

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

AB-9391

File: 20-472435 Reg: 13078671

7-ELEVEN, INC. and PAM AND JAS, INC.,
dba 7-Eleven Store #18159
2985 Via Las Rosas, Oceanside, CA 92054
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 7, 2014
Los Angeles, CA

ISSUED AUGUST 20, 2014

7-Eleven, Inc. and Pam and Jas, Inc., doing business as 7-Eleven Store #18159 (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. and Pam and Jas, Inc., appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly Belvedere.

¹The decision of the Department, dated November 19, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 17, 2008. On June 11, 2013, the Department filed an accusation against appellants charging that, on March 30, 2013, appellants' clerk, Victor Eusebio (the clerk), sold an alcoholic beverage to 18-year-old Tyler Holdsworth. Although not noted in the accusation, Holdsworth was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on August 23, 2013, documentary evidence was received and testimony concerning the sale was presented by Holdsworth (the decoy) and by Tony Lee, a Department of Alcoholic Beverage Control agent. Appellants presented no witnesses.

Testimony established that on the date of the violation, the decoy entered the premises alone, walked straight to the beer coolers, and selected a six-pack of Bud Light beer in bottles. He took the beer to the sales counter.

The clerk asked the decoy for his identification. The decoy handed the clerk his valid Utah driver's license. The license indicated the decoy's correct date of birth, and also bore, in red characters, the words "UNDER 21 UNTIL 12/29/2016." The clerk looked at the license briefly before returning it to the decoy. The clerk asked no questions regarding the decoy's age or date of birth. The decoy then paid for the beer and exited the premises.

The Department's decision determined that the violation charged was proved and no defense was established, and imposed a fifteen-day suspension.

Appellants then filed an appeal contending rules 141, subdivisions (a) and

(b)(3),² were violated because the decoy presented his valid Utah identification, rather than California identification.

DISCUSSION

Appellants contend the Department failed to proceed in the manner required by law by using a decoy with an out-of-state driver's license. Appellants contend this was a novel and unfair strategy, in violation of rule 141, subdivision (a). Moreover, appellants contend that the decoy failed to obtain a California driver's license, despite living in the state for several years, and that the decoy's identification therefore violates rule 141, subdivision (b)(3).

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].) It is within this Board's constitutional authority, however, to decide whether the Department proceeded in the manner required by law. (See Cal. Const., art. XX, § 22.)

Rule 141 states, in relevant part:

(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

(b) The following minimum standards shall apply

¶ . . . ¶

(3) A decoy shall either carry his or her own identification showing the

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.

decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages.

It is undisputed that the decoy presented his Utah identification on request and that it bore his correct date of birth. Additionally, it is undisputed that the decoy's identification had a vertical layout and that it bore the word "UNDER 21 UNTIL 12/29/2016."

Appellants, however, argue that the "Utah license masks the crucial year in red letters placed over the minor's picture, which is in dark colors and makes it difficult to see." (App.Br. at p. 4.) The ALJ found that "[a]lthough this entire statement is not clearly visible in the photocopy of the driver license (Exhibit 4), the decoy showed his original Utah driver license to the Judge and the attorneys at the hearing and the statement in red was clearly visible." (Findings of Fact ¶ II.D.3.) While the photocopy is indeed blurry and difficult to read, (see Exhibit 4), the ALJ is the finder of fact and had the opportunity to examine the identification firsthand. Accordingly, we must defer to the ALJ's finding of fact on this point.

In their brief, appellants further argue that the orientation of the license indicated nothing to the clerk:

[T]he fact that a minor's California identification is turned sideways would notify a clerk used to reviewing California identifications that something is different with respect to the minor's identification. But, because a clerk in Oceanside, California would not be readily familiar with Utah licenses, the design of the license signifies nothing to the clerk.

(App.Br. at p. 4.) In fact, a vertical orientation for holders under 21 is a universal standard adopted by the American Association of Motor Vehicle Administrators. (See AAMVA DL/ID Card Design Standard, Personal Identification - AAMVA North American Standard (August 2013) at § A.6.) A well-trained clerk would be aware of the meaning

of the vertical orientation and its implications, regardless of the identification's state of origin. Ultimately the orientation is irrelevant in light of the visible, accurate date of birth, as well as the red-letter warning that the holder of the identification was under 21.

Finally, appellants contend that the decoy's identification "was not the identification [he] was supposed to have." (App.Br. at p. 4.) The decoy, they argue, had been living in California for some time, but had failed to acquire an in-state driver's license as required by the Vehicle Code. (App.Br. at pp. 4-5, citing Vehicle Code § 12504.) Appellants concede that "[t]he Utah license was a valid I.D. card," but was nevertheless insufficient to grant the decoy driving privileges. (*Ibid.*) Appellants posit that the decoy has therefore been driving illegally in California since he started driving at age 17. (*Ibid.*) Appellants, however, only argue that the license was invalid for purposes of driving in California, and neither argue nor show that the identification was invalid as proof of age and identity. (See *ibid.*)

Whether the decoy could legally drive in California is irrelevant. No portion of rule 141, subdivision (b)(3), requires that the decoy establish his fitness to operate a motor vehicle in California. The rule only requires that the identification carried — if any — be the decoy's own identification, and show the decoy's correct date of birth. Appellants do not dispute these two facts, and therefore cannot prove a violation of rule 141, subdivision (b)(3).

Alternatively, appellants contend that the Department used the "novel tactic" of employing a decoy with an out-of-state license, in violation of the fairness requirement of rule 141, subdivision (a). While this case is certainly unusual and presents a departure from the usual set of facts present in a minor decoy case, mere novelty does not establish unfairness under the rule.

The identification presented bore a clear, accurate date of birth, as well as a red-letter warning that the holder was under 21 until 2016. There is no contention that the identification belonged to anyone but the decoy. The clerk examined the identification and either overlooked or ignored obvious evidence that the decoy was a minor. We see nothing to indicate the operation was unfair.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.