

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

AB-9364

File: 20-489020 Reg: 13078028

7-ELEVEN, INC., MAYA ANTOINE KMEIDA-SAWAYA, and RIZK ROY SAWAYA,
dba 7-Eleven Store # 21794
6991 El Cajon Boulevard, San Diego, CA 92115,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 6, 2014
Los Angeles, CA

Redeliberated April 3, 2014
Sacramento, CA

ISSUED APRIL 16, 2014

7-Eleven, Inc., Maya Antoine Kmeida-Sawaya, and Rizk Roy Sawaya, doing business as 7-Eleven Store # 21794 (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 police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Maya Antoine Kmeida-Sawaya,² and Rizk Roy Sawaya, appearing through their counsel, Ralph Barat

¹The decision of the Department, dated June 13, 2013, is set forth in the appendix.

²This appellant's last name is variously spelled as Kmeid Sawaya, Kmeidsawaya and Kmeida-Sawaya. We believe Kmeida-Sawaya is correct and have used this spelling throughout.

Saltsman and Erica Woodruff, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 13, 2010. On February 14, 2013, the Department filed an accusation against appellants charging that, on September 28, 2012, appellants' clerk, Manuel Contreras (the clerk), sold an alcoholic beverage to 19-year-old Daniel Borboa. Although not noted in the accusation, Borboa was working as a minor decoy for the San Diego Police Department at the time.

At the administrative hearing held on May 7, 2013, documentary evidence was received and testimony concerning the sale was presented by Borboa (the decoy); by Katherine Allison and Bill Kellner, San Diego Police officers; by co-licensee Maya Kmeida-Sawaya; and by James Little, one of appellants' clerks.

Testimony established that on September 28, 2012, the decoy entered the licensed premises, went to the beer coolers, and selected a six-pack of Bud Light Platinum beer in bottles. He took the beer to the counter where the clerk scanned the beer and asked him for his identification. The decoy handed him his California driver's license which contained his true date of birth, a blue stripe stating "PROVISIONAL UNTIL AGE 18 IN 2011," and a red stripe stating "AGE 21 IN 2014." The clerk observed the license and the decoy, then returned the license without asking any age-related questions. He then completed the sale which was observed by Officer Kellner from inside the premises.

The decoy exited the premises and then returned with several officers. The clerk who had made the sale and a second clerk were behind the counter. The decoy was asked to identify who sold him the beer. The decoy pointed out Contreras, and, while

facing him and standing two to five feet away, stated that he had sold him the beer. Officer Allison identified herself as a police detective and advised the clerk that he had sold alcohol to a minor. The clerk acknowledged that he had sold the beer to the decoy, and a photograph was taken of the decoy and the clerk. (Exhibit 3-A.) A citation was then issued to the clerk.

Subsequent to this incident, a meeting was held with all clerks, a video was shown to the employees, and the need to check identification was emphasized. The clerk who sold the beer to the decoy was terminated.

The Department's decision determined that the violation charged had been proven and that no defense to the charge had been established.

Appellants then filed a timely appeal contending the face-to-face identification of the clerk did not comply with rule 141(b)(5).³

DISCUSSION

Appellants contend that the face-to-face identification in this decoy operation failed to comply with rule 141(b)(5) because the clerk was not part of the conversation when he was being identified. They maintain that the fact that the decoy pointed out the clerk while merely making eye contact with him — prior to the officer informing the clerk of the violation — was insufficient to support compliance with the rule. (App.Br. at pp. 4-5.)

Rule 141(b)(5) provides:

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

³References 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.

identification of the alleged seller of the alcoholic beverages.

Appellants maintain that the evidence in this matter does not support the Department's finding that there was compliance with rule 141(b)(5), or that the clerk knew or should have known he was being identified as the seller of the alcohol.

In *Greer* (2000) AB-7403, the Board said it is not necessary that the clerk *actually* be aware that the identification is taking place. The only "acknowledgment" required is achieved by "the seller's presence such that the seller is, *or reasonably ought to be*, knowledgeable that he or she is being accused and pointed out as the seller." (Emphasis added.) Appellants attempt to distinguish *Greer* by noting "the Board placed great weight on the fact that [*sic*] ALJ made an 'extensive and detailed finding' regarding the face-to-face identification and specifically held that the clerk had a 'fair opportunity to observe the minor.'" (App.Br. at pp. 5-6.) They allege that the clerk in this case was unaware of who the officers were or why a customer was pointing at him.

The court in *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126], said that there must be "strict adherence" to the provisions of rule 141. Appellants rely on this language for their contention that there must be a finding that the decoy and the clerk were directly facing each other, looking at each other, and that the clerk must be informed of his violation before he is identified for the identification to be valid.

The administrative law judge (ALJ) found as follows in Findings of Fact ¶ 5:

¶ 5. The decoy and several officers displaying their badges returned to the premises shortly after the sale of the beer had taken place and the clerk who sold to the decoy and a second clerk were standing behind the sales counter. When the decoy was asked to identify the person who had sold him the beer, the decoy pointed to Contreras and stated that he was the one who had sold him the beer. At the time of this identification, the decoy and Contreras were standing within two to five feet from each other

and facing each other. Furthermore, the decoy testified that he also made eye contact with the clerk.

The ALJ also found in Determination of Issues ¶ 2: "There was compliance with Rule 141(b)(2) and Rule 141(b)(5) of Chapter 1, Title 4, California Code of Regulations as well as with Rule 141 in general as set forth in Finding of Fact Paragraphs 2 through 10." The ALJ was not required to make more extensive findings than these for there to be compliance with the rule.

The Appeals Board provided the following definition of "face to face" in the context of rule 141(b)(5) in *Chun* (1999) AB-7287:

[T]he decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Not only is this definition in accord with ordinary dictionary definitions of the meaning of "face-to-face," it takes into consideration the context of a decoy operation, where the safety of the decoy is a concern, and the face-to-face identification is merely one part of the overall situation, not some theatrical confrontation where the script must be followed to the letter, and events must occur in a specific order.

The core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid.*) It does not require a direct "face off" or any overt "acknowledgment" to accomplish these purposes, nor is there a requirement that the officer inform the clerk of the violation prior to his being pointed out by the decoy. (See, e.g., *In re The Vons Companies, Inc.*

(2004) AB-8184 [rejecting appellant's contention that contemporaneous awareness of the clerk at the time the decoy points him out is required.]; *In re 7-Eleven/Prashar* (2012) AB-9221 [finding compliance with 141(b)(5) where the clerk learned he was being identified as the seller *after* the decoy identified him].)

There was no evidence of misidentification in this case, and the clerk had the opportunity to look at the decoy again — as he was being pointed out, and when he was photographed with the decoy. Indeed, immediately after Officer Contreras informed the clerk of the violation, the clerk *acknowledged* that he had sold alcohol to the decoy.

Substantial evidence supports a finding that there was compliance with rule 141(b)(5) in this case.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This 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.