

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

AB-7601

7-ELEVEN, INC., MANJIT S. GREWAL, and GURPAL GREWAL
dba 7-Eleven Store 2235-17334
4501 North Pershing Avenue, Stockton, CA 95207,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-214234 Reg: 99047192

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: February 15, 2001
San Francisco, CA

ISSUED APRIL 18, 2001

7-Eleven, Inc., Manjit S. Grewal, and Gurpal Grewal, doing business as 7-Eleven Store 2235-17334 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, with all 15 days stayed for a probationary period of one year, for appellant's employee selling an alcoholic beverage to a person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Manjit S. Grewal, and Gurpal Grewal, appearing through their counsel, Ralph B. Saltsman and Stephen W.

¹The decision of the Department, dated February 17, 2000, is set forth in the appendix.

Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988.

Thereafter, the Department instituted an accusation against appellants charging that, on May 14, 1999, appellant's clerk sold an alcoholic beverage, beer, to Andrew McGuirk, who was then 19 years old. McGuirk was acting as a police decoy at the time under the direction of the Stockton Police Department.

An administrative hearing was held on January 7, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by McGuirk ("the decoy") and by Stephen Leonesio, a Stockton police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged in the accusation had been proven.

Appellants thereafter filed a timely appeal in which they contend that Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)) was violated.

DISCUSSION

Appellants contend that Rule 141(b)(2) was violated in two ways: 1) the Administrative Law Judge (ALJ) did not analyze the decoy's age under the actual circumstances presented to the seller of the alcoholic beverage at the time of the sale, and 2) the decoy did not present the appearance generally to be expected of a person under the age of 21 because he had a goatee or beard, he wore a baseball cap backwards which partially obscured his face, and he wore wire-rimmed glasses.

The rule requires that the 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; . . ." Appellants contend there were differences in the decoy's appearance at the time of the sale and the time of the hearing and that the ALJ did not specifically address these differences in his proposed decision. Therefore, they argue, the ALJ's analysis here falls short of the requirements of Rule 141(b)(2) because he did not specifically evaluate the decoy's appearance as it was under the actual circumstances presented to the seller at the time of the sale.

The differences to which appellants refer were "some modification to the young man's mustache and goatee" and the absence at the hearing of the baseball cap the decoy was wearing at the time of the sale. (App. Brief at 5.)

In Finding of Fact III-2, the ALJ stated:

"At the time of the sale, Mr. McGuirk was 5'7" tall and weighed 175 lbs, same as on the date of the hearing. At the time of the sale of malt liquor to Mr. McGuirk, he was wearing a white undershirt and a Union Bay tee-shirt, light pants and hiking boots; he was wearing a baseball cap backwards. He had a trimmed goatee and was wearing wire rimmed glasses; he was not wearing any jewelry. Mr. McGuirk has a young-looking face and this combined with his overall physical appearance and demeanor were such that he presented the appearance which could generally be expected of a person under 21 years of age so that a reasonably prudent person would request proof of majority before selling him an alcoholic beverage."

While the ALJ did not address the decoy's appearance at the time of the sale in terms of its differences at the hearing, he clearly evaluated the decoy's appearance as of the time of the sale, taking into consideration the trimmed goatee and the presence of the baseball cap. The rule does not require a comparison, it only requires an

evaluation of the decoy's appearance at the time of the sale. The ALJ did that here.

From the photograph of the decoy taken with the clerk after the sale, it is apparent that he had a short goatee and at least a "five o'clock shadow" over his upper lip. However, the ALJ found that the decoy displayed the appearance generally to be expected of a person under the age of 21.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.²

This principle has particular application when the issue, as here, involves a factual determination regarding whether a person appears to be of a certain age group. As the Board has said in other cases, this is the responsibility of the trier of fact, the ALJ and, ultimately, the Department, to determine whether the decoy selected by the law enforcement agency possesses the requisite appearance under Rule 141(b)(2).

The ALJ sees the decoy as he testifies, is able to observe his physical

²The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

appearance, his demeanor, his poise as a witness, and, to a limited extent his personal mannerisms. The Board, on the other hand, sees only a photograph, if that. While it is true that, in some cases, there is some characteristic of the decoy's appearance that causes the Board to question the fairness of the use of that decoy, this is not such a case.

Appellant refers to the appeal of Kyung Ok Chun (1999) AB-7287, in which the Board reversed the decision of the Department for several reasons, one of which was non-compliance with Rule 141(b)(2). The minor decoy in that case had a visible "five o'clock shadow." In fact, the decoy testified that, after shaving in the morning, "By 5 o'clock, it looks like I haven't shaved for about three days." The Board noted that the decoy operation had taken place at about 5:40 in the evening, and concluded that "[t]he use of this decoy who according to the record would have a pronounced growth [of hair] on his face negates any hint of fairness."

As a factual matter, the heavy beard on the decoy in Chun distinguishes that appeal from the present one. Perhaps more importantly, although the ALJ in Chun discussed the decoy's appearance to some extent, he did not make a finding that the decoy's appearance complied with Rule 141(b)(2) as did the ALJ in this case.

Therefore, in Chun we had no basis for deferring to the ALJ's evaluation of the decoy's appearance.

In the present case, the ALJ had the best opportunity to see and weigh the effect of the differences in the decoy's appearance and he did so. Under the circumstances, we cannot say that the ALJ's conclusion was clearly erroneous or unreasonable.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.