

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

AB-9875

File: 20-557239; Reg: 18087559

7-Eleven, Inc. and Ambrosia Holdings Group, Inc.,
dba 7-Eleven Store #39726A
3044 Foothill Boulevard
La Crescenta, CA 91214,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 10, 2020
Telephonic

ISSUED SEPTEMBER 14, 2020

Appearances: *Appellants:* Adam N. Koslin, of Solomon, Saltsman & Jamieson, as
counsel for 7-Eleven, Inc. and Ambrosia Holdings Group, Inc.,

Respondent: Lisa Wong, as counsel for the Department of
Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Ambrosia Holdings Group, Inc., doing business as 7-Eleven
Store #39726A (appellants), appeal from a decision of the Department of Alcoholic
Beverage Control¹ suspending their license for 15 days because their clerk sold an

¹ The decision of the Department, dated April 10, 2020, is set forth in the
appendix.

alcoholic beverage to a police minor decoy, in violation of Business and Professions Code² section 25658(a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 30, 2015. There is no record of prior departmental discipline against the license.

On October 16, 2018,³ the Department filed a single-count accusation against appellants charging that, on or about July 14, 2018, appellants' clerk, Dewan MD Mushfikur Rahman (the clerk), sold an alcoholic beverage to 19-year-old Nicolle Kies (the decoy). Although not noted in the accusation, the decoy was working for the Department at the time.

At the administrative hearing held on January 16, 2020, documentary evidence was received, and testimony concerning the sale was presented by the decoy and Agent Charlotte Clark. Wayne Wortmann, one of appellants' co-owners, testified on appellants' behalf.

Evidence established that Agent Clark entered the licensed premises on July 14, 2018, followed shortly thereafter by the decoy. The decoy went to the refrigerator and selected a 25-oz. can of Bud Light beer. She took the beer to the counter and set it down. The clerk asked the decoy to see her ID. She handed the clerk her valid California driver's license (exh. 4). He looked at it and asked, "99?" (Findings of Fact,

² All statutory references are to the Business and Professions Code unless otherwise stated.

³ The decision erroneously lists October 16, 2016 as the date the accusation was filed.

¶ 6.) Believing he was referring to her birth year, the decoy responded, “Yes, 99.”

(*Ibid.*) The clerk handed the decoy’s ID back to her and completed the sale.

After the decoy exited the licensed premises, she re-entered with various agents. One of the agents asked her to identify the person who sold her the beer and she pointed to the clerk. A photograph of the two of them was taken. (Exh. 5.)

On February 10, 2020, the administrative law judge (ALJ) issued his proposed decision, sustaining the accusation and recommending a 15-day suspension. The Department adopted the proposed decision in full on April 6, 2020, and issued a certificate of decision four days later.

Appellants filed a timely appeal contending that the Department’s findings that the decoy’s appearance complied with rule 141(b)(2)⁴ were not supported by substantial evidence.

DISCUSSION

Appellants argue that the Department improperly relied on the decoy’s appearance “at the hearing nearly a year and a half later, and after testimony was presented stating that Decoy Kies’ appearance had substantially changed – she had put on weight, and worn different clothes and jewelry.” (AOB, at p. 6.) Ultimately, appellants argue that the decoy’s appearance did not comply with rule 141(b)(2) because the decoy had “dozens of prior purchases under her belt” (*Id.* at p. 8.)

Rule 141(b)(2) provides:

The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual

⁴ References to rule 141 are to title 4 of the California Code of Regulations, section 141 and its subdivisions.

circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

This rule provides an affirmative defense, and the burden of proof lies with appellants.

(*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.)

Here, the Department found that the decoy's appearance complied with rule 141(b)(2). (Conclusions of Law ¶ 5.) Therefore, this Board is required to defer to those findings so long as they are supported by substantial evidence. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Southland)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652, 659] [citing *Kirby v. Alcoholic Beverage Control Appeals Bd.* (1968) 261 Cal.App.2d 119, 122 [67 Cal.Rptr. 628] ["In considering the sufficiency of the evidence issue the court is governed by the substantial evidence rule[;] any conflict in the evidence is resolved in favor of the decision; and every reasonably deducible inference in support thereof will be indulged. [Citations.]"; see also *Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815] ["When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department."].) "Substantial evidence" is "evidence of ponderable legal significance, which is 'reasonable in nature, credible and of solid value.'" (*County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805, 814 [38 Cal.Rptr.2d 304, 307–308], internal citations omitted.)

In its decision, the Department rejected appellants' arguments that the decoy's physical appearance did not comply with rule 141(b)(2). The Department found that:

Both in the photos and at the hearing, Kies had a youthful appearance consistent with her actual age. It is a stretch to say that Kies had "significant" law enforcement experience based solely on her participation in five or six decoy operations. Regardless, there is no evidence that her

prior decoy experience had any effect upon her appearance, particularly since Rahman did not testify.

