

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

AB-8926

File: 20-449168 Reg: 07067425

7-ELEVEN, INC., and R & S, INC., dba 7-Eleven Store #2172-25703C
1495 Superior Avenue, Newport Beach, CA 92663,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 5, 2011
Los Angeles, CA

ISSUED JUNE 17, 2011

7-Eleven, Inc., and R & S, Inc., doing business as 7-Eleven Store #2172-25703C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 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 R & S, Inc., appearing through their counsel, Ralph B. Saltsman and Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

¹The decision of the Department, dated August 11, 2008, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 3, 1998. Thereafter, the Department instituted an accusation against appellants charging that, on September 20, 2007, appellants' clerk, Carlos Rodriguez (the clerk), sold an alcoholic beverage to 16-year-old Peter Chang. Although not noted in the accusation, Chang was working as a minor decoy for the Department at the time.

An administrative hearing was held on June 6, 2008, at which time documentary evidence was received, and testimony concerning the sale was presented by Chang (the decoy) and by Department Investigator Vo.

The decoy was able to buy alcohol in five of the seven premises he visited. Investigator Vo testified that in "more than two" of the premises where there were violations the decoy was asked to produce his identification. The decoy was not asked for his identification in appellants' store.

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 filed an appeal, and contend that there was no compliance with Department Rule 141(b)(2).

DISCUSSION

Appellants contend that the decoy operation did not comply with the fairness standards of Rule 141² because there was no compliance with Rule 141(b)(2).³ They

² Rule 141 (4 Cal. Code Regs., §141) requires a decoy operation be conducted in a "fashion that promotes fairness."

³ Rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2)), requires that "a decoy shall 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."

point to evidence that the decoy had a five o'clock shadow, looked different at the time of the hearing than he did at the time of the sale, was a well-trained police Explorer, and had participated in four or five prior decoy operations. They rely on the Board's decisions in *7-Eleven/Dianne Corp.* (2001) AB-7835, a case where the decoy had purchased an alcoholic beverage in eight of the ten premises he visited, and *Circle K Stores, Inc.* (2001) AB-7762, a case in which there had been a "significant discernible change" in the decoy's appearance in the interim between the date of the sale and the administrative hearing. The Board reversed the Department's decisions in both cases.

The Board has said many times that, in the absence of compelling reasons, it will ordinarily defer to the findings of the administrative law judge (ALJ) on the issue of whether there was compliance with Rule 141(b)(2). The Board has acknowledged that the ALJ has the opportunity to observe the decoy as he or she testifies, while all the Board has is a cold record and, in most cases, a photograph of the decoy. In the cases relied upon by appellants, the Board was persuaded that the facts of those cases warranted a departure from that position. This is not such a case.

In *Circle K Stores, supra*, the decoy had lost a significant amount of weight, had changed her hair style, and displayed a "fidgeting" that she had acquired during a stint in the military following the decoy operation, all of which were thought by the Board to be "dramatic" in their effect on her appearance. Similarly, in *7-Eleven/Dianne Corp., supra*, the Board was influenced by the fact that in none of the eight premises where the sales were made was the decoy asked for identification.

In *7-Eleven, Inc./Jain* (2002) AB-8082), the decoy had purchased an alcoholic beverage in four of the five premises she visited. Appellants there argued that the Board's decision in *7-Eleven/Dianne Corp.* controlled the result. The Board disagreed,

stating, in part:

The Board said in *7-Eleven/Dianne* that the high purchase rate was a “strong indication” that the decoy’s appearance at the time of the sale did not comply with rule 141(b)(2), and the ALJ’s finding that it did comply was undermined by the “apparent contrary belief” of 80 percent of the clerks who saw the decoy in person that night. Neither of these statements, particularly when read in the context of the entire opinion indicates that the Board intended a per se rule of non-compliance with rule 141(b)(2) when a decoy is able to purchase alcoholic beverages without being asked for his or her identification, at 80 percent or more of the premises visited. Although an 80 percent purchase rate during a decoy operation raises questions in reasonable minds as to the fairness of the decoy operation, that by 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.

In the present case, appellants argue that changes in the decoy’s appearance, when combined with the purchase rate, make this case one like *7-Eleven/Dianne*. We believe the ALJ’s findings (Findings of Fact II-D) do not support that argument:

D. The overall appearance of the decoy, including his demeanor, his poise, his size, his mannerisms and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing and on the day of the decoy operation was similar except that he had a darker suntan, his hair was styled with hair gel and he was approximately eight pounds heavier on the day of the hearing.

1. The decoy is a youthful looking male who was five feet six inches in height and who weighed one hundred seventy pounds on the day of the sale. On that day, his clothing consisted of jeans and a T-shirt and he was clean-shaven although Exhibit 2 shows what looks like a “five o’clock shadow” in the mustache area. The decoy testified that he generally shaved about two times per week and that he had shaved the night before the decoy operation.

2. The decoy testified that he had participated in approximately four or five prior decoy operations and that he had been an Explorer with the Cerritos Sheriff’s Department since 2005. As an Explorer, he volunteered for parades and festivals and he wore a uniform and carried a walkie-talkie.

3. The photograph depicted in Exhibit 2 was taken inside the premises on the day of the sale and the photographs depicted in Exhibits

3-A and 3-B were taken at the Newport Beach Police Department's parking lot before going out on the decoy operation. All three of these photographs depict how the decoy appeared and what he was wearing when he was at the premises.

4. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him appear older than his actual age.

5. The decoy was able to purchase an alcoholic beverage at five of the seven locations he visited on September 20, 2007.

6. After considering the photographs depicted in Exhibits 2, 3-A and 3-B, the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellants argue that if five out of seven locations sell to a minor, the only reasonable conclusion to be made about the minor's appearance is that he did not have the appearance generally expected of a person under the age of 21. They argue that the fact that he was not asked for identification by some of the sellers implies that he appeared to be over 21, and that those sellers who asked for identification and still sold to him were so resolute in their belief that he was over 21 that it overrode his or her review of the identification.

As the findings demonstrate, the ALJ considered each of the aspects of the decoy's appearance that appellants say made the decoy appear older than 21 years of age. He also acknowledged the decoy's "success" rate. (Finding of Fact II-D, *supra*.) Given the careful consideration given to the decoy's appearance by the ALJ while acknowledging the decoy's purchase ratio, we are not in a position to say that the result the ALJ reached was an abuse of discretion.

In point of fact, two locations declined to sell to the decoy, and "more than two" [RT 17] sold to him even after asking for identification. We, and appellants, can only

speculate what motivated those retail clerks who sold an alcoholic beverage to a 16-year-old minor, described by the ALJ as “youthful looking.”

Appellants also argue that the decision inserts facts into its “Findings” that are not part of the record and have no evidentiary basis. They assert (App. Br., p.9) that the decision makes findings regarding the decoy’s mannerisms, demeanor and poise at the time of the decoy operation when there was no testimony or other evidence regarding that subject presented at the hearing.

Appellants can only be referring to the first paragraph (II-D) of the findings, since that is the only place where there is any reference to the decoy’s demeanor, mannerisms or poise. Their contention is simply specious. The one-sentence paragraph covers two subjects, and the only reference in the paragraph in question to anything having to do with the day of the decoy operation is the latter portion of the sentence referring to the decoy’s physical appearance.

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, 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.