

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

AB-9193

File: 20-278957 Reg: 11074261

7-ELEVEN INC. and DONNY R. CACY, dba 7-Eleven Store # 2173-24131
7609 Santa Monica Boulevard, West Hollywood, CA 90046,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 31, 2012
Los Angeles, CA

ISSUED JUNE 15, 2012

7-Eleven Inc. and Donny R. Cacy, doing business as 7-Eleven Store # 2173-24131 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, with 10 of the days stayed on the condition that no cause for discipline occurs during a one-year probationary period, for their clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven Inc. and Donny R. Cacy, appearing through their counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated August 31, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 4, 1994. The Department filed an accusation against appellants charging that, on August 29, 2010, appellants' clerk, Ana Sanchez (the clerk), sold an alcoholic beverage to 18-year-old Sebastian Equiarta. Although not noted in the accusation, Equiarta was working as a minor decoy for the Department at the time.

At the administrative hearing held on July 7, 2011, documentary evidence was received and testimony concerning the sale was presented by Equiarta (the decoy) and by Department investigator Benjamin Delarosa.

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 the decoy operation did not comply with rule 141(a) or 141(b)(2)².

DISCUSSION

Department rule 141(b)(2) provides that "[t]he decoy shall 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." Appellants contend that the administrative law judge (ALJ) erred in finding that the decoy's appearance complied with the requirement of the rule. They argue that the ALJ erroneously relied on the decoy's appearance at the hearing in determining that he looked under the age of 21 on the day of the decoy operation; that the decoy wearing his hair "spiked up" at the hearing made him appear drastically

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.

different from his appearance during the decoy operation, when his hair was shorter and not spiked up; and that the photograph of the decoy taken on the day of the decoy operation is the only evidence of how he looked that day and it shows that he appeared older than 21 years old on that day.

The ALJ's findings with regard to the decoy's apparent age are in Findings of Fact 9 through 11:

9. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his maturity, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that his short hair was spiked up using product on the day of the hearing. The decoy is an extremely youthful looking young man who was five feet eleven inches in height and who weighed between one hundred thirty and one hundred forty pounds on the day of the sale. On that day, the decoy was clean shaven and his clothing consisted of blue jeans, a brown shirt, a black hooded jacket and sneakers. Exhibit 2 is a photograph of the decoy that was taken on the day of the sale before going out on the decoy operation and Exhibit 4 is a photograph of the decoy that was taken at the premises. Both of these photographs show how the decoy looked and what he was wearing on the day of the sale.

10. The decoy had not participated in any prior decoy operations, and he had not served as an Explorer.

11. There was nothing remarkable about the decoy's nonphysical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him look older than his actual age. After considering the photographs depicted in Exhibits 2 and 4, 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 twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellants seem to be arguing that the ALJ should have considered *only* the photographs of the decoy taken on the day of the decoy operation when determining the decoy's apparent age and that it was error for the ALJ to consider how the decoy

looked at the hearing. While an appellate court has said that a photograph taken immediately following an illegal sale is "arguably the most important piece of evidence in considering whether the decoy displayed the physical appearance of someone under 21 years of age" (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (The Southland Corporation)* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652]), no court has said that such a photograph must be the only evidence to be considered.

Appellants assert that the ALJ's comparison of the decoy's appearance at the hearing and during the decoy operation shows that his determination is based on the decoy's appearance at the hearing, not his appearance during the decoy operation, as required by the rule. On the contrary, the Appeals Board has previously held that such a comparison demonstrates that the ALJ complied with the rule:

We are well aware that the rule requires the ALJ to undertake the difficult task of assessing [the decoy's] appearance many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date. A specific finding by the ALJ to the effect that the minor's appearance was substantially the same at both times shows that the ALJ was aware of, and took into consideration, the rule's requirement that the minor's apparent age must be judged as of the time, and under the actual circumstances, of the alleged sale.

(*The Southland Corporation/Kim* (2000) AB-7267, fn. 2.)

Appellants complain it was unfair for the decoy to wear his hair combed down during the decoy operation, when he generally wears his hair spiked up. They allege that his appearance was "manipulated" on the day of the decoy operation by changing his hairstyle from the way he usually wore it and that he "may" have appeared younger

with his hair spiked up. They assert that the spiked-up hairstyle "is the preferable and the general look of males under 21 years of age, not hair that is down" (App. Br. at p. 7), implying that a young man can only appear to be under the age of 21 if he wears his hair spiked-up.

Appellants are asking this Board to substitute its judgment of the decoy's appearance for that of the ALJ, a position the Board has repeatedly rejected.

An ALJ's task to evaluate the appearance of decoys is not an easy one, nor is it precise. To a large extent, application of such standards as the rule provides is, of necessity, subjective; all that can be required is reasonableness in the application. As long as the determinations of the ALJ's are reasonable and not arbitrary or capricious, we will uphold them.

(*O'Brien* (2001) AB-7751.)

The ALJ's determination in the present case was neither arbitrary nor capricious, and appellants have not established that the decoy operation was conducted unfairly. Therefore, we must uphold the Department's decision.

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.