

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

AB-9096

File: 20-451794 Reg: 09071950

7-ELEVEN, INC. and ALI REZA KEYHAN, dba 7-Eleven # 2111-27659
3185 Midway Drive, Suite A, San Diego, CA 92110-4542,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 2, 2011
Los Angeles, CA

ISSUED JULY 19, 2011

7-Eleven, Inc. and Ali Reza Keyhan, doing business as 7-Eleven # 2111-27659 (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 Ali Reza Keyhan, appearing through their counsel, Ralph B. Saltsman and Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated February 26, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 6, 2007. The Department filed an accusation against appellants charging that their clerk sold an alcoholic beverage to 18-year-old Jeremy Holman on March 13, 2009. Although not noted in the accusation, Holman was working as a minor decoy for the San Diego Police Department at the time.

At the administrative hearing held on January 7, 2010, documentary evidence was received and testimony concerning the sale was presented by Holman (the decoy) and by Ernesto Encinas, a retired San Diego Police detective.

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 decoy operation was not conducted in accordance with the fairness requirement of rule 141(a)²; (2) the decision does not contain a proper analysis of the raw evidence in the record; (3) the decoy's appearance did not comply with the requirements of rule 141(b)(2); and (4) the penalty was not properly mitigated. Issues 1 and 2 will be discussed together.

DISCUSSION

I and II

Appellants contend that the decoy operation was not conducted in accordance with rule 141(a), which provides:

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

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.

They assert that the decoy was instructed to lie, a clear violation of the fairness requirement. The decoy's attitude going into the operation, they argue, "was that he could deceive and mislead." (App. Opening Br. at p. 6.)

During cross-examination, appellant's counsel asked the decoy what instructions he had received before going out on the decoy operation [RT 17-18]:

- Q. Who gave you those instructions?
 A. Detective Encinas.
 Q. Do you recall what those instructions were?
 A. Don't beg, don't lie about your age, but you're allowed to lie about the investigation.
 Q. What do you mean, "You're allowed to lie about the investigation"?
 A. You don't tell the clerk, "Oh, I'm here for an undercover, trying to bust you."
 Q. If they were to ask you if you were there to try to bust them, you could lie about that?
 A. Yes.
 Q. Did the clerk ever ask you if you were there to bust you - - or bust her?
 A. No.
 Q. In the course of interacting with the clerk, did you tell her any lies?
 A. No.

Detective Encinas, testifying later on cross-examination, was asked about the instructions he gave to the decoy [RT 29]:

- Q. Did you instruct him that he could lie about the investigation, though?
 A. No.
 Q. Did you ever instruct him that he could lie about the investigation to a clerk?
 A. No.
 [¶] . [¶]
 Q. Okay. Are you aware that one of the rules and regulations is that the decoy operation must promote fairness?
 A. Yes.
 Q. And is that why you would never instruct a decoy to lie about the investigation?
 A. Correct.

Appellants' argument on this point is addressed in Finding of Fact E of the decision:

The decoy testified that he had been instructed by Detective Encinas not to lie about his age, but that he could lie if the clerk asked him if he was there to bust her. The Respondents' attorney argued that the decoy operation was unfair and that it violated the Department's Rule 141 because the decoy was instructed to lie. This argument is rejected. First of all, Detective Encinas denied that he had told the decoy that he could lie. Secondly, the decoy testified that the clerk did not ask him if he was there to bust her and that he told no lies to the clerk.

Appellants have two complaints about this finding: The first is that it "fails to bridge the analytical gap between the raw evidence that the decoy was specifically instructed to lie, and the ultimate conclusion that the operation was conducted in a manner that promotes fairness." (App. Opening Br. at p. 5.)

As this Board has explained many times, the Department is not required to explain its reasoning. (*Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543].) In any case, contrary to appellants' charge, the finding does say why the ALJ rejected the argument. It gives two reasons for the rejection: The officer denied telling the decoy he could lie, and, in any case, the decoy did not lie. Either reason is a sufficient basis for rejecting the argument. The ALJ didn't need to decide if it was the officer or the decoy who was more credible; the same result is reached based on the testimony of either.

Appellants' other complaint is that the ALJ did not "explain whether the decoy's testimony, if true, would reveal a violation of Rule 141." (App. Opening Br., *supra*.) As noted above, no explanation is required. In addition, the Department was not issuing an advisory decision and did not need to consider hypothetical questions.

Clearly, the decoy was not instructed to lie generally, as appellants allege. He was told it was allowable to deny being a decoy if asked. This did not cause the decoy operation to violate the fairness requirement of rule 141(a).

III

Appellants contend that the decoy did not "display the appearance which could generally be expected of a person under 21 years of age" as required by rule 141(b)(2). They base their contention on the decoy's "towering stature" of 6'2"; the clerk's statement to the officer that she thought the decoy was over 21; the decoy's study of criminal justice in high school; and the decoy's knowledge of "shoulder tap" operations.

The ALJ made findings that the decoy's appearance was similar at the hearing to his appearance at the licensed premises on March 13, 2009; that he was "a youthful looking male" 6'2" tall weighing 170 pounds; and there was "nothing remarkable" about his nonphysical appearance that made him appear older than he was. He concluded, after considering the photographs of the decoy and his overall appearance at the hearing, that his appearance met the standard of rule 141(b)(2). (Find. of Fact D.)

Obviously, height is only one factor in determining how old a person appears and we fail to see how, in most circumstances, the height of a decoy could make him appear older. Appellants have not explained why, in this instance, the decoy's height made him appear to be at least 21 years old. Certainly, 6'2" is not an extraordinary height for a young man of 18.

The erroneous belief of the clerk is not persuasive on this issue. "[T]he 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." (*7-Eleven, Inc. & Virk* (2001) AB-7597; accord, *Kunisaki* (2005) AB-8284; *7-Eleven, Inc. & Paul* (2002) AB-7791; *Yaghnam* (2001) AB-7758.) It is not the belief of the seller that is controlling, it is the

ALJ's reasonable determination of the decoy's apparent age based upon the evidence and his observation of the decoy at the hearing.

Appellants also rely on the decoy's high school class in criminal justice and his knowledge of shoulder taps to support their contention that he appeared to be over the age of 21. Their "argument" consists entirely of the following: "A decoy with such knowledge would not exhibit the appearance that is to be generally expected of a person under 21. The average 18 year old would know nothing about such matters." (App. Opening Br. at p. 6.) We disregard this argument because it is totally unsupported by any authority or evidence.

Appellants have not given us any reason to question the ALJ's determination of the decoy's apparent age. They have not shown they are entitled to the defense provided in rule 141(b)(2).

IV

Appellants contend that the Department's decision fails to properly mitigate the penalty. They assert that the penalty fails to account for their almost two years of discipline-free operation before this violation occurred. The "proper penalty," according to appellants, would be a 13-day suspension instead of 15 days, giving them one less day of suspension for each discipline-free year of operation.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. (*Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].)

Appellants' opinion that a "proper penalty" would be less than the standard penalty imposed does not make the Department's penalty determination an abuse of discretion.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
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.