

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

AB-9351

File: 20-419747 Reg: 12077150

7-ELEVEN INC., BARBARA GALEA, and JOSEPH GALEA,
dba 7-Eleven Store 2233 29795B
2429 Mission Street, Santa Cruz, CA 95060,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 9, 2014
Sacramento, CA

ISSUED MARCH 4, 2014

7-Eleven Inc., Barbara Galea, and Joseph Galea, doing business as 7-Eleven Store 2233 29795B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, with 5 days conditionally stayed, 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., Barbara Galea, and Joseph Galea, appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

¹The decision of the Department, dated March 7, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 15, 2005. On June 28, 2012, the Department filed an accusation against appellants charging that, on March 20, 2012, appellants' clerk sold an alcoholic beverage to 19-year-old Saul Valadez-Martin. Although not noted in the accusation, Valadez-Martin was working as a minor decoy in a joint operation between the Santa Cruz Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on January 24, 2013, documentary evidence was received and testimony concerning the sale was presented by Valadez-Martin (the decoy) and by Shawn Terry, a Santa Cruz police officer. Appellants presented no witnesses.

Testimony established that on the date of the operation, appellants' clerk sold a six-pack of Corona beer to the decoy. Before proceeding with the sale, the clerk asked to see the decoy's identification. The decoy handed the clerk his California driver's license. The clerk took the license, examined it for three or four seconds, and smiled. The license indicated the decoy's correct date of birth — March 29, 1992 — and bore a red stripe with the words "AGE 21 IN 2013."

After completing the purchase, the decoy took the beer and left the premises. He then reentered the store, accompanied by Officer Terry of the Santa Cruz Police Department. While standing five to ten feet from appellants' clerk, Officer Terry asked the decoy to identify who sold him the beer. The decoy pointed to the clerk and identified him as the seller.

When Officer Terry asked the clerk why he had sold the beer to the decoy, the clerk claimed the decoy had told him he was twenty-one. This was a lie. The decoy

was “wired” with a recording device during the sale. Officer Terry could hear the decoy’s words from outside the premises. The decoy made no such remark.

Following the identification, one of the officers took a picture of the decoy with the clerk.

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

Appellants then filed an appeal contending: (1) the ALJ disregarded arguments and evidence in support of appellants’ rule 141(b)(2) defense; (2) the ALJ failed to make factual findings and bridge the gap between those findings and his conclusions of law; and (3) the face-to-face identification did not comply with rule 141(b)(5). The first and second issues will be addressed together.

DISCUSSION

I and II

Appellants contend that the ALJ “failed to make any findings regarding the decoy’s physical appearance at the time of the minor decoy operation.” (App.Br. at p. 2.) Appellants argue that the absence of findings on this point precludes any meaningful review and is fatal to the Department’s decision. This issue was explicitly waived at the administrative hearing.

It is settled law that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Hooks v. State Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *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,

187 [17 Cal.Rptr. 167].)

During closing arguments at the administrative hearing, counsel for appellants raised only a constitutional due process challenge to rule 141(b)(2):

In addition, and I understand that will not be ruled on this, but I believe that there are 141(b)(2) constitutional issues in regards to the ambiguous nature and vague nature the way Rule 141(b)(2) is — is worded and/or is supposedly to apply to these types of cases, and a violation of due process.

[RT at p. 39.] Counsel made no argument regarding the decoy's actual appearance, and at no point asserted that his appearance violated rule 141(b)(2). The ALJ then verified that counsel for appellants intended to waive the appearance issue:

ADMINISTRATIVE LAW JUDGE LO: Ms. Renshaw, is the license — is the respondent raising a 141(b)(2) issue other than the due process issue?

MS. RENSHAW: No.

[RT at p. 41.] The ALJ noted this exchange in his decision: "Respondents stated that they do not allege a violation of the Department's Rule 141(b)(2), but will seek judicial review of the constitutionality of the rule." (Determination of Issues II.)

Given that appellants explicitly declined to raise a 141(b)(2) defense based on the appearance of the decoy, it is utterly unsurprising that the decision contains no findings on that point. Appellants' argument is frivolous.

III

Appellants contend that there is no evidence that the clerk knew he was being identified as the seller, and that this constitutes a violation of rule 141(b)(5).

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who

purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

(Cal. Code of Regs., tit. 4, § 141(b)(5).) The rule provides an affirmative defense. The burden of proof is therefore on the appellants to show non-compliance.

Appellants rely on this Board's decision in *Chun* (1999) AB-7287, which states:

The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.)

The ALJ, in his decision, cited a more recent opinion from this Board, *Fortune Commercial Corporation* (2005) AB-8418, which clarified the *Chun* holding:

Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. [Citation.] It does not require a direct "face-off" to accomplish these purposes. Regardless of whether the clerk heard what the decoy said to the officer, she had the opportunity to look at the seller again. The opportunity is all that needs to be provided; if the opportunity is provided, but the clerk does not take advantage of the opportunity, the rule is not violated.

(*Id.* at pp. 5-6.) Subsequent Appeals Board decisions have reflected this interpretation.

(See, e.g., *G4 Consortium, LLC* (2010) AB-9061, at pp. 3-4; *7-Eleven, Inc./Kim* (2004) AB-8198, at pp. 4-5; *7-Eleven, Inc./Berg* (2004) AB-8051, at pp. 5-6; see also *Greer* (2000) AB-7403, at p. 4 ["The minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to be actually aware that the identification is taking place."].)

In this case, there is undisputed evidence that the clerk either knew, or reasonably ought to have known, that he was being pointed out as the seller. The Department submitted a photograph of the decoy holding the beer while standing

beside the clerk. (Exhibit 3.) Officer Terry's undisputed testimony also supports an inference that the clerk knew he had been pointed out:

[MR. LUEDERS]: And — okay. At — okay. And what — did the clerk make any statements after you advised him that he sold alcohol to someone who was under the age of 21?

[Objection; overruled.]

A: Initially, he told me that Mr. Valdez [sic] told him he was over 21.

[RT at pp. 33-34.] Ultimately, the ALJ concluded that there was ample opportunity for the clerk to realize he was being identified:

[I]t is undisputed that the decoy, while standing five to ten feet from Respondents' clerk, identified him as the seller of the beer. During this identification, Respondents' clerk had an opportunity to see the decoy again. The clerk had yet another opportunity to see the decoy when they were photographed together. Under these circumstances, Respondents did not meet their burden of proving there was an violation of the Department's Rule 141(b)(5).

(Determination of Issues III.)

The clerk did not testify, and appellants present no other evidence to undermine the conclusion that the clerk, at a minimum, ought to have known that he had been identified as the seller. Appellants have failed to carry their burden of proof on this affirmative defense. We see no reason to disturb the decision below.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.