

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

AB-8940

File: 20-399490 Reg: 08068060

7-ELEVEN, INC. and DHAMI CORPORATION, dba 7-Eleven #2121-13587
2404 University Avenue, San Diego, CA 92104,
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 MARCH 29, 2011

7-Eleven, Inc., and Dhami Corporation, doing business as 7-Eleven #2121-13587 (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, Joginder Singh, selling an alcoholic beverage to Dallas Castro, a 16-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 Dhami Corporation, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its

¹The decision of the Department, dated September 5, 2008, is set forth in the appendix.

counsel, Valoree Wortham.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 4, 2003. On February 29, 2008, the Department instituted an accusation against appellants charging that, on September 22, 2007, appellants' clerk, Joginder Singh (the clerk), sold an alcoholic beverage to 16-year-old Dallas Castro. Although not noted in the accusation, Castro was working as a minor decoy for the San Diego Police Department at the time.

An administrative hearing was held on July 18, 2008, at which time documentary evidence was received, and testimony concerning the sale was presented by Castro (the decoy) and by Linda H. Tibbets, a San Diego police officer.

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

Appellants have filed a timely appeal, and make the following contentions: (1) the decision is based on an underground regulation; (2) the decoy operation was not conducted in a fashion that promotes fairness; (3) the decoy did not display the appearance required by Rule 141(b)(2); and (4) the Department did not consider all evidence of mitigation.

DISCUSSION

I

Appellants contend that the decision is the product of an underground regulation, a policy governing discipline in first-strike minor cases, and that they were prevented from introducing evidence that would show that such an underground regulation existed.

The issue raised by appellant is no stranger to this Board. In fact, since it was raised in embryonic form in 2009 (see *Cirrus Investments* (2009) AB-8766), it has been addressed by the Board at least 16 times,² and rejected each time. There is nothing said in appellants' brief that has not been said in one form or another in the matters cited in the footnote. This appeal is equally lacking in merit.

II

Appellants contend that the decoy operation was not conducted in a fashion that promotes fairness, asserting that the decoy was sent into the store at a time it was particularly busy, and that the decoy lacked the appearance required by Rule 141(b)(2).³

The contention that the decoy operation was conducted unfairly because it was done at a time the store was busy is also one with which the Board is familiar. (See, e.g., *7-Eleven, Inc./Lo* (2005) AB-8384; *Equilon Enterprises, LLC* (2001) AB-7765.) In

² *Cirrus Investments* (March 12, 2009) AB-8766; *Randhawa* (May 19, 2010) AB-8973; *Yummy Foods LLC* (July 22, 2010) AB-8950; *7-Eleven, Inc./Del Rosario* (August 4, 2010) AB-8786; *7-Eleven, Inc./Raqba, Inc.* (August 5, 2010) AB-8988; *Chevron Stations, Inc.* (August 9, 2010) AB-8996; *7-Eleven, Inc./Solanki* (August 9, 2010) AB-9019; *Murshed* (August 9, 2010) AB-9073; *Wong* (August 18, 2010) AB-8991; *7-Eleven, Inc./Triplett* (September 15, 2010) AB-8864; *7-Eleven, Inc./Salem Enterprises* (September 21, 2010) AB-8965; *Sharmeens Enterprises, Inc.* (October 25, 2010) AB-8782 (review denied November 5, 2010); *7-Eleven, Inc./Maldiv Associates* (December 7, 2010) AB-8951; *7-Eleven, Inc./Aziz* (December 9, 2010) AB-8980; *7-Eleven, Inc./Ghuman & Sons, Inc.* (December 9, 2010) AB-8910; *Sharmeens Enterprises, Inc.* (December 9, 2010) AB-8781.

³ Rule 141(b)(2) provides:

The 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;

Equilon, the Board stated:

This Board has consistently rejected the argument that Rule 141 was violated because the premises was busy at the time of the decoy operation. While not saying that a busy premises could never violate the rule, the Board has stated that a rule violation could only occur under very unusual circumstances:

“It is conceivable that in a situation which involved an unusual level of patron activity that truly interjected itself into a decoy operation to such an extent that a seller was legitimately distracted or confused, and the law enforcement officials sought to take advantage of such distraction or confusion, relief would be appropriate.”

