

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

AB-8921

File: 20-429100 Reg: 07067447

7-ELEVEN, INC., and HH&S ENTERPRISES, dba 7-Eleven Store 2171 33035B
3490 Jurupa Street, Ontario, CA 91761,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: September 3, 2009
Los Angeles, CA

ISSUED DECEMBER 10, 2009

7-Eleven, Inc., and HH&S Enterprises, doing business as 7-Eleven Store 2171 33035B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 15 days for their clerk having sold a six-pack of Bud Light beer to Alberto Alvarado, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and HH&S Enterprises, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Alicia R. Ekland, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

¹The decision of the Department, dated August 6, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 15, 2005. On December 13, 2007, the Department instituted an accusation against appellants charging that, on October 25, 2007, their clerk, Hector Carillo Alvarado sold a six-pack of Bud Light beer to Alberto Alvarado, a person under the age of 21. Although not stated in the accusation, Alberto Alvarado was working as a decoy for the Ontario Police Department.

An administrative hearing was held on June 11, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Thomas O'Dell and Gregory Bosco, Ontario police officers, and Alberto Alvarado, the decoy. Appellants presented no witnesses. The undisputed evidence established that the clerk examined Alvarado's California driver's license, which showed his true date of birth and contained a red stripe with white letters which stated "AGE 21 IN 2009," before going forward with the sale. The clerk later explained to the police officers that he thought Alvarado appeared to be 18 years of age. Alvarado testified that he visited 12 premises, was sold alcoholic beverages at six of them, and was asked for identification at four of the six places which sold to him.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and rejected appellants' claim of a defense under Department Rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2)).

Appellants filed a timely notice of appeal in which they contend that the decoy did not display the appearance required by Rule 141(b)(2).

DISCUSSION

Appellants argue that the decoy's military style haircut, muscular frame, serious

facial expressions, and extensive experience working as an Explorer with law enforcement, gave him an appearance of a person older than 21 years of age, and that this, coupled with the fact that he was able to purchase an alcoholic beverage in six of the twelve locations he visited, made his use as a decoy inherently unfair.

Rule 141(b)(2) requires a minor decoy to display 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 at the time of the alleged offense.

The administrative law judge (ALJ) disagreed with appellants. He wrote (Finding of Fact 9):

Decoy Alvarado appears his age, 19 years of age at the time of the decoy operation. Based on his overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of the clerk at the Licensed Premises on October 25, 2007, Alvarado displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to the clerk. Alvarado appeared his true age.

Appellants' arguments, and the facts behind them, were all considered by the ALJ. As we have stated many times, we are unwilling to second-guess an ALJ, who has seen and heard the decoy testify, in the absence of compelling circumstances, none of which are present here. (See, e.g., *7-Eleven, Inc./Sandhu* (2005) AB-8280; *7-Eleven, Inc./Pattaphongse* (2004) AB-8110; *7-Eleven, Inc./Kwon* (2001) AB-7669.)

We do not find the fact that the decoy's ability to purchase an alcoholic beverage at six of the twelve locations he visited at all remarkable. At four of those six locations, one of which was appellants', the decoy was asked for and displayed his identification, which consisted of a California driver's license containing a prominent red stripe with the words "AGE 21 in 2009." While the record does not indicate the reason for the

refusals to sell at the other six locations, i.e., whether it was the decoy's appearance or the information on his driver's license, or the two in combination, it certainly undermines the appellants' contention that the purchase rate is a meaningful aspect of the decoy's appearance.

This case is much like *7-Eleven, Inc./ Mohammad N. Ali* (2007) AB-8535, a case in which the purchase ratio was 80 percent. The Board said, in that case:

In *7-Eleven, Inc./Dianne Corp., supra* ("*Dianne*"), the decoy was able to purchase alcoholic beverages in eight of ten locations visited, in none of which was he asked his age or for identification. The Board thought this "powerful evidence" that the decoy lacked the appearance required by the rule, and that such evidence, coupled with the ALJ's faulty analysis of the decoy's appearance, compelled the conclusion that his decision that there was compliance with the rule was unreasonable and an abuse of discretion.

The Board revisited its decision in *Dianne* in *7-Eleven, Inc./Jain and Jain* (2004) AB-8082 ("*Jain*"), and rejected the notion that it intended its language in *Dianne* to suggest a per se rule that proof of an 80-percent purchase rate compelled the conclusion that the rule was violated.

Instead, the Board stated:

Although an 80 percent purchase rate during a decoy operation raises questions in reasonable minds as to the fairness of a decoy operation, that in itself is not enough to show that rule 141(a) or rule 141(b)(2) were violated. Such a per se rule would be inappropriate since the sales could be attributed to a number of reasons other than a belief that the decoy appeared to be over the age of 21. If we did not make that clear in *7-Eleven/Dianne*, we do so now.

The ALJ, although critical of the Board's view that an 80- percent purchase rate might raise questions as to the fairness of a decoy operation, concluded that the decoy did display the appearance required by Rule 141(b)(2). In reaching this conclusion, he considered the Board's holding in *Dianne*, the testimony about the decoy's appearance, her mannerism, maturity, poise and demeanor while testifying, and photographs of the decoy. (Determination of Issues, paragraph 5.)

We are not persuaded in this case that we should depart from our belief that, in the absence of compelling circumstances, this Board must defer to the determination of the trier of fact with respect to whether there has been a violation of Rule 141(b)(2).

Finally, for what it is worth, we note that the decoy was asked for, and produced identification, which, when examined, should have warned the seller that he was selling an alcoholic beverage to a minor. In *Dianne*, and in *Jain*, none of the sellers asked for identification.

We adhere to what we said in *7-Eleven, Inc./ Mohammad N. Ali*, above.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.