

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

AB-8935

File: 20-408743 Reg: 08068059

7-ELEVEN, INC., and RONAK, INC., dba 7-Eleven # 20884
4253 Palm Avenue, La Mesa, CA 91941,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 3, 2011
Los Angeles, CA

ISSUED APRIL 1, 2011

7-Eleven, Inc., and Ronak, Inc., doing business as 7-Eleven # 20884 (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 Ronak, Inc., appearing through their counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated August 26, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 13, 2004. On February 29, 2008, the Department filed an accusation against appellants charging that appellants' clerk sold an alcoholic beverage to 19-year-old David Challman on June 23, 2007. Although not noted in the accusation, Challman was working as a minor decoy for the La Mesa Police Department at the time.

At the administrative hearing held on July 22, 2008, documentary evidence was received and testimony concerning the sale was presented by Challman (the decoy) and by Timothy C. Cook, a La Mesa police officer. Before testimony began, the administrative law judge (ALJ) effectively quashed the subpoena served by appellants on the Department's District Administrator.

On June 23, 2007, the decoy was 12 days short of being 20 years old. He entered appellants' licensed premises, chose a 6-pack of bottled Coors Light beer, and took it to the counter. Appellants' clerk asked for the decoy's identification and the decoy handed her his valid California driver's license. She looked at the license, handed it back to the decoy, and proceeded to sell the beer to him.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. Appellants then filed an appeal contending: (1) The ALJ erroneously precluded testimony concerning the Department's use of a prohibited underground regulation in determining the penalty to be imposed, and 2) the decoy's appearance violated rule 141(b)(2)².

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.

DISCUSSION

I

Appellants contend that quashing the subpoena prevented them from presenting evidence of the Department's use of an illegal underground regulation in determining the penalty to be imposed.

The Board has addressed and rejected this argument before. (See, e.g., *Yummy Foods LLC* (2010) AB-8950; *Randhawa* (2010) AB-8973; *Chevron Stations, Inc.* (2010) AB-8974; *7-Eleven, Inc./ Wong* (2010) AB-8991; *7-Eleven, Inc./ Solanki* (2010) AB-9019.) Even if the District Administrator testified as the offer of proof said she would, that testimony would not establish that an underground regulation existed. The Board rejects this argument again, as it has done before.

II

Rule 141(b)(2) requires that a decoy present an appearance which could generally be expected of a person under the age of 21. Appellants contend that the decoy's appearance violated this rule because he was 5' 11" tall, weighed 155 pounds, had not shaved on the day of the decoy operation and displayed a "5 o'clock shadow," had been a community service officer for the University of California - San Diego Police Department for a year and a half, and was only 12 days short of his 20th birthday on the day of the decoy operation.

The ALJ discussed the decoy's appearance at the time of the decoy operation in Findings of Fact II-C, describing, among other things, his height and weight, his clothing, the photographs taken of him, his prior experience as a decoy, and his employment as a university community service officer. He specifically found that the

decoy had no facial hair on that day; that only three of approximately 17 premises visited during the decoy operation sold alcoholic beverages to him; that the decoy appeared at the hearing to be under the age of 21, although he had turned 21 about a week before the hearing; and that the clerk did not testify at the hearing. The ALJ concluded that the decoy "displayed an overall appearance that 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."

The ALJ considered the attributes on which appellants rely, but concluded that the decoy's appearance did not violate rule 141(b)(2). Appellants have not established any reason for the Board to reject the ALJ's finding. As the Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing a decoy as he or she testifies. Under these circumstances, the Board will not second-guess the ALJ's factual determination concerning the decoy's appearance.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
MICHAEL A. PROSIO, 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.