

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

AB-9173

File: 20-401808 Reg: 10073459

7-ELEVEN, INC. and DHRU ENTERPRISES, INC., dba 7-Eleven Store #25085
895 Broadway, El Cajon, CA 92021,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED JUNE 12, 2012

7-Eleven, Inc., and Dhru Enterprises, Inc., doing business as 7-Eleven Store #25085 (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 Dhru Enterprises, Inc., appearing through their counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

¹The decision of the Department, dated May 4, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 18, 2003. On August 24, 2010, the Department instituted an accusation against appellants charging that, on April 22, 2010, appellants' clerk, Saba Baho, sold an alcoholic beverage to 17-year-old Shannon P. Although not noted in the accusation, Shannon P. was working as a minor decoy for the Department of Alcoholic Beverage Control.

An administrative hearing was held on March 8, 2011, at which time documentary evidence was received, and testimony concerning the sale was presented by Shannon P. (the decoy) and by Dean Maier, a Department investigator.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed a timely appeal, contending that there was no compliance with rule 141(b)(2).

DISCUSSION

Department rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2)) requires that a minor 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.

Appellants contend that, in this case, the administrative law judge (ALJ) erred in relying, in part, on the decoy's soft-spoken voice, in his determination that she presented the appearance required by the rule. They argue that since the decoy said nothing to the clerk, her soft-spoken voice was not something properly to be considered in assessing the appearance presented to the clerk.

The ALJ described the decoy's appearance in Finding of Fact II-D and

paragraphs 1 through 4 of Finding II-D:

D. The decoy's overall appearance including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation.

1. On the day of the sale, the decoy was five feet eight inches in height, she weighed approximately one hundred forty-five pounds, her blond hair was pulled up and she was not wearing any makeup. Her clothing consisted of a black Rockstar T-shirt, a blue sweatshirt, blue jeans and black tennis shoes. The photograph depicted in Exhibit 7 was taken at the premises and it shows how the decoy was dressed and how she appeared on the day of the sale.

2. The decoy testified that she had participated in seven or eight prior decoy operations, that she is not an Explorer, that she had testified twice before as a decoy and that she received a thirty dollar gift card for acting as a decoy.

3. The decoy was soft-spoken, she provided straight forward answers while testifying and there was nothing about the decoy's physical or non-physical appearance that made her appear older than her actual age.

4. After considering the photographs depicted in Exhibits 4, 5 and 7, the decoy's overall appearance when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellants are wrong in their assertion the decoy said nothing to the clerk. She did not have a conversation with the clerk, but she did say "Hello" to him. [RT 25.] But even if she had said nothing at all, we do not believe the ALJ's inclusion of her manner of speech in a comprehensive assessment of her appearance faults in any way his determination that there was compliance with rule 141(b)(2).

The decoy in this case was only 17 years of age. The ALJ had the benefit of three photographs (Exhibits 4, 5 and 7) of the decoy taken at the time of the decoy operation showing how she appeared at that time, and was able to observe her as she

testified. Appellants' suggestion that this 17-year-old female appears older than 21 years of age solely by reason of her height and weight is unsupported and unsupportable.

The clerk did not testify. We cannot know what went through his mind in the course of the transaction, but we do know he requested and was furnished the decoy's identification, a driver's license showing her date of birth and bearing a prominent red stripe with the legend "21 in 2013." Given the record in this case, we find it an easy task to affirm the decision of the Department.

ORDER

The decision of the Department is affirmed.²

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

² This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.