

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

AB-9202

File: 20-466735 Reg: 11074856

7-ELEVEN, INC., PRABHJOT KAUR, and GURINDER SINGH,
dba 7-Eleven Store #2131-24013
7607 Broadway, Lemon Grove, CA 91945,
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., Prabhjot Kaur and Gurinder Singh, doing business as 7-Eleven Store #2131-24013 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days 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., Prabhjot Kaur, and Gurinder Singh, appearing through their counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 11, 2008. On April 7, 2011, the Department filed an accusation against appellants charging that, on October 27, 2010, appellants' clerk, Biset Misganew, sold an alcoholic beverage to 18-year-old Shannon Pettis. Although not noted in the accusation, Pettis was working as a minor decoy for the San Diego County Sheriff's Department at the time.

At the administrative hearing held on July 28, 2011, documentary evidence was received and testimony concerning the sale was presented by Pettis (the decoy); by Amber Leavitt, a San Diego County Sheriff's deputy; Biset Misganew (the clerk); and Gurinder Singh, one of the co-licensees.

Testimony established that on October 27, 2010, the decoy entered the premises, selected a six-pack of Budweiser beer in bottles from the cooler, and took them to the sales counter. The clerk asked for her identification and the decoy handed her California Driver's License to him. The license contained the decoy's correct date of birth and a red stripe indicating, "Age 21 in 2012." The clerk looked at the license and asked the decoy how old she was, to which she replied that she was 18. The clerk then completed the transaction. Subsequently, the decoy identified the clerk who sold her the beer, and the clerk was issued a citation.

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 rule 141(b)(2)² was violated.

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.

DISCUSSION

Appellants contend that the decoy failed to present the appearance required by Rule 141(b)(2), which states: “[t]he 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.” This decoy, they maintain, presented the appearance of a person over the age of 21, because of her mature physical appearance and prior experience as a decoy.

The administrative law judge (ALJ) assessed the appearance of the decoy as follows (Findings of Fact (FF) 9 and 11):

FF 9. The decoy’s overall appearance including her demeanor, her poise, her mannerisms, her maturity, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that she was approximately ten pounds heavier and her hair color was a little bit lighter on the day of the hearing. The decoy is a very youthful looking young lady who was five feet eight inches in height and who weighed one hundred thirty-five pounds on the day of the sale. On that day, the decoy was wearing no make-up and her clothing consisted of blue jeans, a black T-shirt and black sneakers. Exhibit 2 is photograph of the decoy that was taken at the premises and Exhibits 3 and 4 are photographs of the decoy that were taken on the day of the sale before going out on the decoy operation. All three of these photographs show how the decoy looked and what she was wearing on the day of the sale.

FF 11. There was nothing remarkable about the decoy’s nonphysical appearance and there was nothing about her speech, her mannerisms or her demeanor that made her look older than her actual age. After considering the photographs depicted in Exhibits 2, 3 and 4, the decoy’s overall appearance when she testified and the way she conducted himself [sic] 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.

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 she testifies, and making the determination whether the decoy's appearance met the requirement of rule 141 that she possessed 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that she did not.

We, of course, have no idea what the clerk thought about the decoy's age or appearance because he did not testify at the hearing. We do know, however, that he asked the decoy how old she was, was told "18," and made the sale anyway. This would tend to refute or certainly question any suggestion that he may have thought the decoy to be of legal age to purchase alcohol.

In addition, we feel compelled to address specifically the contention that the decoy's prior decoy experience disqualifies her from acting as a decoy. It is difficult to understand how, other than, perhaps, to eliminate nervousness, experience changes the appearance that is presented to the seller. Nervousness, or lack thereof, is only one consideration, to be balanced against such other considerations as overall appearance, demeanor, manner of dress, manner of speaking, physical movements, and the like. And, while facial appearance alone is not determinative, it is certainly an important consideration. In this regard, we note that the photographs of the decoy (Exhibits 2, 3 and 4) depict a very youthful appearing person, one who appears, at least to this Board, to be well under 21 years of age.

The rule, through its use of the phrase “could generally be expected” implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy’s appearance is one which could generally be expected of that of a person under 21 years of age.

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.