMES R. TITERA, and SUSAN C. TITERA,
dba 7-Eleven Store #2131-16498
103 Worthington Street, Spring Valley, CA 91977,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 6, 2012
Los Angeles, CA

ISSUED OCTOBER 17, 2012

7-Eleven, Inc., James R. Titera, and Susan C. Titera, doing business as 7-Eleven Store #2131-16498 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, with all 10 days stayed for a period of one year, provided no further cause for disciplinary action occurs within that one-year period, 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., James R. Titera, and Susan C. Titera, appearing through their counsel, Ralph Barat Saltsman and D. Andrew

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

Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 25, 1986. On April 4, 2011, the Department filed an accusation against appellants charging that, on January 8, 2011, appellants' clerk, Roberto Carlos Jacome (the clerk), sold an alcoholic beverage to 17-year-old Justin G. (the decoy). Although not noted in the accusation, Justin G. was working as a minor decoy for the Department of Alcoholic Beverage Control.

At the administrative hearing held on July 28, 2011, documentary evidence was received and testimony concerning the sale was presented by the decoy; by Miguel Rios, a Department investigator; and by James R. Titera, one of the licensees.

The evidence established that on January 8, 2011, the decoy entered the licensed premises, selected a can of Budweiser beer from the cooler, took it to the sales counter, and the clerk rang up the sale. The decoy testified that the clerk then asked him for his identification [RT 43] and the investigator who observed the transaction also testified that he saw the decoy hand identification to the clerk. [RT 15-17.] This point is discussed more fully, below.

The Department's decision determined that the violation charged was proved and no defense to the charge was established.

Appellants then filed a timely appeal contending: (1) The findings regarding the decoy's presentation of identification are not supported by substantial evidence, and (2)

rule 141(b)(2)² was violated. These issues will be discussed together.

DISCUSSION

Appellants contend that there is no substantial evidence to support the finding of the administrative law judge (ALJ) that the minor decoy presented identification at the point of sale. They maintain that even though the Department's witnesses testified to this fact, both witnesses recanted their testimony after watching surveillance footage of the operation. (App.Br. at p. 2.) This assertion is not supported by the record, however. After viewing the surveillance video, the decoy admitted that he was mistaken about the clerk placing the beer in a brown paper bag, but he affirmed that the video showed him handing his identification to the clerk. [RT 63-66.] The investigator testified that the video showed the decoy handing something to the clerk but that he could not clearly see what the item was. [RT 72-73.]

Appellants assert that the ALJ's "erroneous finding [about the decoy presenting identification] was used to support the erroneous conclusion that the minor decoy's appearance complied with Rule 141(b)(2)." (App.Br. at p. 2.) Appellants maintain that if the clerk had requested identification, this would indicate that the clerk believed the "minor decoy's appearance was youthful enough that the clerk would require identification. The clerk, [they contend] however, did not request identification because the minor decoy's appearance was mature enough that no identification was required." (App.Br. at p. 6.)

Appellants maintain that the decoy's appearance in this case did not comply with the requirement of rule 141(b)(2) that "[t]he decoy shall display the appearance which

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.

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.” They point out that the 17-year-old decoy was 6 feet tall and weighed 170 pounds, that he had a deep voice, and that he had to shave every couple of days. (App.Br. at p.6.) In addition, appellants argue, the decoy's participation in five or six previous decoy operations contributed to his mature appearance. The result, appellants contend, is that the clerk did not ask for identification because the decoy appeared to be over the age of 21.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies before determining whether the decoy's appearance met the requirement of rule 141(b)(2). The Appeals Board is not in a position to second-guess the trier of fact, and only a clear showing of abuse of discretion would cause the Board to question the ALJ's determination.

The ALJ made detailed findings regarding the appearance of the decoy at the hearing, the photographs taken of him on the day of the decoy operation, and his experience as a decoy, and concluded that his appearance complied with rule 141(b)(2) in Findings of Fact 7-9:

FF 7. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his maturity, 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 seven pounds heavier on the day of the hearing. The decoy is a youthful looking young man who weighed one hundred seventy pounds on the day of the sale. Although the decoy testified that he was not sure as to his height as of the day of the hearing, the decoy's California Driver License which was issued in May of 2009 indicates that he was six feet tall. On the day of the sale, the decoy was clean shaven and his clothing consisted of blue

jeans, a black T-shirt and a blue hooded sweatshirt. Exhibit 2 is a photograph of the decoy that was taken at the premises. Exhibit 3 is a photograph of the decoy that was taken on the day of the sale before going out on the decoy operation. Both of these photographs show how the decoy looked and what he was wearing on the day of the sale except that the decoy is not wearing the hooded sweatshirt in Exhibit 3.

FF 8. The decoy had participated in five or six prior decoy operations and he had not served as an Explorer.

FF 9. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him look older than his actual age. After considering the photographs depicted in Exhibits 2 and 3, the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which 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 have given us no reason to think the ALJ abused his discretion in making the determination that the decoy's appearance complied with rule 141(b)(2).

Appellants' assertion that the decoy's appearance caused the clerk to think the decoy was old enough to purchase an alcoholic beverage, and that as a result the clerk not ask for identification, is irrelevant. Even if the clerk thought the decoy was old enough, and this prompted him not to request identification, a clerk's mistaken belief that the decoy is over the age of 21 is not a defense if, in fact, the decoy's appearance is one which could generally be expected of a person under the age of 21.

We believe the record supports the ALJ's finding that the clerk asked the decoy for identification. More importantly, however, the ALJ determined that the decoy complied with rule 141(b)(2) and appellant has given us no reason to question that determination. Even if, arguendo, no identification was requested and the ALJ was mistaken on that point, we would reach the same result.

ORDER

The decision of the Department is affirmed.³

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

³This 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.