

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

AB-9353

File: 20-512445 Reg: 12077572

7-ELEVEN, INC. and GRJG, INC., dba 7-Eleven #2368-26701
1540 Bear Mountain Road, Arvin, CA 93203,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 5, 2013
Los Angeles, CA

ISSUED JANUARY 31, 2014

7-Eleven, Inc. and GRJG, Inc., doing business as 7-Eleven #2368-26701 (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 GRJG, Inc., appearing through their counsel, Erica Woodruff, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 30, 2011.

¹The decision of the Department, dated March 13, 2013, is set forth in the appendix.

Thereafter, on October 11, 2012, the Department instituted an accusation against appellants charging that, on August 18, 2012, appellants' clerk, Alexandra Lopez (the clerk), sold an alcoholic beverage to 18-year-old Kendra Bias. Although not noted in the accusation, Bias was working as a minor decoy for the Department at the time.

An administrative hearing was held on January 15, 2003, at which time documentary evidence was received, and testimony concerning the sale was presented by Bias (the decoy) and by Isaac Borunda, a Department agent. The evidence established that the 18-year-old decoy entered the licensed premises, selected a 24-ounce can of Coors Light beer and took it to the counter. When asked for identification, she handed the clerk her California driver's license, which contained her true date of birth, a blue stripe with the words "Provisional Until age 18 in 2011," and a red stripe with the words "Age 21 in 2014." The clerk glanced at the license, "slid" it three times on the register, each time followed by a "beep," then pushed a button and proceeded with the sale.

Following her purchase, the decoy left the store, returned to the store three to five minutes later, and identified the clerk as the person who sold her the beer.

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, contending that Department rule 141(b)(5) was violated.²

²Rule 141(b)(5) states:

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.

DISCUSSION

Citing *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126], appellants contend that the face-to-face identification in this case was unduly suggestive and did not adhere to the standards governing decoy operations, because Isaac Borunda, the Department agent who conducted the face-to-face identification, first identified himself as a police officer and told the clerk she had just sold alcohol to an 18-year-old decoy, before asking the decoy who had sold the beer to her.

The contention that a face-to-face identification was unduly suggestive because a police officer or Department agent, while standing next to the decoy, advised a seller he or she had sold an alcoholic beverage to a minor, before asking the decoy who had sold the alcoholic beverage, has been raised repeatedly before the Board,³ but succeeded only once, and in that case the Board was reversed on appeal. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Keller)* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339] [clerk taken outside store to be viewed by decoy.])

The court in *Keller, supra*, explained the objectives of the rule:

There is nothing in the language of [rule 141(b)(5)] that suggests the section was written to require any particular kind of identification procedure except that it be face-to-face. There is no suggestion the section was promulgated to correct identification procedures which resulted in a history of misidentification of sellers. Indeed, there is no suggestion that correct identification of sellers by decoys presented any problem whatsoever.

We note that single-person show-ups are not inherently unfair. (*In re Carlos M.* (1990) 220 Cal.App. 3d 372, 386 [269 Cal.Rptr. 447].) While

³See, e.g., *Hilu* (2013) AB-9262; *Chevron Stations* (2012) AB-9215; and *The Vons Company, Inc.* (2004), unsuccessful appeals pursued by the same law firm which represents appellants in this case and also represented the appellant in *Keller, supra*.

an unduly suggestive one-person show-up is impermissible (*ibid.*), in the context of decoy buy operations, there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

(*Keller, supra*, 109 Cal.App.4th at pp. 1697-1698.)

Where, as here, so little time elapses between the sale transaction and the identification process, more must be shown to make a case for undue suggestion than the mere fact a peace officer advised the selling clerk he had just sold an alcoholic beverage to a minor decoy, something the decoy already knew.

We have undertaken the task of addressing the rule 141(b)(5) *issue* argued by appellants in this appeal, even though we could have declined to do so for the *issue* not having been raised below. At the administrative hearing, appellants argued that the face-to-face identification was defective because the clerk was unaware that she was being identified as the seller of an alcoholic beverage to a minor. There was no contention there that the identification process had been unduly suggestive.

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.