

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

AB-9150

File: 20-362384 Reg: 10073338

7-ELEVEN, INC., JAGDISH B. VALAND, and KOKILA JAGDISH VALAND,
dba 7-Eleven Store # 2171-27437
8201 Arlington Avenue, Suites A & B, Riverside, CA 92503,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 3, 2011
Los Angeles, CA

ISSUED DECEMBER 8, 2011

7-Eleven, Inc., Jagdish B. Valand, and Kokila Jagdish Valand, doing business as 7-Eleven Store # 2171-27437 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, all 10 days stayed on the condition that appellants complete one year of discipline-free operation, 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., Jagdish B. Valand, and Kokila Jagdish Valand, appearing through their counsel, Jessica Cohen, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated December 24, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 10, 2000. The Department filed an accusation against appellants charging that, on January 21, 2010, appellants' clerk, Chad Helms (the clerk), sold an alcoholic beverage to 18-year-old Taylor Lapoint. Although not noted in the accusation, Lapoint was working as a minor decoy for the Riverside Police Department at the time.

At the administrative hearing held on November 3, 2010, documentary evidence was received and testimony concerning the sale was presented by Lapoint (the decoy) and by James Barrette, a Riverside police officer.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. Appellants then filed an appeal contending that Department rules 141(b)(2) and 141(b)(5)² were violated.

DISCUSSION

I

Rule 141(b)(2) requires that the 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." Proof that the law enforcement agency involved failed to comply with any of the provisions of rule 141 provides a defense to an accusation charging a sale-to-minor violation. (Rule 141(c).)

Appellants contend that the decoy's appearance did not comply with rule 141(b)(2) because his experience as a police Explorer "contributed to a mature and confident demeanor at the time of the hearing" (App. Br. at p. 9), and "he had a

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.

receding hairline, which vastly ages an adult's physical appearance." (*Ibid.*) This latter characteristic, appellants say, was not addressed in the decision.

The ALJ described how the decoy appeared on the day of the sale and at the hearing, his experience as a police Explorer and a decoy, and his "receding hairline" in Finding of Fact II-C. In paragraph 4 of that finding, the ALJ addressed both of the contentions appellants raise on appeal:

4. Although it appears that the decoy has a slight receding hairline, his face is very youthful looking. Additionally, there was nothing remarkable about the decoy's nonphysical appearance, there was nothing about the decoy's speech, his mannerisms or his demeanor that made him appear older than his actual age and he actually looks younger in person [than] he does in his photographs.

The ALJ determined that there was nothing about the decoy's nonphysical appearance "that made him appear older than his actual age" of 18. As this Board has said on many occasions, the ALJ is the trier of fact, and had the opportunity, which this Board has not, of observing the decoy as he testified and determining whether his appearance met the requirement of rule 141. The ALJ noted his experience, but still concluded that his appearance complied with the rule. "There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older." (*Azzam* (2001) AB-7631.)

The ALJ obviously found that the decoy's "slight receding hairline" did not "vastly age" him; on the contrary, the ALJ found the decoy to have a "very youthful looking" face. Where the ALJ, who observed the decoy at the hearing, finds that the decoy's appearance complied with rule 141(b)(2), the Board will not second-guess that factual determination unless the appellant has provided a compelling reason to do so. Appellant has failed to do so, and the ALJ's determination is conclusive.

II

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 identification of the alleged seller of the alcoholic beverages.

Appellants contend that the rule was violated because "the preponderance of the evidence did *not* establish that a citation was issued to the clerk after the alleged face-to-face identification." (App. Br. at p. 6.) Only the officer's testimony, they assert, "provided any useful information" on the issue, and he could not remember who actually issued the citation. (*Ibid.*)

Appellants presented no witnesses, so it was not just a preponderance of the evidence that established compliance with the rule, but *all* the evidence presented on the issue established compliance with the rule. Rule 141 provides appellants an affirmative defense, but that means appellants have the burden of producing evidence to show that some provision of the rule was violated. Appellants did not do so.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, 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.