

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

AB-9679

File: 20-426241 Reg: 16084934

7-ELEVEN, INC. and JSVP OPERATING, INC.,
dba 7-Eleven Store #2171 139993E
530 Diamond Bar Boulevard,
Diamond Bar, CA 91765,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: September 6, 2018
Ontario, CA

ISSUED SEPTEMBER 18, 2018

Appearances: *Appellants:* Donna J. Hooper and Faraz Amirani, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc. and JSVP Operating, Inc., doing business as 7-Eleven Store #2171 139993E. *Respondent:* Jonathan Nguyen as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and JSVP Operating, Inc., doing business as 7-Eleven Store #2171 139993E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

1. The decision of the Department, dated December 18, 2017, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 28, 2005. On November 15, 2016, the Department filed an accusation charging that appellants' clerk, Cecilia del Rosario Villagran (the clerk), sold an alcoholic beverage to 19-year-old Ismael Granados on August 21, 2016. Although not noted in the accusation, Granados was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on September 26, 2017, documentary evidence was received and testimony concerning the sale was presented by Granados (the decoy); by Supervising Agent Vic Duong of the Department of Alcoholic Beverage Control; by Villagran (the clerk); and by Jogesh Kumar Vashisht, a shareholder and officer in co-appellant JSVP Operating, Inc.

Testimony established that on the date of the operation, Agent Duong entered the licensed premises. The decoy followed shortly thereafter and walked to the coolers. He selected a six-pack of Bud Light beer and took it to the front counter. He set the beer down and the clerk scanned it. A yellow prompt appeared on the register's screen. The clerk cleared the prompt by pressing the "Visual ID OK" button. The decoy paid for the beer, and the clerk gave him some change. The decoy then exited with the beer. Agent Duong also exited.

The decoy and Agent Duong reentered the licensed premises. Agent Duong contacted the clerk, identified himself, and explained the violation. Agent Duong asked the decoy to identify the person who sold him the beer. The decoy pointed to the clerk and said, "She did." The decoy and the clerk were three to five feet apart at the time,

facing each other at an angle. A photo of the two of them was taken, after which the clerk was cited.

After the hearing, the Department issued a decision determining the violation charged was proved and no defense was established.

Appellants then filed this appeal contending the operation was not conducted in a fashion that promotes fairness because the decoy's experience made him appear over the age of 21, in violation of rule 141(a) and (b)(2).

DISCUSSION

Appellants contend this decoy operation violated rule 141(a) and (b)(2) because the decoy was 19 and had extensive law enforcement training. (App.Br., at pp. 5-10; see also Code Regs., tit. 4, § 141(a).) Appellants contend the decoy's law enforcement experience, which they claim encompasses "almost a third of his entire life," gave him a "authoritative, mature demeanor." (App.Br., at p. 6.) Appellants argue the effect was enhanced by the decoy's "military style" haircut. (App.Br., at p. 9.)

Appellants contend the decoy's mature demeanor is evidenced by the fact that four of the ten premises he visited on the date of the violation sold him alcohol, and that none of those four locations asked for identification. (App.Br., at pp. 6-7.)

Finally, appellants acknowledge the clerk's testimony that she based her belief that the decoy was 25 on his face, and not on his demeanor. (See App.Br., at p. 7.) Nevertheless, they insist his experience and lack of nervousness "gave him the appearance and demeanor of a person over 21." (App.Br., at pp. 7-8.)

This Board is bound by the factual findings in the Department's decision so long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Rule 141 states, in relevant part,

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

(Code Regs., tit. 4, § 141(a).) Additionally, subdivision (b)(2) requires a 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 at the time of the alleged offense." (Code Regs., tit. 4, § 141(b)(2).) The rule provides an affirmative defense, and the burden of proof lies with the party asserting it. (*Chevron Stations, Inc.* (2015) AB-9445, at pp. 3-16; *7-Eleven, Inc./Lo* (2006) AB-8384, at pp. 8-11.)

