

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

AB-9221

File: 20-448826 Reg: 11074741

7-ELEVEN, INC., RAKESH PRASHAR, and SAROJ PRASHAR
dba 7-Eleven Store #2172-22646G
24386 Muirlands Boulevard, Lake Forest, CA 92630,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED OCTOBER 19, 2012

7-Eleven, Inc., and Rakesh and Saroj Prashar, doing business as 7-Eleven Store #2172-22646G (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 12 days for appellant's 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 Rakesh and Saroj Prashar, appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its

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

counsel, Jennifer Casey.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 27, 2011. On April 5, 2011, the Department filed an accusation against appellants charging that, on August 23, 2011, appellants' clerk, Nab Subedi (the clerk), sold an alcoholic beverage to 17-year-old Garrett E. Although not noted in the accusation, Garrett E. was working as a minor decoy for the Department at the time.

At the administrative hearing held on August 31, 2011, documentary evidence was received, and testimony concerning the sale was presented by Garrett E. (the decoy) and by Jeffrey Holsapple and Eric Gray, Department investigators. Co-licensee/franchise co-owner Rakesh Prashar testified about training provided to appellants' employees and other measures taken to prevent the sale of alcoholic beverages to minors. Appellants' clerk did not testify.

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 have filed a timely appeal, and contend in their brief that there was no compliance with rule 141(b)(5) (4 Cal. Code Regs., §141, subd. (b)(5)).²

DISCUSSION

Appellants argue that the ALJ's findings that there was a face-to-face

² Rule 141(b)(5) provides that following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Rule 141(c) provides that a failure to comply with the rule shall be a defense to any action brought pursuant to Business and Professions Code section 25658.

identification are not supported by the evidence. They argue that the clerk had not been informed that the men with the minor decoy were peace officers before the decoy identified him as the seller:

The ALJ's findings mention only that the decoy and the clerk were in "close proximity and facing each other." There is no finding regarding whether the clerk acknowledged the minor decoy or was made aware of the fact that the decoy was identifying him. In fact, the clerk was surrounded by four plain-clothed individuals – three of them were peace officers, and one was the minor decoy – and one of those plain-clothed individuals was engaged in conversation with the clerk. There is no evidence in the record that any of the peace officers identified themselves to the clerk before performing the face-to-face identification. Investigator Holsapple testified to [*sic*] that Investigator Gray initiated contact with the clerk by performing the face-to-face identification.

(App. Br., p. 7.)

Thus, argue appellants, there is no reason that the clerk should have been aware that he was being identified by the minor decoy *at the time of the face-to-face identification*, because the investigators had not introduced themselves as police officers and the clerk had no reason to know what was going on at the time.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded

relevant evidence at the evidentiary hearing.³

When findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

It is customary in minor decoy operations for one of the police officers or Department investigators to identify himself or herself to the seller as a peace officer, and the hearing transcripts invariably reflect this. Whether the clerk knew he was being questioned by police officers is unclear, since he did not testify.

Nonetheless, we find it very difficult to accept the argument that the clerk might have believed he was being identified and photographed as a seller of alcoholic beverages to a minor, at the behest of four plain-clothed men who were not peace officers. Appellants acknowledge that there was conversation between investigator Gray and the clerk preceding the decoy's identification of the clerk as the seller - indeed, appellants' counsel argued at the hearing that the conversation so distracted the clerk as to invalidate the identification. Now, appellants claim their clerk did not know what was going on because he would not have known he was being questioned by law enforcement.

³The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

In any event, there is no requirement in rule 141(b)(5) that a peace officer identify himself to an alleged seller before conducting a face-to-face identification. That the clerk might not know the plain-clothed individuals were peace officers at the precise time the decoy was naming him as the person who made the sale would seem immaterial, there being no dispute that the decoy had identified him as the seller in a face-to-face confrontation. The clerk learned moments later why the person to whom he had just sold an alcoholic beverage had pointed to him, and that he would be cited for a misdemeanor. Viewing the identification process realistically, it is difficult for us to believe the clerk would have been ignorant of what was happening. The ALJ did not think the clerk did not know, and that is enough.

Finally, we should note that appellants' counsel said nothing at the hearing regarding the officers' failure to inform the clerk they were peace officers.

ORDER

The decision of the Department is affirmed.⁴

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴ 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.