

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

AB-7814

File: 20-316167 Reg: 00049510

7-ELEVEN, INC. dba 7-Eleven Store 2133 20014
1955 South Patterson Road, Oxnard, CA 93035,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: June 4, 2002
Los Angeles, CA

ISSUED SEPTEMBER 12, 2002

7-Eleven, Inc., doing business as 7-Eleven Store 2133 20014 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its employee having sold an alcoholic beverage (beer) to Frank Panza, a 17-year old police 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 appellant 7-Eleven, Inc., appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated April 26, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 26, 1996. Thereafter, on September 6, 2000, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on December 22, 1999.

An administrative hearing was held on March 23, 2001, at which time oral and documentary evidence was received.

Frank Panza, the decoy, testified that he purchased a bottle of Miller Genuine Draft beer at appellant's store. He was asked for identification and displayed an identification card bearing his photograph and date of birth. The card was given to him by the Young Marine Corps League, a private organization. The card bore an expiration date of March 24, 1999. Panza was 5' 10" tall and weighed 215 pounds at the time of the purchase, and was wearing a black t-shirt and blue jeans. The t-shirt bore the insignia of the Marine Corps School of Infantry. At the time of the hearing Panza was one inch taller and weighed 170 pounds.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the decoy's appearance did not comply with Rule 141(b)(2); and (2) the identification furnished by the decoy did not comply with Rule 141(b)(3).

DISCUSSION

I

Appellant contends that the Department violated Rule 141(b)(2). Appellant focuses on the difference in the decoy's weight between the time of the sale and the time of the hearing. It is appellant's position that the Administrative Law Judge (ALJ),

by relying only upon a photograph of the decoy's upper body (Exhibit 3), overlooked the impact the decoy's overall appearance would have had upon the clerk.

The issue, simply stated, is whether the ALJ, on the basis of a photograph, could make a fair assessment of what the decoy's appearance would have been at the time of the sale, when the decoy weighed 40 pounds more than he did at the hearing.

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 required by the rule.

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 agree with appellant that there was a substantial change in appellant's weight, but only one inch in his height. Does it necessarily follow that a substantial loss

of weight by a young person - the decoy was only 17 years of age - necessarily affects the appearance, in terms of age, he or she projects? We do not think so. Where, as here, the ALJ has the ability to assess the difference the weight change would have had on the decoy's appearance, we are not in a position to say that either his finding or his reliance on the photograph contravenes the rule.

This Board has considered cases in which a substantial change in the appearance of a decoy between the time of the sale and the time of the hearing has been such that, in combination with other factors, persuaded us that there had been a violation of the rule, but this is not such a case.

II

Appellant contends in its brief that the identification furnished by the decoy violated Rule 141(b)(3) because it was not a governmentally-issued identification and had expired. Appellant argues that a decoy's identification must meet at least some of the requirements of Business and Profession Code §25660.² Appellant does not contend that the date of birth on the identification was not the decoy's correct date of birth.

Appellant appears to have assumed that the objectives of Rule 141(b)(3) and

² Business and Professions Code §25660 provides:

"Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license or an identification card issued to a member of the Armed Forces, which contains the name, date of birth, description, and picture of the person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon."

Business and Professions Code §25660 are sufficiently similar that the requirements of the latter should be read into the former. The assumption is incorrect. While both are intended to provide a form of protection to a seller of alcoholic beverages, there is little else in common.

Rule 141(b)(3) requires a decoy to carry identification showing his correct date of birth, or else carry no identification at all. Thus, a seller who requests identification will, if, as here, identification is produced, be put on notice that the prospective purchaser is a minor. And, if no identification is produced after having been requested, the seller knows that he or she is assuming the risk that the customer is under the age of 21. If a prospective purchaser of an alcoholic beverage presents identification that shows him or her to be younger than 21 years of age, the prospective seller is on notice not to make a sale. Hence, there is little reason to require, in addition, the security measures reflected in Business and Professions Code §25660.

On the other hand, Business and Professions Code §25660 protects a seller against a minor purporting to be 21 or older. It permits a seller to rely upon governmentally-issued identification, but that identification must bear a photograph and description of the person to whom it is issued. Since, in virtually every case where the bearer is attempting to purchase an alcoholic beverage, such identification is being offered to convince the seller the person displaying it is 21 or older, the elements required by §25660 are important. It is in this kind of case where “false identification” is a concern.

The analogy to the §25660 cases where expired identification was found unacceptable is misplaced. In those cases, the person displaying the identification was a minor attempting to pass himself off as an adult by using another person's

governmentally-issued identification. The fact of expiration should have put the seller on notice that the identification was suspect, and that it might not be that of the person using it. Thus, further inquiry was warranted. In this case, on the other hand, the fact that the decoy's identification had expired is of no importance, since it still communicated the decoy's status as a minor.

ORDER

The decision of the Department is affirmed.³

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

³ 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.