

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

AB-7780

File: 20-215125 Reg: 00049234

7-ELEVEN, INC., BEHROZ VADOLI, and NOSH VADOLI dba 7-Eleven #18607
12463 Victory Boulevard, North Hollywood, CA 91606,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

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

ISSUED JANUARY 29, 2002

7-Eleven, Inc., Behroz Vadoli, and Nosh Vadoli, doing business as 7-Eleven #18607 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, all stayed, for their clerk having sold 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., Behroz Vadoli, and Nosh Vadoli, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated March 1, 2001, is set forth in the appendix.

Appellants' off-sale beer and wine license was issued on September 21, 1976. Thereafter, the Department instituted an accusation against appellants charging an unlawful sale of an alcoholic beverage to a minor on April 28, 2000.

An administrative hearing was held on January 3, 2001, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Los Angeles police officer David Riemen and Elizabeth Castillo, the minor decoy, while Tianarar Ittikuli, appellants' clerk, and co-licensee Nosh Vadoli testified on behalf of appellants.

The decoy testified that she purchased a 16-ounce can of Budweiser at appellants' store, and was not asked her age or for identification. She also testified that, after she left the store with her purchase, she returned to the store and, at the request of a uniformed officer, identified the clerk who sold to her by pointing to him. Officer Riemen, who was in the store, observed the transaction.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, rejecting appellants' contentions that the decoy lacked the appearance required by Rule 141(b)(2), and that there was no compliance with Rule 141(b)(5). However, based upon appellants' long history of discipline-free operation, the Department stayed all 15 days of the suspension imposed by its order.

Appellants thereafter filed a timely appeal in which they renew their contentions that there was no compliance with Rule 141(b)(2) and (b)(5).

DISCUSSION

I

Appellants contend that the Administrative Law Judge (ALJ) mistakenly relied upon the decision of the Appeals Board in Longs Drug Stores (1999) AB-7356 and confused appellants' burden of proof relative to compliance with Rule 141, by failing to give consideration to the clerk's "honest and good faith" belief that the decoy appeared to him to be 23 years of age.

The ALJ cited and quoted from the Board's decision in Longs Drug Stores, supra, which rejected the substitution of a "reasonable standard" for the "generally to be expected" standard of Rule 141(b)(2). Appellants now assert that in doing so, the ALJ rejected an argument which had not been made. Instead, appellants say, they were contending that the clerk's perception of the decoy's apparent age must at least be considered, and the ALJ erred by failing to do so.

The ALJ did not, as appellants assert (App.Br., page 9), exclude the clerk's testimony concerning his perceptions of the decoy's appearance. To the contrary, the clerk was permitted to testify freely regarding his impression of the decoy's age and appearance. The ALJ simply rejected the argument implicit in appellant's position, that a reasonable mistake by the clerk in assessing the apparent age of a decoy, could be a defense under Rule 141(b)(2).

We think it apparent from the decision that the ALJ considered the clerk's belief as to the decoy's appearance, when he wrote:

"[I]t is also conceivable that a person who could reasonably be considered at least 21 years old might also be reasonably considered to look under the age of 21 and might display an appearance which could generally be expected of a

person under 21 years old.”

By and large, it is the ALJ's determination whether the decoy presents the appearance of a person who could generally be expected to be under 21 years of age which controls in a minor decoy case. This is because he has the opportunity to observe the decoy as he or she testifies, an opportunity denied this Board. While there may be cases in which an ALJ's determination is so questionable that the Board is compelled to intervene, this is not one of them. Other than the clerk's perception, appellant has offered little to suggest that the ALJ's assessment of the apparent age of the decoy was so unreasonable as to amount to an abuse of discretion. The references to her physical appearance, her nervousness, or absence of nervousness, and her experience in purchasing at other locations, although factors the ALJ might consider, are not controlling in a determination under Rule 141(b)(2).

Finally, appellants' assertion that the ALJ erroneously limited his assessment of the decoy's apparent age to what it appeared to be as of the date of the hearing is in flat contradiction to Finding of Fact V-C:

“Based on the observation of the decoy and on the photographs, the Administrative Law Judge concludes that the decoy displayed the appearance, both physical and non-physical, which could generally be expected of a person under 21 years of age, under the actual circumstances presented to [appellants'] clerk at the time of the sale of the beer.”

II

Appellants contend that the ALJ's finding that there was compliance with Rule 141(b)(5) is not supported by the evidence. They say that Officer Riemen's testimony that the officer who conducted the identification process was not the officer directing the decoy precludes a finding of compliance with Rule 141(b)(5).

It is not in dispute that Officer Buenavides was the officer who asked the decoy to identify the clerk who sold the beer to her.

Officer Riemen testified that Officer Buenavides' role in the decoy operation was limited to "the presence of a uniformed officer after an illegal act." He also testified that Officer Dominguez was in charge of the decoys, and that Officer Buenavides was neither in charge of the decoy operation or in charge of the decoy.

This Board noted, in response to a similar argument in Quik Stop Markets, Inc./Sangha (` ` 2001) AB-7399:

"This contention has been raised in several cases presented to the Board, with no acceptance. It does not strain the language of the rule in the slightest to conclude that any of the several officers engaged in the decoy operation could, with respect to each facet of the decoy's conduct, be for that activity the officer directing the decoy."

One such case is The Southland Corporation/Gonzalez (2000) AB-7392, where the Board characterized as a "play on words" an argument that the deputy who conducted the identification process was not the officer directing the decoy because he thought other officers were in charge of the decoy operation:

"We believe there is full compliance with Rule 141 (b)(5) when one of the officers involved in the decoy operation, who has seen or is aware that a sale to the decoy occurred, is delegated, either expressly or by implication, as the person to conduct the identification process, and does so."

We do not think that Officer Riemen's description of the role occupied by Officer Buenavides is incompatible with the latter's ability to act as the officer directing the decoy during the face-to-face identification phase of the decoy operation.

ORDER

The decision of the Department is affirmed.²

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

² 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.