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

AB-7665

7-ELEVEN, INC., JAY W. JENSEN, and SHARON E. JENSEN dba 7-Eleven #16185
2500 Geer Road, Turlock, CA 95380,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
File: 20-214225 Reg: 99047566

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

Appeals Board Hearing: August 3, 2001
San Francisco, CA

ISSUED SEPTEMBER 27, 2001

7-Eleven, Inc., and Jay W. and Sharon E. Jensen, doing business as 7-Eleven #16185 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a minor decoy, 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., and Jay W. and Sharon E. Jensen, appearing through their counsel, Ralph B. Saltsman and Stephen

[1]The decision of the Department, dated June 22, 2000, is set forth in the appendix.

W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 11, 1998. Thereafter, the Department instituted an accusation against appellants charging that, on August 3, 1999, appellants' clerk, Toni Dudek ("the clerk"), sold beer, an alcoholic beverage, to 16-year-old Christina Renfrow.[2] Renfrow was acting as a minor decoy for the Turlock Police Department at the time of the sale.

An administrative hearing was held on May 3, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction by Renfrow ("the decoy"), by Turlock police officers Scott Wachs and Tony Silva, and by the clerk, Dudek.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been sustained and no defense had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(3) was violated, and (2) Rule 141(b)(5) was violated.

DISCUSSION

I

Appellants contend that Rule 141(b)(3) was violated because neither the decoy's driver's license nor a photocopy of the license was brought to the hearing, and testimony about the license was admitted over objection.

[2]The accusation and the Administrative Law Judge's Proposed Decision show her name as "Christina Rentfro." However, we use "Renfrow" here because she spelled her name that way for the record at the administrative hearing.

Rule 141(b)(3) provides: "A decoy shall either carry his or her own identification showing the 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."

Although appellants contend that Rule 141(b)(3) was violated, they do not allege any facts that would show such a violation had taken place. They do not allege that the decoy carried any identification other than her own; they do not allege that the identification carried by the decoy showed anything other than the correct date of her birth; they do not allege that the decoy failed to present her identification to the clerk when asked for it. No evidence in the record even suggests that any of the provisions of the rule were violated. The only conclusion that can be reached is that there is no evidence of a violation of Rule 141(b)(3).

Appellants attempt to turn the decoy's failure to bring her identification to the hearing into a violation of Rule 141(b)(3). However, the rule concerns only what the decoy must do during the decoy operation, not what the decoy must do at the hearing.

While appellants may be correct that the best evidence of the contents of the decoy's driver's license would be the license itself, there is no dispute here about the contents of the driver's license. The only relevance to Rule 141(b)(3) that the contents of the driver's license could have would be whether or not the driver's license showed the decoy's true and correct date of birth. Since it is presumed, and not controverted, that DMV did what it was supposed to do when issuing the decoy's license, it must be presumed that the driver's license carried the decoy's correct date of birth.

Appellants complain that they have not seen the license or a photocopy of the license. However, they had the opportunity to request inspection of the license or a photocopy of it during discovery. Appellants filed a Motion to Compel Discovery, but

that motion did not allege refusal of the Department to provide the decoy's license or a photocopy thereof. We must conclude, therefore, that appellants either were allowed access to the license or a photocopy, or they did not request that in the first place. Under the circumstances, appellant's objections at the hearing and on appeal must be considered untimely.

Appellants cite this Board's decision in Kim (1999) AB-7103, for the proposition that the failure of the Administrative Law Judge (ALJ) to discuss Rule 141(b)(3) is a basis for reversal. That case is inapposite. In Kim, the ALJ did not address the defense raised of failure to comply with Rule 141(b)(2), which requires that the decoy display the appearance that could generally be expected of a person under the age of 21. In reversing the Department's decision revoking the license, the Board explained that, although the ALJ had obviously rejected the defense, without any discussion of the decoy's appearance the Board could not determine whether the correct standard had been used in evaluating the apparent age of the decoy.

Rule 141(b)(3), unlike Rule 141(b)(2) which was involved in Kim, has no specific legal standard under which compliance must be judged. In addition, while appellants here alluded to Rule 141(b)(3), they supported that allusion with neither argument nor evidence. During closing argument in the present case, appellants' counsel opined that, without the decoy's driver's license, any ALJ "would be hard pressed to reach findings of the facts concerning what it was that the clerk was looking at . . . ." [RT 84.] With no elaboration by counsel of why the driver's license was necessary, and uncontested evidence in the record that the 16-year-old decoy had carried only her own driver's license and had handed that same license to the clerk when requested for

identification, we do not believe that the ALJ was under any obligation to make up an argument for appellants and then refute it.

Appellants' citation of this Board's decision in Prestige Stations, Inc. (2000) AB-7484, for the proposition that it was reversible error for the ALJ to admit oral testimony about the license without the license being in evidence, is similarly inapposite. In AB-7484, the Board reversed the Department's decision because the only evidence that the minor in that case (not a decoy) was under 21, was "administrative hearsay" which may be used only to supplement or explain some other item of admissible evidence. With no underlying admissible evidence of age, the accusation could not be sustained. As explained above, in the instant case the truth of the contents of the decoy's driver's license was not in question, and the testimony that the license belonged to the decoy and that she showed her license to the clerk upon request was clearly admissible.

Even if the Board were to conclude that the decoy's driver's license should have been produced at the hearing, that testimony about the license should not have been admitted, and that there should at least have been a photocopy of the license in the record, there would still be no basis for finding that Rule 141(b)(3) was violated.

