

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

AB-9502

File: 20-347268 Reg: 14081096

7-ELEVEN, INC. and TOM WAN HO LEE,
dba 7-Eleven #2173-18303
4460 Santa Monica Boulevard, Los Angeles, CA 90029,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: September 3, 2015
Los Angeles, CA

ISSUED SEPTEMBER 25, 2015

Appearances: Michelangelo Tatone of the law firm Solomon, Saltsman & Jamieson, on behalf of appellants, 7-Eleven, Inc. and Tom Wan Ho Lee, doing business as 7-Eleven #2173-18303. Jennifer M. Casey on behalf of the Department of Alcoholic Beverage Control.

OPINION

This appeal is from a decision of the Department of Alcoholic Beverage Control¹ suspending appellants' license for 10 days, with all 10 days stayed subject to one year of discipline-free operation, because appellants' clerk sold an alcoholic beverage to a police minor decoy in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated March 12, 2015, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 10, 1998. On August 27, 2014, the Department filed an accusation against appellants charging that, on June 8, 2014, appellants' clerk, Jerson Franco (the clerk), sold an alcoholic beverage to 19-year-old Luis Cordova. Although not noted in the accusation, Cordova was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on January 7, 2015, documentary evidence was received and testimony concerning the sale was presented by Cordova (the decoy); by Robert Solorio, an officer for the LAPD; and by Todd Turner, a Sergeant for the LAPD. Also, appellants presented the testimony of the clerk.

Testimony established that, on the date of the operation, the decoy and Officer Solorio drove to the licensed premises in the same vehicle. (See RT at pp. 25, 46.) The decoy entered the licensed premises followed a few moments later by Solorio. The decoy went to the rear of the licensed premises and selected a 23.5 ounce can of fruit-punch-flavored Four Loko, an alcoholic beverage. He took the Four Loko to the register area and got in line behind other customers. While the decoy was in line, Solorio was standing approximately one foot directly behind him. (RT at pp. 15-16, 31.)

When it was the decoy's turn to be served, he set the can down on the sales counter. The clerk scanned the can and asked to see the decoy's ID. The decoy handed the clerk his California identification card, and the clerk looked at it for a few seconds before handing it back to the decoy. The decoy paid for the can of Four Loko, and the clerk bagged it. The decoy and Officer Solorio then exited the licensed premises.

The Department's decision determined that the violation charged was proved and no defense was established. Presumably in light of appellants' lengthy history of discipline-free operation, the administrative law judge (ALJ) proposed — and the Department ultimately adopted — the mitigated penalty of a 10-day, all stayed suspension.

Appellants then filed a timely appeal contending the Department erred in finding compliance with rule 141.²

DISCUSSION

Appellants contend that the Department erred in finding that there was compliance with rule 141. Specifically, they claim that Officer Solorio's active participation in the operation essentially rendered it unfair. (App.Br. at p. 7.) Moreover, in light of Officer Solorio's participation in the operation, appellants maintain that the Department erred by not taking into consideration Solorio's presence in determining whether the decoy's appearance complied with rule 141(b)(2). (*Id.* at pp. 7-8.)

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

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.

Rule 141(b)(2) requires that a decoy must “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.” Rule 141(a) requires that minor decoy operations be conducted “in a fashion that promotes fairness.” A defense asserted under rule 141 is an affirmative defense, and the burden is therefore on the appellants to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Nothing in rule 141 mandates that a decoy purchase alcoholic beverages alone. However, when more than one person participates in the minor decoy operation at or near the time and place of the attempted purchase, the real question to be asked is whether any extraneous participant — i.e., any participant in the operation who is *not* the purchasing decoy — “engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law.” (*7-Eleven, Inc./Janizeh Corp.* (2002) AB-7790, at p. 4 [stating the determinative issue in the context of decoy operations where multiple decoys are used].)

