

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

AB-9273

File: 21-501726 Reg: 11075894

7-ELEVEN, INC., dba 7-Eleven
6262 Rosemead Boulevard, Temple City, CA 91780-1542,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 6, 2013
Los Angeles, CA

ISSUED JULY 24, 2013

7-Eleven, Inc., doing business as 7-Eleven (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant 7-Eleven, Inc., appearing through its counsel, Ralph Barat Saltsman and Saba Zafar, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated May 16, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on September 29, 2010. On October 18, 2011, the Department filed an accusation against appellant charging that, on July 15, 2011, appellant's clerk, Dion Mumphery (the clerk), sold an alcoholic beverage to 16-year-old Valerie S. Although not noted in the accusation, Ms. S. was working as a minor decoy for the Department at the time.

At the administrative hearing held on March 20, 2012, documentary evidence was received, and testimony concerning the sale was presented by Ms. S. (the decoy) and by Salvador Zavala, a Department investigator.

Testimony established that on July 15, 2011, the decoy entered the licensed premises and selected a six-pack of Bud Light beer. After waiting in line, she set the beer down on the counter when it was her turn, and the clerk said that she looked buzzed already. (Finding of Fact ¶7.) The clerk then asked for her ID, looked at it, then proceeded with the sale. The decoy exited the premises, and re-entered with several Department investigators and L.A. County sheriff' deputies. One of the investigators advised the clerk that he had sold alcohol to a minor and asked the decoy to identify who sold her the beer, which she did. A photo was taken of the clerk.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellant has filed an appeal making the following contentions: (1) The citation was issued before the decoy identified the clerk as the seller, in violation of rule 141(b)(5);² and (2) rule 141(b)(2) violates the due process clauses of the California and

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.

United States Constitutions.

DISCUSSION

I

Appellant contends that the Department failed to establish compliance with rule 141(b)(5)³ because the face-to-face identification took place after the issuance of the citation. (App.Br. at p. 5.)

Rule 141(b)(5) requires, following a completed sale, and prior to the issuance of a citation, that the peace officer conducting the decoy operation make a reasonable attempt to reenter the premises and have the decoy make a face-to-face identification of the alleged seller of alcoholic beverages. Appellant contends the rule was violated because, even though such an identification took place, it was preceded by the issuance of a citation, and thus not in conformity with the rule.

The administrative law judge (ALJ) made a finding that the citation was issued after the face-to-face identification in Findings of Fact ¶9. He goes on to explain in Conclusions of Law ¶5:

With respect to rule 141(b)(5), the Respondent focuses on Inv. Zavala's testimony. On direct examination, Inv. Zavala testified to the following sequence of events: He asked Valerie to identify the person who sold her the beer, Valerie identified Mumphery, a photo of the two of them was taken, after which Mumphery was cited. On cross-examination, Inv. Zavala testified that Inv. Mathos wrote out the citation at the end of the investigation, that he was the one who actually issued it (i.e., handed it) to Mumphery, that he explained the various facets of the citation to Mumphery as he was being cited, and that his last conversation with Mumphery was before the face-to-face identification. Piecing his

³Rule 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."

testimony on cross together, the Respondent reasoned that, since Inv. Zavala explained the citation to Mumphery as the citation was being issued and his last conversation with Mumphery was before the face-to-face identification, it necessarily follows that the citation was issued before the face-to-face identification. This argument is rejected. While the Respondent's argument is logically constructed from bits and pieces of Inv. Zavala's testimony, Inv. Zavala was clear throughout his testimony that the citation was issued after the face-to-face identification and the photo. This aspect of his testimony, which does not require reconstructing events as if they were part of a jigsaw puzzle, is credible and is expressly relied upon.

Appellant is asking the Board to ignore findings of the ALJ, reweigh the evidence, and resolve conflicts most favorable to appellant's position. This is exactly contrary to what the Board is authorized to do by the California Constitution and the Alcoholic Beverage Control Act.

The Appeals Board's review of the decision is strictly limited: the Board must determine whether the Department's findings of fact are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821,

826-827 [40 Cal.Rptr. 666].)

It is the province of the trier of fact to resolve conflicts in the evidence, and the Board is bound to accept the Department's findings unless they are patently unreasonable. We have carefully reviewed the record, and are satisfied that the decision, its findings, and the ALJ's determinations are supported by substantial evidence.

II

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

This Board has recently rejected numerous challenges to the constitutionality of rule 141(b)(2). (See *7-Eleven Inc.* (2013) AB-9248 and *Garfield Beach* (2013) AB-9258.) As the Board noted in those cases, rule 141(b)(2) complies with both state and federal constitutional requirements, and we refer appellants to those opinions for a full discussion of the Board's position.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.