

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

AB-9305

File: 20-388238 Reg: 12076641

7-ELEVEN, INC. and AAA MANAGEMENT CORPORATION,
dba 7 Eleven Store 2111-16054
1650 West San Marcos Boulevard, San Marcos, CA 92078,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 1, 2013
Los Angeles, CA
Telephonic Deliberation: August 12, 2013

ISSUED AUGUST 29, 2013

7-Eleven, Inc. and AAA Management Corporation, doing business as 7-Eleven Store 2111-16054 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 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. and AAA Management Corporation, appearing through their counsel, Ralph Barat Saltsman and D. Andrew Quigley, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated August 23, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 12, 2002.

Thereafter, on March 15, 2012, the Department instituted an accusation against appellants charging that, on February 12, 2012, appellants' clerk, German Santos (the clerk), sold an alcoholic beverage to 18-year-old Anthony Fien. Although not noted in the accusation, Fien was working as a minor decoy for the Department at the time.

An administrative hearing was held on June 7, 2012, at which time documentary evidence was received, and testimony concerning the sale was presented by Fien (the decoy) and by Tony Lee, a police officer.

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

Appellants filed an appeal making the following contentions: There was no testimony or evidence to support findings concerning the decoy's mannerism, poise, speech, and demeanor. If the ALJ relied upon these indicia of age as bearing on the decoy's appearance under rule 141(b)(2), he relied on evidence not in the record.

DISCUSSION

Rule 141(b)(2)² requires that a 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." If the decoy does not display that appearance, appellants would have an affirmative defense.

Appellants have presented no evidence of the decoy's appearance at the time of

² Cal. Code Regs., tit. 4, § 141(b)(2).

the sale.

In this case, there was only a four-month gap between the decoy operation and the administrative hearing. Given the absence of any evidence of any incident or event which might have effected a significant change in the decoy's physical appearance or his more behavioral aspects of speech, mannerisms, poise, and demeanor, we do not find it beyond the ability of a conscientious judge to rely on what he sees and hears at the hearing to make a reasonable judgment as to the appearance the decoy displayed when he was in appellants' store.

The ALJ had the benefit of three photographs of the decoy taken before and during the decoy operation, as well as the photograph on the decoy's driver's license. The ALJ observed the decoy as he testified, heard him speak in response to questions on direct and cross-examination, saw his mannerisms, and observed his poise and demeanor. Appellants have offered no evidence whatsoever that these indicia were absent or different when the sale transaction took place.

That having been said, we think it is worth noting that the only issue appellants raised at the hearing regarding the decoy's appearance had to do with the decoy's prior experience as a decoy. Counsel argued:

In this case the respondent reserves all defenses. In particular, I believe there's a 141(b)(2) issue here due to the minor's experience. The decoy testified that he was comfortable in his role, he was confident as a decoy, he knew that the police officers were there to protect him, he has participated in two previous decoy operations, this was approximately twenty to thirty stores. He stated on this operation he was more confident for that reason.

[RT 36.]

Nothing was offered to explain how this 18-year old decoy would have appeared to the clerk to be over 21 years of age.

Finally, we do not overlook the fact that the clerk requested and was shown the decoy's California driver's license which showed his true date of birth, and that he would not be 21 until 2014.

For these reasons, we believe this appeal lacks merit.

ORDER

The decision of the Department is affirmed.³

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

³This 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.