In his proposed decision, the ALJ found as follows with regard to appellants’ rule 141 defenses:

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(a) and 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that [the decoy’s] size and bulk gave him the appearance of a person who was old enough to purchase alcohol, particularly since Ofcr. Robert Solorio was “with” him. This argument is rejected — [the decoy] had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 10.)

6. Ofcr. Solorio’s presence in the Licensed Premises was irrelevant. [The decoy] and Ofcr. Solorio entered separately, did not interact with each other while inside, and [the decoy] approached the counter by himself. Ofcr. Solorio did not interject himself in the sales transaction at all or do

anything which would affect [the clerk's] ability to do his job. [The clerk's] failure to appreciate the significance of [the decoy's] ID was his own doing.

(Conclusions of Law ¶¶ 5-6.)

There are certain aspects of the ALJ's assessment that the Board finds troubling. For instance, we do not agree with the ALJ's conclusion that Officer Solorio's presence in the licensed premises was irrelevant. (See Conclusions of Law ¶ 6.) In light of the clerk's repeated insistence that he believed the decoy and Solorio to be together (see RT at pp. 56-57, 63), consideration of Officer Solorio's presence is essential for the disposition of this case, and is therefore very much relevant.³

To that end, there are several facts — uncontradicted by any evidence in the record — that undoubtedly weigh into appellants' rule 141 defenses, but which the ALJ omitted from any express consideration in the proposed decision. First, it is undisputed that Officer Solorio and the decoy arrived at the licensed premises in the same vehicle on the date of the subject decoy operation. (RT at pp. 25, 46.) According to the clerk's testimony, which was also undisputed, he saw the pair arrive together and exit the same vehicle, and therefore assumed they were together:

[BY MS. ROSE:]

Q. Did [the decoy] come to the 7-Eleven we're talking about by himself?

[THE CLERK:] No. He came with a friend.

Q. When he arrived with his — when he arrived with his friend, how did you know that they were together?

³Evidence Code section 210 defines relevant evidence as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

A. Because they got off on the same car.

Q. So you saw a car outside the store?

A. Uh-huh, yes.

Q. Where was the car?

A. In front of where I was attending to people.

Q. So you were behind the register —

A. Uh-huh.

Q. — and you could see out in the parking lot?

A. Yes.

Q. And the car was out in front of the store?

A. Uh-huh, yes.

Q. And did you say you saw them get out of the same car?

A. Correct.

(RT at pp. 56-57.) Moreover, both Solorio and the decoy testified that Solorio was standing approximately one foot behind the decoy once the decoy got in line to purchase the Four Loko. (RT at pp. 15-16, 31.) This fact was consistent with the clerk's version of events, to which he testified on cross examination:

[BY MS. CASEY:]

Q. Okay. So you saw them come out of the same car; correct?

[THE CLERK:] Uh-huh, yes. Correct.

Q. So you assumed they were friends?

A. Yes.

Q. Okay. And where was the friend when the person who you sold the alcohol to was at the cooler?

A. Where was the friend you said?

Q. Yeah.

A. He was, like — I think they were together.

Q. Say that again.

A. Together.

THE COURT: He thinks they were together.

THE WITNESS: Near each other.

BY MS. CASEY:

Q. Do you know? Did you see them?

A. Well, they were standing in line, like — like right next to each other. But the guy — I guess his friend — let him go first.

Q. Okay. So when they first came in the store and the decoy was — the person you sold alcohol to was at the cooler, do you know where his friend was at that time?

A. No. I didn't keep track of them.

Q. Okay. But at some point you saw that the person you sold alcohol to and the other person were in line behind each other; is that right?

A. I think so, yes.

(RT at pp. 62-63.)

