

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

AB-9214

File: 20-483867 Reg: 11074842

7-ELEVEN, INC., NUHA TANNOUS AKKAWI, and KAMAL AZIZ BITAR,
dba 7-Eleven #34235
2387 Midway Drive, San Diego, CA 92110,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 6, 2012
Los Angeles, CA

ISSUED OCTOBER 17, 2012

7-Eleven, Inc., Nuha Tannous Akkawi, and Kamal Aziz Bitar, doing business as 7-Eleven #34235 (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., Nuha Tannous Akkawi, and Kamal Aziz Bitar, appearing through their counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated November 3, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 3, 2010. On April 7, 2011, the Department filed an accusation against appellants charging that, on November 13, 2010, appellants' clerk, Mauriah Peterson (the clerk), sold an alcoholic beverage to 18-year-old Joshua Ramirez. Although not noted in the accusation, Ramirez was working as a minor decoy for the San Diego Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on September 6, 2011, documentary evidence was received and testimony concerning the sale was presented by Ramirez (the decoy), and by Esmeralda Tagaban and Nick Kelbaugh, San Diego Police detectives.

The evidence established that on November 13, 2010, the decoy entered the licensed premises and went to the cooler section where he selected a six-pack of Bud Light beer in cans. The decoy took the beer to the sales counter, and the clerk asked for his identification. The clerk did not ask any age-related questions nor any questions about the decoy's identification which was later shown to be expired. The clerk completed the sale, after which the decoy re-entered the premises and identified the clerk with a Department investigator and San Diego Police officer. The clerk was then issued a citation.

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: (1) Rule 141(a)² was violated, and (2) rule 141(b)(3) was violated. These issues will be discussed together.

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.

DISCUSSION

Appellants contend that rule 141(b)(3) was violated when the decoy presented his expired driver's license to the clerk when asked for identification. Rule 141(b)(3) states: "A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages[.]"

Appellants also assert that the decoy operation was not conducted "in a fashion that promotes fairness," as required by rule 141(a), because the decoy used an expired, and therefore invalid, license. (App.Br. at p. 2.)

The administrative law judge (ALJ) addressed both these contentions in Conclusions of Law 6:

CL 6. Respondents also argue that Rule 141(b)(3) was violated because decoy Ramirez' identification was expired when it was presented to Clerk Peterson. The identification expired on July 24, 2010, approximately four months prior to this operation. (See Exhibit 4). This argument is also rejected. The rule requires that the decoy carry his own identification showing his correct date of birth. Exhibit 4 is decoy Ramirez' own identification and it does contain his true date of birth. The fact that the identification was expired by four months does not establish an affirmative defense. Nor does the use of this identification render the operation unfair in any way. The clerk simply did not check the identification properly.

As the ALJ points out, the license, though expired, met the requirements of the rule that the license belong to the decoy and contain his true date of birth. Appellants cite no authority for the contention that, because the license was expired, it was not the decoy's own identification.

Appellants argue that *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126] (*Acapulco*) mandates that there be strict adherence to the rules set forth for decoy operations, and, they maintain,

the use of an expired license is not permitted if 141(b)(3) is strictly complied with. Appellants also assert that since a defense cannot be successfully raised under Business and Professions Code section 25660 (§25660) when an expired license is presented in a fake identification case, similarly, an expired license should not be permitted to be used in a decoy operation.

The rationale behind rule 141(b)(3) is much different than that underlying a §25660 matter. In a decoy operation, the decoy is directed to carry his own identification, showing his correct date of birth, to produce it if requested by a clerk or bartender, and to give his correct age if asked. These directives in a decoy operation give the seller of alcohol an opportunity to realize that they are about to make a mistake, and give the seller an opportunity to abort an impending sale of alcohol to a minor decoy, by asking for and receiving the decoy's identification. There is no issue of reasonable reliance in a decoy matter, because this is their true identification, showing their true picture, description, and birth date. Even if the license is expired, all of the other indicia are correct, and give the seller the information needed to cut the transaction short and avoid a violation.

On the other hand, in a fake identification matter, the question is whether the seller of alcohol reasonably relied on *false* identification, and the expiration date issue is but one of many considerations regarding the reasonableness of accepting such identification to establish that the person is over the age of 21. To equate these two types of cases, and to say that it is unfair to accept an expired license in one but not the other, is comparing apples and oranges.

Appellants' contention on this issue is rejected.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, 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.