

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

AB-8152

File: 20-215269 Reg: 02054004

7-ELEVEN, INC., BEVERLY FUSS, and RICHARD FUSS dba 7-Eleven #2175-17210
660 East Foothill Boulevard, San Dimas, CA 91773,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED JULY 30, 2004

7-Eleven, Inc., Beverly Fuss, and Richard Fuss, doing business as 7-Eleven #2175-17210 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Beverly Fuss, and Richard Fuss, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Gary D. Labin, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging that,

¹The decision of the Department, dated June 5, 2003, is set forth in the appendix.

on February 22, 2002, appellant's clerk, Kimar Rayinder, sold a six-pack of Coors Light beer to Sandra Poister, an 18-year-old minor acting as a decoy for the Los Angeles County Sheriff's Department.

An administrative hearing was held on April 30, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the transaction had occurred as alleged in the accusation, and ordered the suspension from which this timely appeal has been taken.

Appellants do not dispute the charge that there was the sale of an alcoholic beverage to a minor, contending only that there was no compliance with the face-to-face identification requirement of Rule 141(b)(5).

DISCUSSION

The ALJ found that the decoy identified the person who sold the beer to her by pointing to him and verbally identifying him as the seller. The clerk was facing the decoy and standing approximately ten feet from her. (Finding of fact V.) In addition, a photograph was taken of the decoy and the clerk.

Appellants contend that, even though the decoy was standing approximately 10 feet from the clerk, who was facing her, and pointed to the clerk while she told the officer he was the person who had sold her the beer, the identification was defective. They say that an identification from a distance of approximately 10 feet cannot be face-to-face, and that, even though the clerk was facing the decoy, there was not the mutual acknowledgment of the type referred to in *Chun* (1999) AB-7287.

In *Chun*, an early case involving the identification issue, the Board was attempting to define the kind of identification the rule required, stating:

“face to face” means that the two, 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.

A year later, in *Greer* (2000) AB-7908, the Board rejected the argument that the face-to-face identification was defective because the seller did not identify the decoy.

The Board said, in that case:

Appellant's argument stands the rule on its head. The 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 was taking place.

Later cases have explained that all that is necessary is that the seller "reasonably ought to be" aware of the identification. (See *7-Eleven, Inc./Christenson* (2003) AB-7908.)

In *Department of Alcoholic Beverage Control v Alcoholic Beverage Control Appeals Board/Keller* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339], the court observed that Rule 141(b)(5) was "primarily designed" to insure that the seller will be given the opportunity, soon after the sale, "to come face to face" with the decoy. While the Board in past decisions may not have acknowledged such a "primary" design, it has always recognized that the seller is entitled to a reasonable opportunity to view the decoy in the course of the identification process. (See, e.g., *7-Eleven, Inc./Chawla* (2003) AB-8107, where the Board stated:

It is clear that the Board believes that the focus must be on the decoy's identification of the seller. That approach reduces to an absolute minimum the possibility that an innocent clerk, one who had no involvement in the transaction, will be falsely accused. And, since the practical requirement of the identification process is to return the decoy to the store shortly after his or her purchase, the likelihood that his or her renewed presence, accompanied by police officers, will go unnoticed by the selling clerk is virtually non-existent.

The clerk did not testify, and we find it impossible to believe he was not aware that he had been accused. The decoy pointed to him, told an officer he sold her the beer, and then posed for a photograph with him. There is no question but that the clerk reasonably ought to have been aware of the identification.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.