

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

AB-9242

File: 20-214340 Reg: 11074849

7-ELEVEN, INC., NOORJEHAN HASSAN ALI, and SHOUKAT ALI,
dba 7-Eleven #2136-19239
6610 Foothill Boulevard, Tujunga, California 91042,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 7, 2013
Los Angeles, CA

ISSUED APRIL 10, 2013

7-Eleven, Inc., Noorjehan Hassan Ali, and Shoukat Ali, doing business as 7-Eleven #2136-19239 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, with all 10 days stayed, 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., Noorjehan Hassan Ali, and Shoukat Ali, appearing through their counsel, Ralph Barat Saltsman and Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated January 25, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. On April 7, 2011, the Department filed an accusation against appellants charging that, on January 27, 2011, appellants' clerk, Juan Gutierrez Gonzalez (the clerk), sold an alcoholic beverage to 19-year-old Talia Lamb. Although not noted in the accusation, Lamb was working as a minor decoy for the LAPD at the time.

At the administrative hearing held on November 30, 2011, documentary evidence was received and testimony concerning the sale was presented by Lamb (the decoy) and by Maricela Vargas, an LAPD officer. Appellants presented no witnesses.

On the date of the sale, Officer Vargas entered the premises, and the decoy followed. The decoy proceeded to the coolers, where she selected a can of Four Loko malt liquor, which she brought to the counter. The clerk asked to see the decoy's identification. The decoy handed the clerk her California driver's license, which bore a red stripe with the words "AGE 21 IN 2012." The clerk examined the decoy's driver's license for approximately thirty seconds, then handed it back and completed the sale.

The ALJ concluded that the decoy's appearance complied with rule 141(b)(2).

The Department's decision determined that the violation charged was proved and no defense was established. A penalty of 10 days' suspension was imposed, with all days stayed.

Appellants then filed this appeal contending that rule 141(b)(2) violates both federal and state due process requirements, and is therefore unconstitutional.

DISCUSSION

Appellants contend that rule 141(b)(2) unconstitutionally violates both federal and state due process requirements by presenting a standard that is impossible for the ALJ to meet.

As an initial matter, this Board has jurisdiction to hear constitutional challenges to administrative regulations issued by the Department, including rule 141,² as part of its authority to determine whether the Department has proceeded according to law. (Bus. & Prof. Code §23804(b).)

This Board has recently faced a surge of challenges to the constitutionality of rule 141(b)(2). (See, e.g., *7-Eleven Inc.* (2013) AB-9248; *Circle K Stores* (2013) AB-9274). Though the facts in these cases vary, the arguments presented are indistinguishable, if not identical.

As this Board noted in those cases, rule 141(b)(2) complies with both state and federal constitutional requirements. In short, apparent age is a determination that eludes concrete definition; therefore, the rule need only be sufficiently definite to provide directives of conduct to the administrative officers. Taken in its regulatory context, rule 141(b)(2) provides sufficient guidance.

As the arguments in this case do not differ significantly from those presented in *7-Eleven, Inc.* (2013) AB-9248, we refer appellants to that opinion for a complete analysis.

We reiterate, however, that we are perplexed by appellants' attack on their own affirmative defense. We note that rule 141, including subdivision (b)(2), resulted from

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.

legislative dialogue and amendments to section 25658 in the wake of the supreme court's *Provigo* holding. (See *Provigo v. Alcoholic Beverage Control Appeals Board* (1994) 7 Cal.4th 561 [28 Cal.Rptr.2d 638].) *Provigo* held that the appearance of the decoy was ultimately irrelevant, provided there was no "overbearing conduct" that was "likely to induce one to commit crime." (*Id.* at 569.) A mature appearance alone did not constitute such overbearing conduct. (*Ibid.*) As the court noted, "the seller may readily protect itself by requiring sales agents to routinely check identification." (*Id.* at 642.)

During the legislative process to amend section 25856, however, there was broad support for the inclusion of an appearance requirement in the mandated ABC guidelines. Supporters "argue[d] that the adoption of an ABC guideline rule would provide certainty, would give everyone, law enforcement agencies and retailers alike, input into the process and would allow for on-going flexibility through the rule amendment process." (Sen. Floor Analysis of Assem. Bill No. 3805 (1993-1994 Reg. Sess.) August 8, 1994, p. 3.)

The supporters behind the 1994 amendments to section 25658 were almost entirely retailers and alcoholic beverage producers. (See Sen. Floor Analysis, *supra*.) In fact, Southland Corporation – the parent company of appellant 7-Eleven, Inc. – is listed among the organizations supporting the inclusion of an appearance requirement. (*Ibid.*) It is unclear why appellants are now arguing against a rule *supported by their own parent company* that was designed to ensure fairness in decoy operations above and beyond what was required by the *Provigo* decision. This smacks of blatant hypocrisy, reminiscent of the proverbial plea by the son who murders his parents and then seeks mercy from the court because he is now an orphan.

Unquestionably, rule 141 provides more certainty than the amended version of section 25856, which imposes appearance standards only on decoy operations conducted prior to the adoption of ABC guidelines. (Bus. & Prof. Code § 25658(f); see also Sen. G.O. Com. Analysis of Assem. Bill No. 3805 (1993-1994 Reg. Sess.) August 9, 1994, p. 5.) We are confident not only that the rule is constitutional, but that it provides a level of certainty that is both appropriate and practicable under the circumstances. If appellants feel that more stringent guidelines are appropriate, they may resort to the rule amendment process.

Finally, we note that appellants' entire argument is patently disingenuous in light of the fact that their clerk examined the minor decoy's driver's license and completed the sale anyway. As noted in cases addressing vagueness, a provision must be considered in the context of its statutory and regulatory scheme. (See, e.g., *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1122 [108 Cal.Rptr.2d 102].) Accordingly, rule 141's subdivisions (b)(2) and (b)(3) should not be considered in isolation from each other. They are, in fact, supplementary. Where a decoy has provided her valid identification at the clerk's request, in compliance with rule 141(b)(3), it will necessarily influence whether the clerk is justified in relying on the decoy's physical appearance.

In closing, we are deeply troubled by counsel's suggestion at oral argument that clerks sometimes request a customer's identification, then interpret the mere fact that the customer voluntarily supplied the identification as evidence that the individual is over 21 – apparently without reference to the age information provided on the identification itself. We find this unacceptable, and wish to vigorously discourage such habitual inattention. The clerk (who, we note, did not testify) had no need to rely on

apparent age when he asked for and was presented with concrete proof of the decoy's *actual* age.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
FRED HIESTAND, 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.