

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

AB-8051

File: 20-215276 Reg: 02053369

7-ELEVEN, INC., and DWIGHT and NORENE BERG, dba 7-Eleven # 2173-18897
11656 Wilshire Boulevard, West Los Angeles, CA 90025,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED JANUARY 22, 2004

7-Eleven, Inc., and Dwight and Norene Berg, doing business as 7-Eleven # 2173-18897 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Dwight and Norene Berg, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Jessica Brown, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 18, 1988. On July 18, 2002, the Department filed an accusation against appellants charging that, on

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

February 26, 2002, appellants' clerk (the clerk), sold an alcoholic beverage to 18-year-old Lino Pavon. Although not noted in the accusation, Pavon was working as a minor decoy for the Los Angeles Police Department at the time.

An administrative hearing was held on October 4, 2002, at which time documentary evidence was received, and testimony concerning the sale was presented by Pavon (the decoy) and by Marla Kiley, a Los Angeles police officer.

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

Appellants have filed a timely appeal in which they contend: Violations occurred of rule 141(a), rule 141(b)(2), and rule 141(b)(5).²

DISCUSSION

I

Appellants contend the requirement of rule 141(a), that a decoy operation be conducted in a fashion that promotes fairness, was violated when the decoy asked the clerk how much the six-pack of Tecate beer cost. Appellants assert that the clerk was "immediately bombarded" with the decoy's "demand" for the price of the beer, and that this "unnecessary conversation," engaged in intentionally to distract the clerk, prevented the clerk from "evaluating the customer." (App. Br. at 9-10.)

The ALJ addressed this contention in Determination of Issues II and rejected it, saying:

Since Respondents' clerk did not testify, there is no evidence whether he was distracted by the decoy's question. However, it is difficult to understand how a question such as "How much is the beer?" would distract Respondents' clerk. If anything, as Department counsel argued, the question would have drawn the clerk's attention to the fact that he was

²References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

selling beer. In any event, the fact that the decoy asked Respondents' clerk for the price of the beer was not in any way inconsistent with the Department rule that the decoy operation promote fairness.

Appellants' description of what happened goes beyond exaggeration to the point of fabrication. There was no testimony by the decoy or the police officer (the only ones who testified) that even hinted that the clerk was bombarded with demands to know the price. The decoy simply asked, "How much is the beer?" The ALJ was correct in concluding that no unfairness resulted from the decoy's question.

II

Rule 141(b)(2) requires that the decoy's appearance be that 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." Appellants contend that this decoy appeared to be over the age of 21 because he wore gold jewelry: a bracelet, a ring, and a chain with a crucifix; his hair had a short, "military cut," that made it appear as if his hairline were receding; and he displayed the confidence and poise of an adult, due to his extensive law enforcement experience.

The ALJ discussed the decoy's appearance in Findings of Fact V through VIII:

V- The decoy was a sergeant in the Los Angeles Police Department explorer program in February 2002, supervising approximately 25 other explorers. As an explorer, he had received extensive training in various aspects of law enforcement. Prior to February 26, 2002, the decoy had participated in more than fifty decoy operations and had visited approximately 500 licensed premises as a decoy.

VI- The decoy was between 5' 9" and 5' 10" tall and weighed 180 pounds on February 28, 2002. He wore a red T-shirt, a chain with a crucifix and a ring, and a gold bracelet. A photograph (Exhibit 2) was taken of the decoy and the clerk that day. The photograph shows that the decoy's hair was very short, in a "military cut". Contrary to Respondents' argument, the decoy's hair did not appear to be receding. The photograph shows that the decoy displayed the physical appearance which could generally be expected of a person under twenty-one years old.

VII- The decoy was 5' 10" tall and weighed 180 pounds on the day of the hearing. Although his hair was a little longer at the hearing, the decoy appeared very similar to the photograph of him taken on February 28. He displayed the physical appearance which could generally be expected of a person under twenty-one years old while he testified. While testifying, the decoy was polite and felt "normal, O.K.," just as he also felt "normal, O.K." while purchasing the beer at Respondents' store.

