

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

AB-7756

File: 20-214213 Reg: 00049243

7-ELEVEN, INC., ALSA SAFAR, and ANTWAN SAFAR dba 7-Eleven #2235-17647
1048 West Yosemite, Manteca, CA 95336,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 11, 2001
San Francisco, CA

ISSUED DECEMBER 13, 2001

7-Eleven, Inc., Alsa Safar, and Antwan Safar, doing business as 7-Eleven #2235-17647 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, with 5 days stayed for a probationary period of one year, 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., Alsa Safar, and Antwan Safar, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

¹The decision of the Department, dated December 21, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1998.

Thereafter, the Department instituted an accusation against appellants charging that, on May 12, 2000, appellant's clerk, Sandra Wood ("the clerk"), sold a 24-ounce can of Bud Light beer to 16-year-old Trevor Blackwell. Blackwell was working as a minor decoy for the Manteca Police Department at the time of the sale.

An administrative hearing was held on November 7, 2000, at which time documentary evidence was received and testimony was presented by Blackwell ("the decoy"), by Manteca police officer Steve Harris, by the clerk, and by co-licensee Antwan Safar.

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

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)) was violated, and (2) the Administrative Law Judge (ALJ) failed to justify his credibility determinations.

DISCUSSION

I

Appellants contend the decoy was "oversized," and misrepresented his height as 6'2" and his weight as 175 pounds, when he was really 6'4" tall and weighed 190 pounds. They also argue that the ALJ did not make a fair and impartial analysis of the decoy's appearance, in particular by ignoring the \$250 belt and silver buckle the decoy wore during the decoy operation and instead going "on a tangent" regarding whether or

not the decoy was wearing a jacket. They conclude that the decoy did not comply with the requirement of Rule 141(b)(2) that a decoy "shall 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."

The decoy testified that he was 6'2" tall and weighed 175 pounds, both at the time of the hearing and at the time of the decoy operation. [RT 9.] Appellants' allegation that the decoy was taller and weighed more is based on a "minor decoy information sheet" that was not offered into evidence. Appellants' counsel asked the decoy if the information sheet listed his height as 6'4" and his weight as 190 pounds; the decoy agreed with counsel's statements of what was on the information sheet, but it is not at all clear that he was agreeing the information itself was correct.² In any case, we do not know the date of the information sheet, who prepared it, or anything else about it. Under the circumstances, the ALJ was justified in his finding of the decoy's height and weight, based on the decoy's testimony.

As far as the silver belt buckle is concerned, we cannot say, as appellants do, that one would not expect to find such an item worn by someone under 21. Many young men wear the same type of large, Western-style decorative belt buckle. The fact that the belt and buckle cost \$250 is not a factor in the decoy's apparent age.

²Q. And the minor decoy sheet states that you're 6 foot 4; is that correct?

"A. Somewhere around there.

"Q. And it has your weight, box number 8, 190 pounds. Is that true?

"A. Yes."

[RT 22-23.]

The perception of a decoy's apparent age is based on a number of factors in combination. It is unavailing to pick out an isolated item of apparel and argue it makes the decoy look over the age of 20. The ALJ who presided over the administrative hearing in 7-Eleven and Apend Incorporated (7/31/01) AB-7666, was presented with an argument similar to that of the present appellants, and this Board quoted his analysis with approval in its opinion. It bears repeating here:

"It is not one or two elements in the makeup and impression of a minor that are usually controlling in assessing whether a person has the appearance which could generally be expected of a person under 21. It is the overall impression based on numerous factors, such as the appearance, demeanor, mannerisms, attitude, etc., that form the foundation for a finding on this critical issue. The [appellants'] argument is based on a few selected characteristics and impressions which, without more, are misleading in making a reasonable assessment of the appearance of the minor's age."

The ALJ in the present case based his assessment on a variety factors – "his physical appearance, as well as his face, his voice and manner of speaking, his demeanor and his maturity" [Finding VIII-B] – and concluded that the decoy's appearance complied with Rule 141(b)(2). Substantial evidence supports that finding, and appellants' attempts to call it into question are unavailing.

II

Appellants contend the ALJ failed to justify his credibility determinations as required by the case of Holohan v. Massanari (2001) 246 F.3d 1195 (9th Cir.).

The Board considered and rejected this contention in 7-Eleven, Inc. and Huh (8/16/01) AB-7680, saying:

"We have reviewed the decision in [Holohan], and the court decisions cited in support of that portion of the court's holding, and are satisfied that the view expressed by the court is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California. While it may be

true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

There is no reason for us to decide the issue any differently in the context of the present appeal.

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.