II

Appellants contend Rule 141(b)(5) was violated because "Officer Silva so completely diverted the attention of the seller that the seller could not reasonably be aware that she was being identified . . . ." (App. Br. at 12.) They also argue that the ALJ erred when he found that the clerk's testimony about what happened after the sale was not reliable because she was very upset.

Rule 141(b)(5) requires the decoy to make a face-to-face identification of the seller of the alcoholic beverage. In Chun (1999) AB-7287, this Board interpreted the term "face to face" to mean

> "that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller."

Here, the ALJ made extensive findings regarding what occurred after the sale:

> "III. . . . 5. Detective Silva, observing Ms. [Renfrow] leaving the premises, followed her outside and Detective Wachs took possession of the beer. Detective Silva asked for Ms. [Renfrow's] driver [sic] license, and while Detective Wachs secured the beer in the trunk of the police vehicle, Detective Silva and Ms. [Renfrow] re-entered the premises. Detective Silva identified himself to the clerk as a member of the Turlock Police Department. Detective Silva does not recall whether he asked Ms. [Renfrow] to identify the clerk who sold her the alcohol. Ms. [Renfrow] testified that about a second after identifying himself to Ms. Dudek, Detective Silva asked her, Ms. [Renfrow], to identify the person who sold her the beer; that she had pointed at Ms. Dudek, who was standing at a distance of about 2 ½ feet, the width of the counter, and stated, 'This is the person who sold it to me,' or similar words. Ms. Dudek knew, or should have known, that Ms. [Renfrow] had identified her as the person who sold her the beer. While showing her Ms. [Renfrow's] license, Detective Silva then asked Ms. Dudek, 'Do you realize you sold alcohol to a minor?' Ms. [Renfrow's] testimony was internally consistent and her answers did not appear to be rehearsed; there is no evidence that she had any motive to lie in this matter, and her testimony is found to be credible.
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> "6. Detective Wachs entered the premises shortly thereafter, and while standing by Ms. [Renfrow], approximately five to six feet from the clerk, he asked Ms. [Renfrow] to identify the clerk who had sold her the beer. Ms. [Renfrow] identified Ms. Dudek. Since the evidence suggests that Ms. Dudek may have been engaged in a conversation with Detective Silva at that time, and since the Department has the burden of proof to establish that a face to face identification occurred, it was not established that Ms. [Renfrow's] identification of Ms. Dudek to Detective Wachs, as the seller of the alcoholic beverage, constituted a 'face to face' identification within the meaning of subdivision (b)(5) of Section 141, Title [4], California Code of Regulations (hereinafter 'Rule 141').
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> "IV. Ms. Dudek testified that after Detective Silva came in and identified himself to her and advised her she had sold an alcoholic beverage to a minor, she became quite upset; she does not recall Ms. [Renfrow] re-entering the premises, or identifying her, Ms. Dudek, after re-entering the premises. She also stated that

> she was upset, and does not recall events between the time Detective Silva advised her that she had sold an alcoholic beverage to a minor, and the time when Detective Wachs spoke with her to retrieve the $5 bill used in the transaction, a time span of about five to ten minutes. It is noted that although the testimony of Ms. [Renfrow], Detective Silva and Detective Wachs differed in some respects, all testified that Ms. [Renfrow] re-entered the premises in order to identify the clerk who sold her the alcohol. Under these circumstances, it is found that Ms. Dudek was very upset at having sold alcohol to a minor, and her testimony about the events after the sale of beer to Ms. [Renfrow] is not reliable."

Appellants argue that there was "some testimony . . . that the sequence of events made it impossible for the seller to know and understand she was being identified." They contend that the clerk, at the time the identification was made, "was distraught" and "incapable of seeing what was going on around her." Appellants do not cite the testimony they rely on, and the record does not support their contention.

The clerk testified that she didn't remember anything from the time Silva told her she had sold to a minor until several minutes later when Wachs came up and asked for the "buy money" from the register [RT 73, 74-76]. She acknowledged that at that time she was "in a state of shock" [RT 73], "upset" [RT 73, 74], and "disappointed in herself" [RT 74]. Silva testified that when he told the clerk she had sold to a minor and showed her the decoy's driver's license, "She immediately had a disbelieving sickening look on her face, like she couldn't believe she had done that" [RT 45]. Wachs recalled "the expression on the clerk's face when she was looking at [the decoy], and was kind of like in shock, dumbfounded" [RT 60]. The clerk, the decoy, and Wachs all testified that the clerk's attention was on Silva when he identified himself and told her she had sold to a minor [RT 33-35, 59-60, 72].

The testimony is sufficient to support the ALJ's conclusion that the clerk was very upset and that "her testimony about the events after the sale . . . is not reliable." If the

clerk was upset and could not remember events during a certain period of time, her testimony about events during that time period is by definition not reliable.

There is no evidence, however, to support appellants' assertion that the clerk was "incapable of seeing what was going on around her." Her distress and lack of memory about the identification are not inconsistent with the conclusion that she was aware, or should have been aware, that she was being identified. The clerk did not remember the decoy identifying her, but the decoy testified, credibly and consistently, that she did identify the clerk from a distance of about two and one-half feet. [RT 18-19, 22.] It was reasonable for the ALJ to conclude that the clerk was aware, or should have been aware, that the decoy was identifying her as the seller.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]This 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.