

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

AB-7739

File: 20-295216 Reg: 00049062

7-ELEVEN, INC. and RAJWINDER S. ATWAL dba 7-Eleven Store #13999
2850 Brea Boulevard, Fullerton, CA 92635,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 6, 2001
Los Angeles, CA

ISSUED OCTOBER 30, 2001

7-Eleven, Inc., and Rajwinder S. Atwal, doing business as 7-Eleven Store #13999 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a minor decoy, 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., and Rajwinder S. Atwal, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Kim.

¹The decision of the Department, dated November 16, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 2, 1994.

Thereafter, the Department instituted an accusation against appellants charging that, on April 20, 2000, appellants' clerk, Ahmed Naseer ("the clerk") sold an alcoholic beverage (a six-pack of Bud Light beer) to 19-year-old Christopher Joshua Smith. Smith was acting as a decoy for the Fullerton Police Department at the time of the sale.

An administrative hearing was held on September 14, 2000, at which time documentary evidence was received, and testimony was presented by Smith ("the decoy"), Fullerton police officer Juan Santa, and co-appellant Rajwinder Singh Atwal.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained and no defenses had been established.

Appellants thereafter filed a timely appeal in which they contend that the Administrative Law Judge (ALJ) committed reversible error when he did not admit into evidence a copy of the Decoy Guidelines submitted by appellants.

DISCUSSION

Appellants contend the ALJ erred in failing to admit a copy of the Department's Decoy Program Guidelines (the "Guidelines") into evidence and in believing that he could not consider the Guidelines in the context of a Rule 141 violation.

Appellant's counsel asked the ALJ to take official notice of "guidelines earlier issued by the Department" [RT 55] but, not having a copy of them, the ALJ gave counsel time after the hearing to submit copies of the Guidelines, with Department counsel to have time thereafter to submit objections in writing. [RT 56, 57, 73-74.] The

Guidelines were submitted and the Department filed its objection. In his proposed decision, the ALJ addressed the Guidelines, and appellants' related argument, in

Finding II-G:

"The [appellants'] attorney also argued that in determining whether the decoy operation had been conducted 'in a fashion that promotes fairness' that the totality of the operation should be considered, and that Rule 141(a) had been violated because of the combination of the appearance of the decoy and the fact that the decoy operation took place during the morning coffee rush. Based upon this argument, [appellants] are asking that Exhibit A (the Decoy Guidelines) be admitted into evidence. However, both the California Supreme Court and the Appeals Board have determined that a violation of the Decoy Guidelines does not provide a defense to a sale of an alcoholic beverage to a minor decoy. Furthermore, the evidence in this case did not establish that the police officers considered the Decoy Guidelines in conducting their decoy operation at the premises or that they were even aware of the existence of the Guidelines. Under these circumstances, the Guidelines are not relevant in the instant matter and Exhibit A will not be admitted into evidence. Additionally, the preponderance of the evidence did not establish that [appellants'] clerk was rushed especially in light of the fact that the clerk had time to request and look at the decoy's identification. After viewing the totality of the evidence presented, a finding is made that the decoy operation was conducted fairly."

Appellants argue that the ALJ was wrong in concluding that the Guidelines were not relevant. They contend that his reliance upon decisions of the California Supreme Court (presumably Provigo Corp. v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561 [28 Cal.Rptr.2d 638, 643]) and of this Board (e.g., Circle K (5/25/99) AB-7108; Tang and Tran (10/19/00) AB-7454; Circle K (4/11/01) AB-7476) was misplaced.

The court in Provigo, supra, 7 Cal.4th at 570, said "it is unclear why invalid departmental guidelines should afford petitioners a defense to a violation of the liquor laws." Appellants argue that Provigo was decided before the promulgation of Rule 141, so it could not have been discussing the guidelines with regard to whether the decoy operation was conducted in a fashion that promotes fairness as required by Rule

141(a). However, if the guidelines were not a defense when Provigo was issued, we fail to see any reason they should be used now as a defense, when Rule 141 has superceded them.

Appellants misread this Board's decisions. They rely upon Assaedi (1999) AB-7144, in which this Board "acknowledged that under the correct circumstances, a violation of a departmental guideline may render a particular decoy operation unfair with respect to Rule 141." In Tang and Tran, supra, we responded to this same argument:

"Assaedi does contain broad language which suggests there may be circumstances when a violation of one of the Department's guidelines may be such as to render a particular decoy operation unfair when measured against Rule 141. We believe, however, that such an instance will be rare, because the guidelines are merely that, and are not written with sufficient precision to warrant their application as if they were rules of law. . . . ¶ It is conceivable that in a situation which involved an unusual level of patron activity that truly interjected itself into a decoy operation to such an extent that a seller was legitimately distracted or confused, and the law enforcement officials sought to take advantage of such distraction or confusion, relief would be appropriate."

In other words, there might arise a situation in which a premises would be so busy that it could be called a "rush hour," and it might involve circumstances that could be shown to make the decoy operation unfair under Rule 141(a). However, the violation of the rule would arise from the unfairness of the circumstance, **not** because one of the Guidelines was violated. Therefore, appellants are incorrect when they say that this Board "acknowledge[s] the possibility that a guideline violation might constitute a manner of unfairness thereby violating the Rule."

Admittedly, this Board has referred to the Guidelines in prior cases, but merely for the purpose of addressing an argument when this issue has been raised. The

Board's position has been, and continues to be, that violation of one of the Guidelines does not, by itself, constitute a violation of Rule 141. We feel it is imperative to reiterate this position to give notice to licensees who may not be already aware, that this argument is unavailing in an appeal before this Board.

Because the Guidelines are irrelevant to finding a violation of Rule 141, the ALJ properly refused to admit them as evidence.²

ORDER

The decision of the Department is affirmed.³

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

²We also note that appellants have not provided any foundation for the introduction of the Guidelines as an exhibit. They have not shown that the Guidelines were in effect, or effective, at the time of the decoy operation at issue in this matter or, if so, that they were binding on the local law enforcement agency conducting the decoy operation.

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.