The court of appeal recently held that the fairness requirement contained in rule 141(a) is not an ambiguous, general decree, but is defined by the five requirements that follow in subdivision (b):

Contrary to the Appeals Board's contention, Rule 141 provides specific guidance regarding how to preserve fairness in minor decoy operations. Subdivision (b) of Rule 141 implements the goal of fairness by imposing five specific requirements for every minor decoy operation. Decoys must be under the age of 20; have the appearance of a person under 21; carry their own actual identification and present that identification upon request; truthfully answer any questions about their ages; and make face-to-face identifications of the persons who sold the alcoholic beverages. (Rule 141, subd. (b)(1)-(5).) Fairness under Rule 141 is assured by a set of five expressly defined safeguards, all of which must be fulfilled during a minor decoy operation.

(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Garfield Beach CVS) (2017) 7 Cal.App.5th 628, 638 [213 Cal.Rptr.3d 130] [addressing general fairness defense where decoy did not respond to clerk's age-related statement].) The court went on to "reject the Appeals Board's attempt to add a new defense to Rule 141 that is not expressed in the rule." (*Id.* at p. 640.)

This Board's only question, then, is whether the decoy's appearance complied with the requirements of rule 141(b)(2).

The ALJ made the following findings of fact related to the decoy's appearance:

8. [The decoy] had been a decoy numerous times before this operation. Typically, he visited between five and eight locations per operation. On August 21, 2016, he visited ten locations, of which four sold an alcoholic beverage to him. [The decoy] learned of the decoy program through his role as an Explorer with the Bell Gardens Police Department. He rose to the rank of Explorer Captain before leaving the program. Starting in 2016, he became a public safety officer. His duties include taking some types of crime reports, assisting police officers, investigating property damage arising from traffic collisions, and working at community events.

9. [The clerk] testified that she believed [the decoy] appeared to be about 25 years old at the time of the sale because his face appeared to be that of an older person. She further testified that she believed he was wearing

a different shirt than the one he is wearing in the photo (exhibit 2). [The clerk] was retrained after this incident and continues to work at the Licensed Premises.

[¶ . . . ¶]

11. [The decoy] appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in the Licensed Premises on August 21, 2016, [the decoy] displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to [the clerk].

(Findings of Fact, ¶¶ 8-9, 11.) Based on these findings, the ALJ reached the following conclusion of law:

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)^[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that [the decoy]'s physical appearance, coupled with his training and experience, gave him the appearance of a person over the age of 21. This argument is rejected. As noted above, [the decoy] had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶ 11.) In making this determination, [the clerk]'s self-serving testimony that he had an older face is given less weight than the photo taken shortly after [the] sale, particularly since [the clerk] did not recall how [the decoy] was dressed. With respect to [the decoy's] demeanor, [the clerk] did not refer to a single aspect of his demeanor when asked why she believed him to be 25 years old. Instead, she focused on [the decoy's] face. Accordingly, there is no evidence that [the clerk]'s training and experience had any impact upon his appearance while he was inside the Licensed Premises.

(Conclusions of Law, ¶ 5.)

Appellants presented no evidence whatsoever to indicate that this particular decoy's experience influenced his physical appearance or apparent age. While appellants describe the decoy's experience at length, they rely only on speculation and generalizations for support.

For example, appellants claim that "[t]he reasonableness of the ALJ's conclusion that [the decoy] appeared as generally expected of a person under 21 should immediately be suspect because [the decoy] was able to purchase alcohol at four of the ten locations he visited" on the date of the operation. (App.Br., at pp. 6-7.) This is pure speculation. There is no evidence in the record to suggest why clerks at other premises sold alcohol to this decoy. The sales may equally have resulted from lax verification practices at those four premises. Indeed, six of the ten premises—the majority—did *not* sell alcohol to the decoy. Employing appellants' reasoning, this must indicate the decoy looked under 21. In reality, any conclusions based on the decoy's relative "success rate" lack support in evidence.

Similarly, appellants rely on the unsupported generalization that law enforcement experience will necessarily endow a minor with an "authoritative, mature demeanor" and therefore make him appear over the age of 21. (See App.Br., at p. 6.) Generalizations are not evidence. Moreover, even this generalization was undermined by appellants' own clerk, who testified on direct examination it was the decoy's face—and not his demeanor—that convinced her he was over 21. (See RT at pp. 45-46.) Appellants have failed to establish a violation of rule 141(b)(2).

