

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

AB-9314

File: 20-411385 Reg: 12076682

7-ELEVEN, INC. and HARPREET KAUR SAHOTA, dba 7-Eleven Store M2237 24462D
1201 South Mooney Boulevard, Visalia, CA 93277,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: October 3, 2013
Sacramento, CA

ISSUED NOVEMBER 15, 2013

7-Eleven, Inc. and Harpreet Kaur Sahota, doing business as 7-Eleven Store M2237 24462D (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 Harpreet Kaur Sahota, appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

¹ The decision of the Department, dated September 19, 2012, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 27, 2004.

Thereafter, the Department instituted an accusation against appellants charging that, on February 3, 2012, appellants' clerk, (the clerk), sold an alcoholic beverage to 18-year-old Winston Appling. Although not noted in the accusation, Appling was working as a minor decoy for the Visalia Police Department at the time.

An administrative hearing was held on August 8, 2012, at which time documentary evidence was received, and testimony concerning the sale was presented by Appling (the decoy). Appellants presented no witnesses.

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 an appeal making the following contentions: the ALJ abused his discretion when (1) he disregarded appellants' rule 141(b)(2) argument and the evidence supporting that argument; and (2) he failed to rule on appellants' objections to admission of evidence at the time of the hearing.

DISCUSSION

I

Appellants argue that the ALJ disregarded their argument, and the evidence supporting that argument, that the decoy did not display the appearance required by rule 141(b)(2).²

² Rule 141(b)(2) requires that a decoy "shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances as presented to the seller of alcoholic beverages at the time of the alleged offense."

Appellants argue that the decoy's receipt of law enforcement training from experience as a police Explorer, combined with the fact that he was less nervous and more confident as a result of his earlier store visits (this was his first decoy operation), his attempt to appear casual, and his physical appearance (he was 5 feet, 11 inches tall and weighed 145 pounds on the day of the decoy operation), all compelled a finding that his appearance did not comply with the rule.

On its face, this is nothing more than an attempt to persuade this Board to retry the case on the decoy-appearance issue. Appellants ignore the many reminders which have come from this Board that the ALJ's finding is a question of fact that this Board cannot overturn in the absence of an abuse of discretion. (See, e.g., *7-Eleven, Inc./Lobana* (2012) AB-9164.)

It is clear from the findings made by the ALJ (Findings of Fact D 1-4) that he took into account all of the points raised by appellants, and more, in reaching his ultimate determination that the decoy's appearance complied with the rule:

FF D. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty one years, and his appearance at the time of the hearing was substantially the same as his appearance on the day of the decoy operation.

FF D-1. On the day of the sale and at the hearing, the decoy had his hair cut very short on the sides, and close-cropped brownish hair on top of his head. (State's Exhibits 5 & 6) Appling weighed around 145 pounds on the date of the operation, and he was 5 feet 11 inches tall. At the hearing, Appling looked to be the same height and weight. Appling wore a "paracord" type bracelet on his right wrist during the decoy operation. Decoy Appling has dark eyebrows and his lips are thin. His complexion is smooth and wrinkle free. The photographs in State's Exhibits 5 and 6 accurately depict what the decoy looked like and what he was wearing at the premises on the day of the sale.

FF D-2. The decoy testified politely and quietly at hearing. He answered many questions from counsel and the Court by saying, "Yes, sir." Appling

testified that he felt a “bit nervous” when he entered Respondent’s store, but was more nervous earlier in the six stores he visited prior to the 7-Eleven.

FF D-3. This was Appling’s first minor decoy operation. He was instructed by law enforcement personnel to produce his identification if asked for it, to tell the truth about his age if asked, and to “act like a teenager” trying to buy beer. As to the latter instruction, Appling took this to mean he should “act casual.” Appling had been an Explorer with the VPD for about one year prior to this decoy operation. As an Explorer, Appling participated in two “ride-alongs” with the VPD, helped provide security at some high school football games, and he attended some recruiting events at high schools and middle schools in the area. At the football games and at the recruiting events he would wear a uniform with badges and ribbons indicating he was associated with law enforcement. There was no evidence presented that Appling’s prior experience as an Explorer, or law enforcement personnel’s instructions prior to the decoy operation, caused or contributed to the clerk selling an alcohol beverage to him. The selling clerk did not testify at the hearing.

FF D-4. After considering State’s Exhibits 5, 6, and 7, the decoy’s overall appearance when he testified, and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale.

II

Appellants contend (App.Br. at p. 7) that the ALJ abused his discretion by failing to rule on timely-made objections to photographic Exhibits 5, 6, and 7, which had been admitted in evidence subject to their objections. Appellants’ counsel objected, on hearsay grounds, to the admission of the exhibits because each of them contained an out of court statement caption beneath the photo. (See RT 16:2-12; RT 19:19-21; RT 20: 8-11; RT 21:17-2.) The Administrative Law Judge admitted the exhibits into evidence, and deferred ruling on Appellants’ counsel’s objection.³

³Exhibit 5 is a photograph taken of the decoy shortly before the commencement of the decoy operation. Below the photograph is a caption:

(continued...)

Appellants' arguments are flawed at every level:

(a) They have not demonstrated, or even attempted to demonstrate, how they were prejudiced by the alleged failure to rule on their objections.

(b) Their objections were specifically limited to the material in the captions, and not to the photographs themselves. [RT 15; RT 19; RT 21.] The captions referred to matters already in evidence, and the reference to an ABC file number conveyed no information in any way claimed to be relevant to the charges of the accusation or prejudicial to appellant.

(c) The ALJ overruled appellants' objections as they related to the first two lines of the captions, since that information was in evidence independent of the captions.

(d) When the ALJ stated he would defer ruling on any other objections relating to the captions, he specifically offered appellants the opportunity to seek a ruling on their

³(...continued)

Minor Decoy Winston Appling
 DOB: 05/30/1993
 Taken by Inv. Oaklander on 2/3/12
 ABC Case 12-21-017

Exhibit 6 is a photograph of the decoy and the clerk identified by the decoy as the seller of the alcoholic beverage. This exhibit also has a caption:

Suspect Sandra Mason with minor decoy Winston Appling
 Taken by Inv. Oaklander on 2/3/12
 ABC Case 12-21-017

Exhibit 7 is a photographic copy of the decoy's California Driver's License, again with a caption:

Minor Decoy Winston Appling
 DOB-05/30/1993
 ABC Case 12-21-017

objections:

JUDGE LOEHR: Well, the objection is overruled as to the first two lines where it indicates he was a minor decoy, he did testify to that, and his date of birth. As for the ABC case number, I'll defer a ruling on that. We can take that up a little later, if you want.

[RT 16.]

Appellants never exercised that option until filing this appeal. Therefore, we consider the objection waived.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.