

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

AB-9231

File: 20-388256 Reg: 11075129

7-ELEVEN INC., HARBHAJAN KAUR HUNDAL, and RAJKARAN SINGH HUNDAL,
dba 7-Eleven Store #2131-20508
948 Grand Avenue, 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: December 6, 2012
Los Angeles, CA

ISSUED JANUARY 16, 2013

7-Eleven Inc., Harbhajan Kaur Hundal, and Rajkaran Singh Hundal, doing business as 7-Eleven Store #2131-20508 (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., Harbhajan Kaur Hundal, and Rajkaran Singh Hundal, appearing through their counsel, Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated December 28, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 18, 2002. On May 25, 2011, the Department filed an accusation against appellants charging that, on March 4, 2011, appellants' clerk, Christopher Garcia (the clerk), sold an alcoholic beverage to 18-year-old Daniel Navarro. Although not noted in the accusation, Navarro was working as a minor decoy for the San Diego Sheriff's Department at the time.

At the administrative hearing held on October 11, 2012, documentary evidence was received and testimony concerning the sale was presented by Navarro (the decoy); by Albert Carrillo, a San Diego Sheriff's Department officer; and by co-licensee Rajkaran Hundal on behalf of the appellants.

The testimony established that on March 4, 2011, the decoy entered the premises, walked to the coolers, selected a six-pack of Bud Light beer cans, carried the beer to the sales counter, and waited in line. When it was his turn, the decoy placed the beer on the counter, and the clerk asked for identification. The decoy handed the clerk his California driver's license, which indicated a date of birth of 06-06-92 and bore a red stripe with the words "AGE 21 in 2013." The clerk took possession of the license, examined it, swiped it, returned it to the decoy, and proceeded with the sale.

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 rule 141(a)² was violated.

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.

DISCUSSION

Appellants contend that the decoy operation was not conducted in a manner that promoted fairness, as required by rule 141(a), because the operation occurred during the store's "rush hour." Appellants allege that the store was busy enough to merit opening a second register, and that the clerk was overwhelmed and distracted by the inordinate number of customers demanding attention. (App.Br. at p. 6.)

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decisions, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing. (California Constitution, art. XX, § 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].)

Rule 141(a) calls for fairness in the use of minor decoy operations:

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 . . . and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

As noted by appellants, the requirements of rule 141 must be strictly obeyed: "The Department's increasing reliance on decoys demands strict adherence to the rules

adopted for the protection of the licensees, the public, and the decoys themselves.”
(*Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575, 580 [79 Cal.Rptr.2d 126, 129] [addressing a case of insufficient face-to-face identification].)

The ALJ considered appellant’s contention and concluded that “the evidence did not establish that the decoy operation was conducted in an unfair manner.”

(Determination of Issues ¶ II.) The appellants have offered no reason why this Board should reconsider the ALJ’s conclusion.

Appellants nevertheless insist that the operation was unfair because “there is evidence demonstrating that the clerk was overwhelmed and distracted by an inordinate number of customers demanding attention” and “that a second register had to be opened in order to attend to the large amount of customers.”³ (App.Br. at p. 6.) Appellants imply, but do not directly argue, that the facts do not support the ALJ’s conclusion.

This Board has repeatedly noted the flawed logic of the so-called “rush hour” defense. The obligation to prevent sales to minors does not simply vanish as the number of customers increases:

The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy.

(*Circle K Stores, Inc.* (2000) AB-7476 at p. 5.) If anything, the licensee must ensure

³Appellants introduce their argument on appeal with factual allegations pertaining to an unrelated case. (See App.Br. at p. 3.) We have disregarded that portion of the brief. We strongly encourage counsel for appellants to exercise the utmost diligence in drafting and editing future briefs, and to scrupulously avoid sloppy cut-and-paste methods.

that its employees are *more* vigilant during rush hour periods, as a savvy minor may take advantage of a clerk's inattention. This Board has made it clear that preventing sales to minors must be among the licensee's highest priorities:

When commerce reaches the point where the desire not to inconvenience customers overrides the importance of preventing sales of alcoholic beverages to minors, the public safety and morals of the people of the State of California will be irreparably injured. Such an unacceptable result will not occur on this Board's watch.

(*The Vons Company, Inc.* (2001) AB-7788 at p. 4).

As appellants point out, this Board has indeed noted that there may be circumstances where a truly incapacitating level of activity, coupled with an intent on the part of officers to take advantage of the situation, might merit relief:

It is conceivable that, where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate.

(*Circle K Stores, Inc., supra*, at p. 5.) Such an exception would require "persuasive evidence of something associated with the timing of the decoy operation that truly *prevents* a seller from acting with circumspection when faced with the possibility that a prospective purchaser of alcoholic beverages is a minor." (*The Vons Company, Inc., supra*, at p. 4, emphasis added.) Notably, we are unaware of any case where such an abuse has been proven.

Contrary to appellants' assertion, there is no evidence that the clerk was overwhelmed or distracted. The clerk did not testify, and neither co-licensee Hundal nor the Department's witnesses offered testimony regarding the clerk's emotional state at the time of the sale.

Moreover, there is no evidence indicating that there were a large number of

customers in the store. The decoy testified that there were “[a]bout three or four” other customers in the store when he entered. [RT 19.] Officer Carrillo testified that when he and the decoy reentered the store after the sale, “[t]here were a few people in line, and we waited for those people to complete their purchases.” [RT 34.] While co-licensee Hundal mentions the existence of a security video, appellants were unable to produce the video or enter it into evidence. [RT 52.] What little evidence exists on this point is therefore undisputed, and indicates that there were no more than a handful of other customers in the store.

Finally, the evidence does not show that the clerk opened the second register to accommodate an increased number of customers. Again, the clerk did not testify; any discussion of his motive for opening the register is speculation.

Appellants have shown neither a level of activity sufficient to make compliance truly impossible nor an intent on the part of officers to exploit such a situation. On the contrary, there is a total lack of evidence supporting appellants’ position. We can find no cause to reconsider the ALJ’s conclusions.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
FRED HIESTAND, 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.