Finally, there is no rule prohibiting the use of a decoy with extensive past experience. (See Code Regs., tit. 4, § 141(b).) Nor does the use of an experienced decoy violate rule 141(a). As the court of appeal observed in *Garfield Beach CVS*, fairness in minor decoy operations is ensured by the five safeguards outlined in rule 141, subdivision (b). (See *Garfield Beach CVS*, *supra*, at p. 638.) This Board cannot and will not "add a new defense to Rule 141" based on the extent of a decoy's

experience. (*Id.* at p. 640.) Indeed, such a rule would be foolish. Experienced decoys are more likely to execute an operation safely and fairly, since they are familiar with the procedures and requirements of a decoy operation and are comfortable communicating with law enforcement officials.

In sum, appellants' contentions lack merit.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
PETER J. RODDY, MEMBER
MEGAN MCGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

2. This 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.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

7 ELEVEN INC, JSVP OPERATING INC
7 ELEVEN STORE 2171 139993E
530 N DIAMOND BAR BLVD
DIAMOND BAR, CA 91765

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)
under the Alcoholic Beverage Control Act.

MONROVIA DISTRICT OFFICE

File: 20-426241

Reg: 16084934

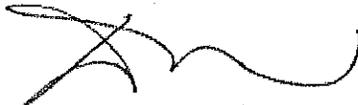
AB: 9679

CERTIFICATION

I, Dominique Williams, do hereby certify that I am a Senior Legal Analyst for the Department of Alcoholic Beverage Control of the State of California.

I do hereby further certify that annexed hereto is a true, correct and complete record (not including the Hearing Reporter's transcript) of the proceedings held under Chapter 5 of Part 1 of Division 3 of Title 2 of the Government Code concerning the petition, protest, or discipline of the above-listed license heretofore issued or applied for under the provisions of Division 9 of the Business and Professions Code.

IN WITNESS WHEREOF, I hereunto affix my signature on February 7, 2018, in the City of Sacramento, County of Sacramento, State of California.


Office of Legal Services

2018 FEB -9 AM 9:30
RECEIVED
ABC APPEALS BOARD

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

7-ELEVEN INC, JSVP OPERATING INC
7-ELEVEN STORE #2171 139993E
530 DIAMOND BAR BLVD
DIAMOND BAR, CA 91765

OFF-SALE BEER AND WINE - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

MONROVIA DISTRICT OFFICE

File: 20-426241

Reg: 16084934

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on December 13, 2017. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 300 Capitol Mall, Suite 1245, Sacramento, CA 95814.

On or after January 29, 2018, a representative of the Department will contact you to arrange to pick-up the license certificate.

Sacramento, California

Dated: December 18, 2017



Matthew D. Botting
General Counsel

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

7-Eleven Inc. & JSVP Operating Inc.	}	File: 20-426241
dba 7-Eleven Store #2171-139993E	}	
530 N. Diamond Bar Blvd.	}	Reg.: 16084934
Diamond Bar, California 91765	}	
	}	License Type: 20
Respondents	}	
	}	Word Count: 10,000
	}	
	}	Reporter:
	}	Tracy Terkeurst
	}	California Reporting
	}	
<u>Off-Sale Beer and Wine License</u>	}	<u>PROPOSED DECISION</u>

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on September 26, 2017.

Jonathan V. Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Donna J. Hooper, attorney-at-law, represented respondents 7-Eleven Inc. and JSVP Operating Inc.

The Department seeks to discipline the Respondents' license on the grounds that, on or about August 21, 2016, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Ismael Granados, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on September 26, 2017.

