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

AB-7602

7-ELEVEN, INC., MANJIT S. GREWAL and GURPAL GREWAL
dba 7-Eleven Store #2235-20632
4627 Da Vinci Drive, Stockton, CA 95207,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-243403 Reg: 99047193

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 #2235-20632 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk, Ranjit Singh ("Singh"), having sold an alcoholic beverage (a 40-ounce bottle of King Cobra Malt Liquor) to Andrew McGuirk ("McGuirk"), a minor, 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). McGuirk was acting as a decoy for the Stockton Police Department at the time of the transaction.

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

Appearances on appeal include appellants 7-Eleven, Inc., Manjit S. Grewal and Gurpal Grewal, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 2, 1990. Thereafter, the Department instituted an accusation against appellants charging a sale of malt liquor by Singh to McGuirk on May 14, 1999.

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 and Stockton police officer Stephen Leonesio regarding the circumstances of the sale, and by Manjit Grewal, one of the present appellants, who testified that he owned the store, and had been told by his manager that Singh, an employee, was working at the store on the day of the sale.

Subsequent to the hearing, the Department issued its decision which determined that the sale violated Business and Professions Code §25658, subdivision (a), and appellants had failed to establish any defense to the charge.

Appellants thereafter filed a timely appeal in which they contend that the Stockton Police Department violated Rule 141(b)(2) by the use of a decoy who did not present the appearance which could generally be expected of a person under 21 years of age.

DISCUSSION

The Administrative Law Judge (ALJ) made the following finding and special

findings of fact with respect to the appearance of the decoy and Rule 141(b)(2):

> "At the time of the sale, [the decoy] was 5' 7" tall and weighed 175 pounds, the same as on the date of the hearing. At the time of the sale of malt liquor to [the decoy], 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. [The decoy] has a young-looking face and this combined with his overall 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."
> (Finding of Fact III-2).
> ...
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> "Respondents argue that subsection (b)(2) of Rule 141 was violated because [the decoy] did not display to [the clerk] the appearance which could generally be expected of a person under 21 years of age. It is noted that on May 14, 1999, [the decoy] was 5' 7' in height and weighed 175 lbs. As described above, his appearance, that is his physical appearance and demeanor were such as could generally be expected of a person under 21 years of age.
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> "Respondents argue that [the decoy]'s goatee disqualified him from being a decoy, or in the alternative, the goatee made the decoy look older than 21 years old. This argument is rejected. Despite [the decoy]'s goatee, his young-looking face and demeanor caused [the decoy] to look like the college student he is, with an appearance which could generally be expected of a person under 21 years of age. Accordingly, there was compliance with subsection (b)(2) of Rule 141."
> (Finding of Fact VI).

Appellants assert that in neither of these references to the decoy's appearance did the ALJ state that the decoy displayed the appearance which could generally be expected of a person under 21 years of age "under the actual circumstances presented to the seller ... at the time of the offense." They suggest that while there is not always a significant difference between the age of the minor decoy at the time of the decoy operation compared to the time of the

administrative hearing, there is "in this case because there is testimony concerning the distinctions in the apparent age of the decoy between the two occasions." (App.Br., at page 5). Appellants refer to the decoy's testimony that he had trimmed his goatee before the decoy operation, that he had worn a baseball cap backwards,[2] and he was wearing wire-rimmed glasses.[3]

This is another example of a case which appellants seek to have retried by the Appeals Board. All of the arguments which have been presented to the Board were presented, albeit in slightly different format, to the ALJ. In his closing argument, counsel for appellants referred specifically to the baseball cap and the goatee, and argued that they presented an appearance older than 21.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he possessed 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance

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[2] Appellant's statement that the bottom rim of the cap touched his eyebrows is not borne out by the record: "Q. It's not quite down to your eyebrows in this photograph. A. No. Q. There's a little bit of skin between your eyebrows and the rim of the hat; is that right? A. Yes. Q. And that's approximately the way you were wearing your hat when you were in front of the clerk ...? A. Yes." [RT 14].

[3] The decoy was also wearing glasses when he testified at the hearing, but the record does not indicate whether they were the same wire-rimmed glasses.

required by the rule, and an equally partisan response that he did not.

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older.

We think it worth noting that we hear many appeals where, despite the supposed existence of such a policy, the evidence reveals that the seller made the sale in the supposed belief that the minor was in his or her early or mid-20's, and for that reason did not ask for identification and proof of age. It is in such cases, and in those where there is a completed sale even though the buyer - not always a decoy - displayed identification which clearly showed that he or she was younger than 21 years of age, that engenders the belief on the part of the members of this Board that many sellers, or their employees, do not take sufficiently seriously their obligations and responsibilities under the Alcoholic Beverage Control Act.

By the same token, we appreciate the fact that, on occasion, police may have used decoys whose appearance, because of large physical stature, facial hair, or other feature, is such that a conscientious seller may be unfairly induced to sell an alcoholic beverage to that person. Within the limits that apply to this Board as a

reviewing tribunal, we have attempted to deter such practices, either by outright reversal, or by stressing the importance of compliance with Rule 141. If licensees feel more is necessary, their resort must be to another body.

We do not ignore the evidence in this case that the decoy was able to purchase alcoholic beverages in several the establishments he visited. While this suggests that he may have presented a more mature appearance to some sellers than he did to others, or even that some sellers were more careless than others, we can only assume the ALJ took this into consideration in his deliberations.

Finally, we are satisfied that the decision, read as a whole, contains findings sufficient to satisfy the requirement of the rule regarding the appearance of the decoy at the time of the offense.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.