(Conclusions of Law, ¶ 11.) As noted above, “we are bound to construe the evidence in the light most favorable to the ALJ's decision” and will uphold the findings so long as they are supported by substantial evidence. (*Southland, supra*, 103 Cal.App.4th at 1087.)

To support its findings, the Department relied on several photographs of the decoy from the day of the operation. (Exhs. 2-3 & 5; Findings of Fact, ¶¶ 5 & 7.) Photographs of a decoy from the day of the operation are “arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age.” (*Southland, supra*, 103 Cal.App.4th at 1094.) Further, the Department relied on the ALJ's personal observations of the decoy's appearance at the hearing. The evidence established that the decoy was approximately 5'4" tall and 107 pounds on the day of the operation. (Findings of Fact, ¶ 5.) The ALJ found the decoy credibly testified “that her appearance [at the hearing] was the same, except that she was approximately 20 pounds heavier.” (*Id.* at ¶ 5; RT 13:5-8.)

The Department is entitled to rely on an ALJ's personal observations of a decoy when the decoy testifies that his or her appearance and mannerisms were “the same on the stand as it was when he purchased the beer.” (*Southland, supra*, 103 Cal.App.4th at 1094.) The Board sees no error with the Department's findings regarding the decoy's appearance, which are supported by the photographs of the decoy from the date of the operation, as well as the ALJ's personal observations of the decoy at the

hearing. Both sources are “reasonable in nature, credible and of solid value.” (*County of Los Angeles, supra*, 32 Cal.App.4th at 814.)

However, appellants contend that certain non-physical factors, such as the decoy’s law enforcement experience, made her appear older than 21 years old. (AOB at p. 8.) However, as noted by the Department, there is no evidence in the record that the clerk sold alcohol to the decoy based on her experience or demeanor. As the Department noted, the clerk did not testify. Thus, there is no evidence as to why the clerk sold beer to the decoy and rejected the decoy’s ID, showing her to be 19 years old, much less any evidence to establish that the clerk’s error was the result of the decoy’s demeanor.

Based on the above, the Department’s findings regarding the decoy’s appearance must stand. Ultimately, appellants are asking this Board second-guess the Department and reach a different result. Extensive legal authority prohibits this Board from doing so. (*Southland, supra*, 103 Cal.App.4th at 1094.)

ORDER

The decision of the Department is affirmed.⁵

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ This 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.

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.*

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE APPEAL BY:

7-ELEVEN, INC. & AMBROSIA HOLDINGS
GROUP, INC.
DBA: 7-ELEVEN STORE 39726A
3044 FOOTHILL BLVD
LA CRESCENTA, CA 91214-2713

VAN NUYS DISTRICT OFFICE

File: 20-557239

Reg: 18087559

AB: 9875

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

CERTIFICATION

I, Yuri Jafarinejad, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on June 18, 2020, in the City of Sacramento, County of Sacramento, State of California.



Office of Legal Services

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

7-ELEVEN INC. & AMBROSIA HOLDINGS
GROUP INC.
7-ELEVEN #39726A
3044 FOOTHILL BLVD.
LA CRESCENTA, CA 91214-2713

OFF-SALE BEER AND WINE - LICENSE

VAN NUYS DISTRICT OFFICE

File: 20-557239

Reg: 18087559

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on April 6, 2020. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

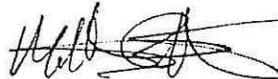
Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after May 21, 2020, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: April 10, 2020



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven Inc. & Ambrosia Holdings Group Inc.	}	File: 20-557239
dba 7-Eleven #39726A	}	
3044 Foothill Blvd.	}	Reg.: 18087559
La Crescenta, California 91214-2713	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 9,500
	}	
	}	Reporter:
	}	Shelby Maaske
	}	Kennedy Court Reporters
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Van Nuys, California, on January 16, 2020.

Alanna K. Ormiston, Attorney, represented the Department of Alcoholic Beverage Control.

Adam N. Koslin, attorney-at-law, represented respondents 7-Eleven Inc. and Ambrosia Holdings Group Inc. Wayne Wortmann, one of the owners of Ambrosia Holdings Group Inc., was present.

The Department seeks to discipline the Respondents' license on the grounds that, on or about July 14, 2018, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Nicolle Kies, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on January 16, 2020.