VIII- The Administrative Law Judge observed the decoy's mannerism, demeanor, poise, and maturity while he testified. Based on this observation, the testimony about the decoy's appearance, and the photograph, the Administrative Law Judge finds that the decoy displayed the appearance which could generally be expected of a person under twenty-one years old when he purchased the beer from Respondents' clerk.

The ALJ took into consideration all the factors that appellants contend made the decoy appear to be at least 21 years old, and concluded that, in spite of them, the decoy still appeared to be under the age of 21.

We note that, at the hearing, appellants did not argue that the gold jewelry made the decoy appear to be old enough to purchase beer, and we need not consider it now that it is raised for the first time on appeal. The ALJ obviously took the jewelry into consideration in his evaluation of the decoy's apparent age, and found that it did not have the effect of making him appear older. Appellant's argument on appeal is based on totally unsupported assertions about the extent, value, and age-appropriateness of the decoy's jewelry, and if we were to consider the argument, we would reject it.

The ALJ specifically found that the decoy's hairline did not appear to be receding. The ALJ had the benefit of seeing what the decoy's hair looked like at the hearing, as well as how it looked in the photograph taken at the premises. This Board has only the photograph to look at, and we cannot say that the ALJ was obviously wrong in his conclusion.

The ALJ discussed, and rejected, the arguments that the decoy's experience and lack of nervousness made him appear older, quoting from several Appeals Board decisions: *Prestige Stations, Inc.* (2002) AB-7802, *7-Eleven/Azzam* (2001) AB-7631, *7-Eleven/Virk* (2001) AB-7597, *The Vons Companies* (2001) AB-7568, and *Kim* (2001) AB-7523. In those decisions, the Board rejected arguments about decoys' experience and lack of nervousness, explaining that experience, by itself, does not disqualify the decoy, and that a lack of nervousness is only one indicia of age that must be considered in conjunction with all the other indicia.

III

Rule 141(b)(5) provides that, after a sale, the officer directing the decoy shall have the decoy make a face-to-face identification of the alleged seller of the alcoholic beverage. Appellants argue that there was no acknowledgment by the clerk that the identification was being made. For this reason, they contend, there was not an adequate face-to-face identification as described in this Board's decision in *Chun* (1999) AB-7287. In *Chun*, the Board said that a face-to-face identification means that

the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

In Finding of Fact IV, the ALJ found that a proper face-to-face identification of the seller took place:

After paying for the beer, the decoy exited the store with it. He then reentered the store and was asked by Los Angeles Police Sergeant Sasso to identify the person who sold the beer to him. The decoy pointed to the clerk who sold him the beer. During the identification, the decoy stood approximately five feet from the clerk, separated by the counter. The two were facing each other. The decoy's identification of the clerk as the seller of the beer was in compliance with the Department's Rule 141(b)(5). After the identification was made, a citation was issued to the clerk.

In their brief, appellants very selectively quote the testimony of the decoy and officer Kiley. They assert that the decoy merely "pointed out" the seller to an officer, and speculate that, even though the clerk was facing the decoy at the time, he could have been talking to the other officers and not been aware he was being identified.

Appellants' argument relies on their assertion that *Chun* requires a "mutual acknowledgment between the seller and the decoy." This is not true. The Appeals Board explained in *Greer* (2000) AB-7403, that rule 141(b)(5) requires that "[t]he minor decoy must identify the seller; there is no requirement that the seller identify the minor, nor is it necessary for the clerk to be actually aware that the identification is taking place."

The testimony established, as found by the ALJ, that while making the identification, the decoy was about five feet from the clerk, and the decoy and the clerk were facing each other. Under the circumstances, the clerk reasonably ought to have been aware that he was being identified as the seller. This is all that is required.

ORDER

The decision of the Department is affirmed.³

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

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.