(*Tang and Tran* (10/19/00) AB-7454; see also *7-Eleven, Inc. and Atwal* (10/30/01) AB-7739.) This is not such a case.

There is no evidence of any activity that may have distracted or confused the clerk. The police officer’s description of the store activity level as “pretty busy” adds nothing to appellants’ argument.

Appellants’ argument that the decoy lacked the appearance required by Rule 141(b)(2) is based primarily on the assertion that the decoy’s police cadet experience gave him a confidence level and demeanor not to be expected of a person under 21 years of age.

The administrative law judge (ALJ) addressed the 16-year-old decoy’s appearance in detail (Findings of Fact II-C):

C. The overall appearance of the decoy including his demeanor, his poise, his mannerisms, his size 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 was similar to his appearance on the day of the decoy operation except that he was about five pounds heavier and his hair was a little longer and had gel in it on the day of the hearing.

1. The decoy is a healthy and very youthful looking young man. On the day of the sale, he was five feet seven inches in height and he weighed one hundred sixty-five pounds. His hair was cut fairly short and he had no facial hair. His clothing consisted of tan shorts, a black muscle shirt and black sneakers. The photograph depicted in Exhibit 2 was taken at the premises and the photographs

depicted in Exhibits 3 and 4 were taken at the Police Headquarters before going out on the decoy operation. All three of these photographs show how the decoy looked and what he was wearing on the day of the sale.

2. The decoy testified that he had not participated in any prior decoy operations, that he had been a police cadet for approximately four months prior to the decoy operation, that he attended a cadet academy and that he was not paid to be a cadet or a decoy.

3. The clerk who sold beer to the decoy did not testify at the hearing.

4. After considering the photographs depicted in Exhibits 2, 3 and 4, the overall appearance of the decoy when he testified and the way he conducted himself at the hearing, a finding is made 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 was aware of the factors that appellants assert show that the decoy's appearance violated the rule. Appellants have given us no reason to depart from our general rule of deference to the ALJ's determination regarding the decoy's appearance.

III

Appellants assert that, in determining the penalty in this matter, the Department failed to consider all of the evidence of mitigation, and particularly the testimony of the licensee, Tarlok Tokhi.

Tokhi was the only witness who testified on behalf of appellants. Appellants say that the Department "mentions but completely ignores the entirety of this mitigating evidence." (App. Br., p. 16.)

It is untrue to say that the Department "completely ignored" Tokhi's testimony. It is more accurate to say that, in the overall circumstances of the case, Tokhi's testimony simply fell short of being persuasive mitigating evidence. The decision states (Findings of Fact II-D):

D. Dhami Corporation's president, Tarlok Tokhi, testified that he was familiar

with the training provided at the premises.

1. Tokhi further testified that the Respondents use the Come of Age computerized training, that the clerks have to pass a test at the end of the training, that they also have three weeks of in-store training, that they have the clerks sign an Affidavit after the alcoholic beverage laws are explained to them, that the clerks go through an annual refresher course and that Singh is still employed at the premises.
2. After the instant sale to a decoy, a meeting was held with all the employees and all the employees were retrained using the Come of Age program. The Respondents also use a secret shopper program.
3. The Department's attorney recommended a penalty consisting of a fifteen day suspension. After considering all the evidence presented at the hearing including the testimony of Mr. Tohki and the length of time that the Respondents have been licensed, a determination has been made that the recommended penalty is an appropriate penalty in this matter. The training provided by the Respondents was not effective in preventing the sale to the minor and the clerk did not ask the decoy for identification even though the decoy was only sixteen years old and had a very youthful appearance.

It is worth noting that Department counsel cited the decoy's age and "very youthful appearance" as aggravating factors to offset appellants' mitigating evidence.

[RT 60.]

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.