Nowhere within the proposed decision is there any mention of these undisputed facts that are critical to the assessment of the totality of the actual circumstances presented to the clerk at the time of the sale. Moreover, the ALJ failed to make any findings regarding witness credibility, so the Board is left with no explanation as to why he discredited the clerk's testimony that — after observing the two get out of the same car and stand in line together — he believed Officer Solorio and the decoy were together, and thus made an assumption about the decoy's age because of Solorio's

appearance as someone "way older." (See RT at p. 63.)

In *Hurtado* (2000) AB-7246, a 27-year old, plain-clothed police officer sat at a table with the decoy in a bar, and each ordered a beer. (*Id.* at pp. 2-3.) The Board reversed the Department's decision denying the appellants' rule 141 defense, and found "the officer's active participation in the decoy operation to be highly likely to affect how the decoy appeared and to mislead the seller." (*Id.* at p. 5.) Notably, the crux of the Board's decision focused on an assessment of the officer's conduct during the entire operation, not necessarily at or even near the time of the transaction. It follows that while the active participation standard may be a subjective one, in order for it to have any real significance in light rule 141(a)'s fairness requirement, the totality of the factual circumstances confronting the seller of alcoholic beverages throughout the operation — and not just those immediately preceding the sales transaction — should be considered.

Here, the ALJ focused his analysis on those circumstances immediately preceding the transaction, such as the fact that the decoy and Officer Solorio technically entered the store separately, albeit by just a few seconds (RT at p. 14) and did not interact in the store, and the fact that the decoy approached the counter by himself. (Conclusions of Law ¶ 6.) But it may very well be that the presence of an adult companion⁴ who arrived in the same car as the decoy, entered a just few moments

⁴The analysis would no doubt change if the decoy's companion throughout the operation was another minor. (See, e.g., *The Vons Company, Inc.* (2015) AB-9448, at p. 10 [the mere presence of a second minor near the checkout stand, "without more," was not enough to constitute unfairness]; *Janizeh Corp., supra*, at pp. 4-5 [the presence of a second decoy whose physical appearance was not at issue, and who simply stood silent at the sales counter was not sufficient involvement in the transaction to create unfairness]; *CEC Entertainment, Inc.* (2004) AB-8189, at p. 3 ["the mere fact that a

(continued . . .)

later, and stood within very close proximity to the decoy in line⁵ and while the decoy made the purchase — all of which was observed by the clerk — had the effect of misleading the clerk and distracting him from accurately assessing the decoy's age, regardless of the identification shown to him and whether Solorio and the clerk interacted while in the store. Hence, although Solorio did not necessarily actively participate in the sales transaction itself, his blatant presence, which was observed by the clerk, from arrival at the licensed premises through the decoy's purchase of the alcoholic beverage, is sufficient to constitute active participation in the operation.

As the Board explained in *7-Eleven, Inc./Amroli* (2002) AB-7784, “[t]he ALJ does not determine the apparent age of the decoy in a vacuum, but in the context of the particular factual setting existing when the clerk sold an alcoholic beverage to the decoy.” (*Id.* at p. 5.) In light of the omissions from the proposed decision, the Board is not convinced that the *entire* context of the particular factual setting was considered in this case. We therefore believe that “the Board cannot accord deference [to the Department’s] determination when, as here, a factual determination essential to a legal conclusion is *absent*” (*Garfield Beach* (2014) AB-9178a, at p. 6, emphasis in original.)

All in all, the Board finds it was error for the Department to hold that appellants failed to establish their rule 141 defenses without considering the totality of

⁴(. . . continued)

second decoy accompanied the decoy who made the purchase is not, in and of itself, enough to persuade us that the decoy operation was unfair.”.) However, where, as here, a decoy's companion is an adult, this fact in and of itself could, under the right circumstances, provide sufficient grounds to establish unfairness in the decoy operation.

⁵Notably, Officer Solorio was standing in line near the decoy without any items of his own to purchase. (See RT at p. 16.)

circumstances confronting the clerk on the date of the alleged violation.

ORDER

The decision of the Department is reversed.⁶

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

⁶This final decision 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 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.