

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

AB-8050

File: 20-215131 Reg: 02053322

7-ELEVEN, INC., ARMANDO R. FRANCISCO and TERESITA FRANCISCO
dba 7-Eleven #2136-19670
11351 Moorpark Street, North Hollywood, CA 91601,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Richard J. Lopez

Appeals Board Hearing: August 14, 2003
Los Angeles, CA

ISSUED OCTOBER 3, 2003

7-Eleven, Inc., Armando R. Francisco, and Teresita Francisco, doing business as 7-Eleven #2136-19670 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Armando R. Francisco, and Teresita Francisco, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated October 31, 2002, is set forth in the appendix.

Appellants' off-sale beer and wine license was issued on July 1, 1988. On July 12, 2002, the Department instituted an accusation against appellants charging that, on April 12, 2002, their employee, agent, or servant, Eduardo D. Cabling, sold beer to Jeremy James Miller, a person then approximately 19 years of age. Although not disclosed in the accusation, Miller was acting as a decoy for the Los Angeles Police Department.

An administrative hearing was held on September 17, 2002, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged, and appellants had failed to establish an affirmative defense.

Appellants thereafter filed a timely appeal in which they contend that there was no compliance with Rule 141(b)(2).

DISCUSSION

The administrative law judge (ALJ) noted the decoy's part-time employment with the Los Angeles Police Department (Finding of fact 3), and described his impression of the decoy as follows (Finding of Fact 4):

Miller appeared at the hearing essentially as he had on the evening of April 12. He wore a black T-shirt; blue jeans and running shoes. He wore the same watch he wore on April 12 and had no other jewelry. He is clean shaven with a short hair style. He has no visible tattoos. He is approximately 6 feet tall and weighs approximately 195 pounds. He is youthful appearing and in his speech uses colloquialisms common to his age. He uses hand gestures and has facial expressions common to his age.

On the basis of this finding, the ALJ found compliance with Rule 141(b)(2).

There is much repetition in appellant's brief, but the thrust of it is that the decoy's

size,² his experience as a student worker for the Los Angeles Police Department, as a criminal justice student in college, and an earlier experience as a decoy manifested itself by way of the decoy's overall demeanor while testifying and operating as a decoy. Thus, appellants argue, the evidence established that the decoy had the maturity, size, and demeanor of an individual 21 years of age or older.

The Appeals Board's role is limited. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.³

It is readily apparent from the decision that the ALJ, who observed the decoy as he testified, was satisfied from what he saw and heard that the decoy met the standard imposed by Rule 141(b)(2). His proposed decision indicates that he took into consideration the same factors relied upon by appellants. It does not appear that there is any particular aspect of the decoy's appearance that compels a different result. As the Board has said many times, the ALJ is the trier of fact, and had the opportunity,

² Appellants emphasize the fact that the decoy was six feet tall and weighed 195 pounds. By itself, this means little, since many high school juniors and seniors are probably that size. Physical size is only one of a number of characteristics which must be considered under the rule.

³The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

which the Board does not, of observing the decoy as he testified. Under these circumstances, the Board is not in a position to second guess the ALJ. (See *7-Eleven, Inc./Gonser* (2001) AB-7750.)

ORDER

The decision of the Department is affirmed.⁴

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ 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.