

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

AB-9200

File: 20-363465 Reg: 11074852

7-ELEVEN, INC., NUHA TANNOUS AKKAWI, and KAMAL AZIZ BITAR,
dba 7-Eleven 2131-15944
9365 Jamacha Boulevard, Spring Valley, CA 91977,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 6, 2012
Los Angeles, CA

ISSUED OCTOBER 17, 2012

7-Eleven, Inc., Nuha Tannous Akkawi, and Kamal Aziz Bitar, doing business as 7-Eleven 2131-15944 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, all stayed, for their clerk selling an alcoholic beverage to a law enforcement minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Nuha Tannous Akkawi, and Kamal Aziz Bitar, appearing through their counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

¹The decision of the Department, dated October 11, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 31, 2000. The Department filed an accusation against appellants charging that, on October 27, 2010, appellants' clerk, Paul Shaw (the clerk), sold an alcoholic beverage to 18-year-old Erin Weaver. Although not noted in the accusation, Weaver was working as a minor decoy for the San Diego Sheriff's Department at the time.

At the administrative hearing held on August 17, 2011, documentary evidence was received and testimony concerning the sale was presented by Weaver (the decoy) and by Sheriff's Deputy Nathaniel Black. Appellants presented no witnesses.

The testimony established that the decoy took a 6-pack of Bud Light beer to the counter in the licensed premises, where the clerk asked how old she was. She replied, truthfully, that she was 18 years old. The clerk said "Okay" and proceeded to sell the beer to her.

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's appearance violated rule 141(b)(2).²

DISCUSSION

Appellants contend that the decoy's appearance violated rule 141(b)(2). Rule 141(b)(2) provides:

The 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.

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.

If law enforcement violates a provision of rule 141, a licensee has a defense to a sale-to-minor charge. (Cal. Code Regs., § 141, subd. (c).)

Appellants assert that "the best evidence for determining how a minor decoy appeared to the clerk . . . are photographs of the decoy taken on the date of the alleged sale." (App. Br. at p. 4.) The photographs in this case, appellants say, "do not depict a childlike teenager." (*Ibid.* at p. 5.)

With regard to the importance of photographs of the decoy, the Board has said:

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.

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In any case, the standard is not that the decoy must display the appearance of a "childlike teenager" but "the appearance which could generally be expected of a person under 21 years of age." In Finding of Fact (FF) II-B, the ALJ found that she did:

B. The overall appearance of the decoy including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that her hair was a little darker brown than on the day of the hearing.

1. The decoy is a youthful looking female who is five feet eight inches in height and who weighs one hundred twenty pounds. On the day of the sale, she was not wearing any makeup or jewelry. Her clothing consisted of blue jeans, a dark T-shirt, a gray hooded sweatshirt and tennis shoes. Exhibit 2 was taken at the premises on the day of the sale and Exhibits 3 and 4 were taken before going out on the decoy operation. All three photographs depict what the decoy was wearing and how she appeared at the premises.

2. According to the decoy, she had participated in two prior decoy operations, she had not testified in court before, she was not paid to be a decoy, she was not really nervous at the premises, she was confident at the premises and she enjoyed the decoy operations.

3. There was nothing about the decoy's speech, her mannerisms or her demeanor that made her appear older than her actual age.

4. After considering the photographs depicted in Exhibits 2, 3 and 4, the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance that 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 also allege that the decoy was "self-assured, mature, not nervous" and "displayed the confidence that would be abnormal for a teenager in her position," attributes that are "[in]consistent with the appearance 'generally expected of a person under 21 years of age.'" (App. Br. at p. 5.) They state that the "decision lacks sufficient evidence to support [the ALJ's] findings and conclusions." (*Ibid.*) This assertion is based on consideration of only a portion of the evidence presented. If one considers only the factors that appellants focus on, perhaps there would not be sufficient evidence to support the ALJ's findings. However, the evidence presented at the hearing, including the presence of the decoy herself, clearly did provide substantial evidence for finding that the decoy's appearance complied with the requirements of rule 141(b)(2).

Something the Board has said before bears repeating here:

Suffice it to say, this is another of the many cases where a licensee's counsel disagrees with the ALJ's determination regarding a decoy's appearance. We find nothing that persuades us that his conclusions are such that intervention by this Board would be justified.

The ALJ's findings and determinations in this case were both well-considered and clearly reasonable. We can only conclude that the Department's decision should be affirmed.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
BAXTER RICE, 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.