FINDINGS OF FACT

1. The Department filed the accusation on October 16, 2016.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on July 30, 2015 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Nicolle Kies was born on March 3, 1999. On July 14, 2018, she served as a minor decoy during an operation conducted by the Department. On that date she was 19 years old.
5. Kies appeared and testified at the hearing. On July 14, 2018, she was 5'4" tall and weighed 107 pounds. She wore a black tank top, jeans, and Vans. Her hair was parted in the middle and came down past her shoulders. She had a watch on her left wrist. (Exhibits 2-3 & 5.) At the hearing her appearance was the same, except that she was approximately 20 pounds heavier.
6. On July 14, 2018, Agent C. Clark entered the Licensed Premises. Kies followed a short time later. Kies went to the refrigerator and selected a 25-oz. can of Bud Light beer. She took the beer to the counter and set it down. The clerk, Dewan MD Mushfikur Rahman, asked to see her ID. She handed her California driver license (exhibit 4) to him. He looked at it and asked, "99?" Believing that he was referring to her date of birth, Kies responded, "Yes, 99." Rahman handed the driver license back to Kies. Kies offered it to him a second time, but he said, "No, you're OK." Kies paid for the beer, received some change, and exited.
7. Kies re-entered the Licensed Premises with various agents. One of the agents asked her to identify the person who sold her the beer. She pointed to Rahman. A photo of the two of them was taken. (Exhibit 5.)
8. Agent Clark asked Rahman about the transaction. He indicated that he had swiped the ID, but that the register indicated it was not good. When Agent Clark indicated that she had not seen him swipe the ID, he re-iterated that he had, but the register indicated that it was not good. Agent Clark obtained an electronic journal of the sale from the store manager. (Exhibit 6.) The electronic journal indicated "VISUALLY APPROVED FOR AGE 21" in connection with this transaction.
9. Wayne Wortmann, one of the owners of the franchisee, supervises the operation of the Licensed Premises. He does not work at the Licensed Premises, but works with the managers and supervisors there. The Respondents provide training to their employees over a three-week period when they are first hired. First, all new employees must watch a video relating to the sale of age-restricted products. Rahman completed this portion of

the training in July 2017. (Exhibit A.) All of their employees (except some new hires who are still in training) have completed this training. (Exhibit C.)

10. Next, new employees receive three weeks of supervised training on the point of sale system. During this time, a supervisor stands next to the trainee and observes each transaction. The first few sales of age-restricted products are made by the supervisor, who demonstrates how the system works. Subsequent sales are made by the employee. The point of sale system includes a prompt which stops the transaction until (1) the clerk scans or swipes an ID, (2) presses a button indicating that he or she has seen an ID with an acceptable date of birth, or (3) presses a button indicating that the purchaser appears to be over the age of 30. (Exhibit B.)

11. Rahman was a good employee who always followed proper procedures. Although they offered him a second chance, he subsequently quit. The Respondents spoke to all of the employees about what had happened, describing what Rahman had done wrong, emphasizing the proper procedure, and describing the potential ramifications of a violation.

12. Kies learned of the decoy program through the college she attended. She had been on five or six operations before this one. On July 14, 2018, she visited approximately 10 locations (roughly the same number she visited on each of the other operations). Three of those location, including the Licensed Premises, sold alcohol to her.

13. Kies appeared to be 19 years old at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in the Licensed Premises on July 14, 2018, Kies displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Rahman.

14. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on July 14, 2018, the Respondents' employee, Dewan MD Mushfikur Rahman, inside the Licensed Premises, sold an alcoholic beverage to Nicolle Kies, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-8 & 12-13.)

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Kies had the appearance of a person who was old enough to purchase alcohol based on the photographs of her on the day of the operation and her "significant" law enforcement experience. This argument is rejected. Both in the photos and at the hearing, Kies had a youthful appearance consistent with her actual age. It is a stretch to say that Kies had "significant" law enforcement experience based solely on her participation in five or six decoy operations. Regardless, there is no evidence that her prior decoy experience had any effect upon her appearance, particularly since Rahman did not testify. As noted above, Kies' appearance was consistent her actual age, 19 years old; as such, she had the appearance generally expected of a person under the age of 21. (Finding of Fact ¶ 13.)

PENALTY

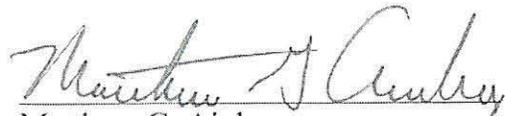
The Department requested that the Respondents' license be suspended for a period of 15 days. The Respondents argued that a mitigated penalty was appropriate based on the training they provide to their employees and the policies and procedures they have in place to prevent sales to minors. The penalty recommended herein complies with rule 144.

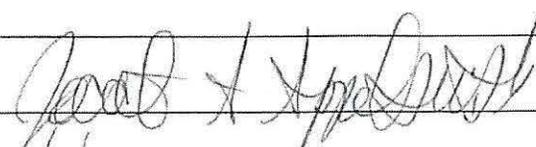
² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 15 days.

Dated: February 10, 2020


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>4/6/20</u>