

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

AB-9166

File: 20-482561 Reg: 10073711

7-ELEVEN INC. and R & B RETAILERS INC., dba 7-Eleven Store # 2175-17210
660 East Foothill Boulevard, San Dimas, CA 91773,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 3, 2012
Los Angeles, CA

ISSUED JUNE 11, 2012

7-Eleven Inc. and R & B Retailers Inc., doing business as 7-Eleven Store #2175-17210 (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 law enforcement minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven Inc. and R & B Retailers Inc., appearing through their counsel, Ralph B. Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated April 15, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 9, 2010. On November 9, 2010, the Department filed an accusation against appellants charging that, on March 12, 2010, appellants' clerk, Radhider Singh Sodhi (the clerk), sold an alcoholic beverage to 18-year-old David Duarte. Although not noted in the accusation, Duarte was working as a minor decoy for the Los Angeles Sheriff's Department.

At the administrative hearing held on February 17, 2011, documentary evidence was received and testimony concerning the sale was presented by Duarte (the decoy) and by Los Angeles Sheriff's deputies Marc Burruss and Geoff Grisso. A principal of co-licensee R & B Retailers Inc., Richard Fuss, also testified.

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 rules 141(a) and 141(b)(2)² were violated.

DISCUSSION

I

Appellants contend that the decoy operation was not conducted in a manner "that promotes fairness" as required by rule 141(a). They assert that photographs were taken of the decoy just before the operation began, but the photographs were lost. The lost photographs, they contend, "constitute relevant evidence that would have provided the administrative law judge with more complete evidence on which he could base his determination of the minor decoy's appearance." (App. Br. at p. 8.) The only

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.

photograph of the decoy available to the administrative law judge (ALJ) was one taken with the clerk, after the sale was made. Therefore, they conclude, the operation violated the fairness requirement of rule 141(a).

Appellants had no admissible proof that a photograph was taken before the decoy operation and lost. Even if there were such proof, it would make no difference, since there was ample evidence without such a photograph and appellants do not allege that the Sheriff's Department purposely mislaid or withheld the purported photograph to unfairly disadvantage appellants' case.

The ALJ had a photograph of the decoy, taken at the time of the decoy operation. Therefore, the photograph available to the ALJ was more probative of how the decoy appeared at the time of the sale than a previously taken photograph would have been.

Even if a previously taken photograph had been lost, we fail to see how that would show that the decoy operation had not been conducted in a manner that would promote fairness.

II

Appellants contend that the decoy's appearance violated rule 141(b)(2) which requires that a decoy "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."

Appellants argue that the decoy's experience and training as a police Explorer gave him confidence and poise, making his appearance "inconsistent with" the appearance of a person under the age of 21.

The ALJ specifically rejected this argument and found specifically that the decoy had the appearance generally expected of a person under the age of 21. (Concl. of Law 5.)

It is the ALJ who makes the factual determination about the decoy's appearance, not this Board. The Board is neither entitled nor willing to substitute its judgment on this issue, absent some compelling demonstration of an abuse of discretion.

Appellants made no demonstration of an abuse of discretion, compelling or otherwise.

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.