

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

**AB-9149**

File: 20-388926 Reg: 10073490

7-ELEVEN, INC. and JOSEPH TUAN NGUYEN, dba 7-Eleven # 2233-23135C  
2301 Fremont Street, Monterey, CA 93940,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: October 6, 2011  
San Francisco, CA

**ISSUED DECEMBER 2, 2011**

7-Eleven, Inc. and Joseph Tuan Nguyen, doing business as 7-Eleven # 2233-23135C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 15 days, five days of which were stayed on the condition that appellants complete one year of discipline-free operation, 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 Joseph Tuan Nguyen, appearing through their counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

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<sup>1</sup>The decision of the Department, dated December 24, 2010, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 21, 2002. On August 31, 2010, the Department filed an accusation against appellants charging that, on April 16, 2010, appellants' clerk sold an alcoholic beverage to 15-year-old Jorge Q.<sup>2</sup> Although not noted in the accusation, Jorge Q. was working as a minor decoy for the Monterey Police Department at the time.

At the administrative hearing held on November 3, 2010, documentary evidence was received and testimony concerning the sale was presented by Jorge Q. (the decoy) and by Jeffrey Reiland, a Monterey police officer.

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 rule 141(b)(2)<sup>3</sup> was violated.

## DISCUSSION

Rule 141(b)(2) provides that minor decoys must "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." Rule 141(c) provides that law enforcement's failure to comply with any provision of rule 141 furnishes a licensee with a complete defense to a sale-to-minor violation. Appellants contend that the decoy's appearance violated rule 141(b)(2) because he displayed a degree of confidence uncharacteristic of a person only 15 years old (App. Br. at p. 5) and he had a mustache.

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<sup>2</sup>Because of his age, the decoy's last name was not used (and was blacked out on documents) at the hearing.

<sup>3</sup>References 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.

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 met the requirement of rule 141. The ALJ made substantial findings regarding the decoy's appearance, both physical and non-physical, including a finding that he had a "slight, light mustache" both at the hearing and during the decoy operation, and concluded that the decoy appeared his true age, 15 years old.

Appellants' argument that the mustache shows the decoy was trying to look older is meaningless if he didn't actually look over 21. The ALJ determined that the decoy did not look over the age of 21, even though he had a "slight, light mustache." Even if a 15-year-old looked 16 or 17 or 18, his appearance would not violate rule 141(b)(2); he must appear to be over the age of 21.

Appellants state that the decoy's experience going into other stores gave him "an unusual degree of confidence not generally displayed of [*sic*] a minor attempting to illegally purchase alcohol." We find nothing in the record that supports this allegation, nor do appellants tell us what part of the record they rely on. We note, as did the ALJ in Finding of Fact 10, that April 16, 2010, was the first time Jorge Q. had worked as a decoy. His "experience" when he entered appellants' store was obviously very limited.

We would need considerably more than appellants' unsupported assertions to convince us that the ALJ abused his discretion by concluding that 15-year-old Jorge Q. had the appearance that could generally be expected of a person under the age of 21. Appellants have not shown any violation of rule 141(b)(2).

ORDER

The decision of the Department is affirmed.<sup>4</sup>

FRED ARMENDARIZ, CHAIRMAN  
TINA FRANK, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>4</sup>This 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.