

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

AB-9068

File: 20-374196 Reg: 09071001

7-ELEVEN, INC., and SANDEEP DHIMAN, dba 7-Eleven Store # 2172-22174
8982 Chapman Avenue, Garden Grove, CA 92841,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 2, 2010
Los Angeles, CA

ISSUED OCTOBER 28, 2010

7-Eleven, Inc., and Sandeep Dhiman, doing business as 7-Eleven Store # 2172-22174 (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 Sandeep Dhiman, appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated September 8, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 21, 2001. The Department filed an accusation against appellants charging that their clerk sold an alcoholic beverage to 19-year-old Andrea Dorantes on December 16, 2008. Although not noted in the accusation, Dorantes was working as a minor decoy for the Garden Grove Police Department at the time.

At the administrative hearing held on July 29, 2009, documentary evidence was received, and testimony concerning the sale was presented by Dorantes (the decoy) and by Douglas Pluard, a Garden Grove police officer. Appellants presented no witnesses.

The Department's decision determined that the violation charged was proved and no affirmative defense was established.

Appellants then filed an appeal contending the Department did not prove that there was compliance with rule 141(b)(5)².

DISCUSSION

Rule 141(b)(5) provides that, after a decoy has purchased an alcoholic beverage, the decoy should make a face-to-face identification of the seller of the alcoholic beverages. Appellants contend that the Department has not proved that the identification complied with rule 141(b)(5). In particular, appellants state that the Department did not provide evidence to show the clerk was aware he was being accused of selling an alcoholic beverage to a minor. Appellants assert that they are "entitled to a defense as a matter of law." (App. Opening Br. at p. 5.)

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.

In *Chun* (1999) AB-7287, the Appeals Board stated that the term "face-to-face" as used in rule 141(b)(5) means that "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."

The Department's decision addresses the face-to-face identification in Finding of Fact II.C.:

C. The evidence established that a face to face identification of the seller of the beer did in fact take place and that the identification of the clerk complied with the Department's Rule 141.

I. After Officer Pluard stopped the decoy, he asked her to go back to the sales counter. Pluard then identified himself to the clerk. When Pluard asked the decoy to identify the clerk that had sold her the beer, the decoy identified Jagdeep Dhiman as the person who had sold her the beer. When this identification took place, the clerk and the decoy were standing on opposite sides of the sales counter.

Appellants state that no evidence showed the clerk was aware he was being accused of selling an alcoholic beverage to a minor. The standard set in *Chun*, however, requires only that the clerk "reasonably ought to be" aware of the identification by the decoy.

Appellants do not contest the finding with respect to the identification process, and that finding makes clear that the requirement was met. Within moments after the sale, before the decoy had exited the premises, Pluard identified himself to the clerk as a police officer and called the decoy back to the sales counter. At the sales counter, Pluard asked the decoy to identify who had sold the alcoholic beverage to her, and the decoy did so by pointing at the clerk and saying, "Him." Any reasonable person would say that the clerk reasonably ought to have been aware he was being identified as the person who sold an alcoholic beverage to a minor.

Appellant has not presented any evidence that would contradict the finding quoted above or the reasonable assumption of the clerk's awareness that arises from that finding. Language from the Board's decision in *The Von's Corporation* (2002) AB-7819 is pertinent here:

The evidence presented by the Department in the present case was clearly sufficient to allow the ALJ to conclude that the violation had occurred and that the decoy operation was conducted fairly; it was appellant's burden at that point to present evidence rebutting that evidence. If appellant chose not to present any evidence, but to rely solely on its mistaken belief that the Department had not met its initial burden of producing evidence, it has no basis for complaint on appeal.

Rule 141 provides licensees with an affirmative defense, and it is the licensee who bears the burden of showing that the rule was violated. Substantial evidence existed in this case to support the finding of the ALJ, and appellant presented no evidence to contradict it. The Department's decision must be affirmed.

ORDER

The decision of the Department is affirmed.³

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