FINDINGS OF FACT

1. The Department filed the accusation on November 15, 2016.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 20, off-sale beer and wine license to the Respondents for the above-described location on June 28, 2005 (the Licensed Premises).
3. There is no record of prior departmental discipline against the Respondents' license.
4. Ismael Granados was born on December 10, 1996. He served as a minor decoy during an operation conducted by the Department on August 21, 2016. On that date he was 19 years old.
5. Granados appeared and testified at the hearing. On August 21, 2016, he was 5'2" tall and weighed 145 pounds. He wore a dark blue t-shirt, black tennis shoes, and a watch. His hair was short on the top and shaved on the sides. (Exhibit 2.) His appearance at the hearing was the same, except that he was five pounds heavier.
6. On August 21, 2016, Supervising Agent Vic Duong entered the License Premises. Granados entered shortly thereafter and walked to the coolers. He selected a six-pack of Bud Light beer and took it to the front counter. He set the beer down and the clerk, Cecilia del Rosario Villagran, scanned it. A yellow prompt appeared on the register's screen. Villagran cleared the prompt by pressing the "Visual ID OK" button. He paid for the beer, she gave him some change, then he exited with the beer. Supv. Agent Duong also exited.
7. Granados and Supv. Agent Duong re-entered the Licensed Premises. Supv. Agent Duong contacted Villagran, identified himself, and explained the violation. Supv. Agent Duong asked Granados to identify the person who sold him the beer. Granados pointed to Villagran and said, "She did." Granados and Villagran were three to five feet apart at the time, facing each other at an angle. A photo of the two of them was taken (exhibit 2), after which Villagran was cited.
8. Granados had been a decoy numerous times before this operation. Typically, he visited between five and eight locations per operation. On August 21, 2016, he visited ten locations, of which four sold an alcoholic beverage to him. Granados learned of the decoy program through his role as an Explorer with the Bell Gardens Police Department. He rose to the rank of Explorer Captain before leaving the program. Starting in 2016, he became a public safety officer. His duties include taking some types of crime reports, assisting police officers, investigating property damage arising from traffic collisions, and working at community events.
9. Villagran testified that she believed Granados appeared to be about 25 years old at the time of the sale because his face appeared to be that of an older person. She further testified that she believed he was wearing a different shirt than the one he is wearing in

the photo (exhibit 2). Villagran was retrained after this incident and continues to work at the Licensed Premises.

10. Jogesh Kumar Vashisht, a shareholder and officer of JSVP Operating Inc., testified that he has held alcohol licenses in some capacity since 1988 without incurring any violations. After the sale to Granados, he removed the "Visual ID OK" button from the register. He also informed all employees to check ID in every case. Finally, he described the Come of Age computer training which all employees must undergo when first hired.

11. Granados appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in the Licensed Premises on August 21, 2016, Granados displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Villagran.

12. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.

3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.

4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on August 21, 2016, the Respondents' clerk, Cecilia del Rosario Villagran, inside the Licensed Premises, sold an alcoholic beverage to Ismael Granados, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 4-11.)

5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rule 141(b)(2)² and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Granados' physical appearance, coupled with his training and experience, gave him the appearance of a person over the age of 21. This argument is rejected. As noted above, Granados had the appearance generally expected of a person under the age of 21. (Findings of Fact ¶ 11.) In making this determination, Villagran's self-serving testimony that he had an older face is given less weight than the photo taken shortly after sale, particularly since Villagran did not recall how Granados was dressed. With respect to Granados' demeanor, Villagran did not refer to a single aspect of his demeanor when asked why she believed him to be 25 years old. Instead, she focused on Granados' face. Accordingly, there is no evidence that Villagran's training and experience had any impact upon his appearance while he was inside the Licensed Premises.

PENALTY

The Department requested that the Respondents' license be suspended for a period of 15 days. The Respondents argued that a mitigated penalty was appropriate given their 11 years of discipline-free operation at this location and their 18 years of discipline-free operation at other locations. The Respondents are partially correct—their lengthy discipline-free history at the Licensed Premises warrants some mitigation. The penalty recommended herein complies with rule 144.

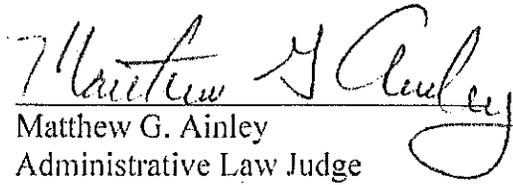
² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

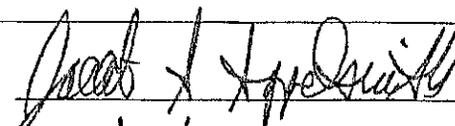
7-Eleven Inc. & JSVP Operating Inc.
File #20-426241
Reg. #16084934
Page 5

ORDER

The Respondents' off-sale beer and wine license is hereby suspended for a period of 5 days.

Dated: October 26, 2017


Matthew G. Ainley
Administrative Law Judge

<input checked="" type="checkbox"/> - Adopt
<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>12/13/17</u>