

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

AB-9076

File: 20-391842 Reg: 09070956

7-ELEVEN, INC., DAVID NEIL HENDRICKS, AND DORENE MICHELLE HENDRICKS,
dba 7-Eleven Store #2171-33062A
41260 Murrieta Hot Springs Road, Murrieta, CA 92562,
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 29, 2010

7-Eleven, Inc., David Neil Hendricks, and Dorene Michelle Hendricks, doing business as 7-Eleven Store #2171-33062A (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, with 5 days stayed, subject to a one-year probationary period, 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., David Neil Hendricks, and Dorene Michelle Hendricks, appearing through their counsel, Ralph Barat

¹The decision of the Department, dated October 5, 2009, is set forth in the appendix.

Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 21, 2002. On April 20, 2009, the Department issued an accusation against appellants charging that, on December 30, 2008, appellants' clerk, Isabel Gutierrez (the clerk), sold an alcoholic beverage to 19-year-old Nicholas Alexander Figueroa. Although not noted in the accusation, Figueroa was working as a minor decoy for the Murrieta Police Department at the time.

At the administrative hearing held on August 26, 2009, documentary evidence was received and testimony concerning the sale was presented by Figueroa (the decoy), by John Therien, a Murrieta police officer, and by appellant David Neil Hendricks.

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

Appellants then filed a timely appeal contending that rule 141² was violated by utilizing a decoy with the demeanor of a person over the age of 21.

DISCUSSION

Appellants contend that the Department unfairly utilized a decoy with the demeanor of a person over the age of 21, in violation of rule 141. Subdivision (a) of rule 141 provides:

A law enforcement agency may only use a person under the age of 21

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.

years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

And subdivision (b)(2) of the rule 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.”

The Administrative Law Judge (ALJ) assessed the appearance of the decoy as follows (Findings of Fact II-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

[¶] . . . [¶]

3. There was nothing remarkable about the decoy’s nonphysical appearance while he was testifying other than the fact that he was soft spoken and there was nothing about his speech, his mannerisms or his demeanor that made him appear older than his stated age. In actuality, he looked even younger in person than in his photographs.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy’s appearance and demeanor met the requirement of rule 141, that he possessed 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.

The Appeals Board is not entitled to second-guess the factual determination by the ALJ concerning the appearance of the decoy, where all we have to go on is a partisan appeal that the decoy displayed the appearance and demeanor required by the

rule, and an equally partisan response that he did not.

We disagree with appellants' assertion that the decoy's prior experience disqualifies him from acting as a decoy, and that it necessarily translates into his having the demeanor of a person over the age of twenty-one. As we said in *Azzam* (2001) AB-7631:

Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older.

By the same token, we appreciate the fact that, on occasion, police have used decoys whose appearance or demeanor is such that a conscientious seller may be unfairly induced to sell an alcoholic beverage to that person. Within the limits that apply to this Board as a reviewing tribunal, we have attempted to deter such practices, by

stressing the importance of strict compliance with rule 141. However where, as here, the ALJ made a factual finding about the appearance and demeanor of the decoy, and found compliance with rule 141, we cannot re-weigh the evidence and come to a different conclusion.

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.