

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

**AB-9577**

File: 20-408729 Reg: 15082796

7-ELEVEN, INC., HADY NAWABI, and NAZANIN NAWABI,  
dba 7-Eleven #2237-16459E  
2255 East Gerard Avenue,  
Merced, CA 95340,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: David W. Sakamoto

Appeals Board Hearing: June 7, 2018  
Los Angeles, CA

**ISSUED JULY 16, 2018**

Appearances: *Appellants:* Donna J. Hooper, of Solomon Saltsman & Jamieson, as counsel for 7-Eleven, Inc., Hady Nawabi, and Nazanin Nawabi, doing business as 7-Eleven #2237-16459E.  
*Respondent:* Colleen R. Villarreal as counsel for the Department of Alcoholic Beverage Control.

**OPINION**

7-Eleven, Inc., Hady Nawabi, and Nazanin Nawabi, doing business as 7-Eleven #2237-16459E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> suspending their license for five days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

---

1. The decision of the Department, dated March 18, 2016, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 1, 2004. On July 21, 2015, the Department filed an accusation charging that appellants' clerk, Jesus Vega (the clerk), sold an alcoholic beverage to 19-year-old Donald King III on May 6, 2015. Although not noted in the accusation, King was working as a minor decoy for the Merced Police Department at the time.<sup>2</sup>

At the administrative hearing held on January 6, 2016, documentary evidence was received and testimony concerning the sale was presented by King (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and went to a beer cooler. He removed a single 24-ounce can of Bud Light beer and took it to the sales counter area. When it was time to make his purchase, the decoy set his beer on the sales counter. The clerk asked the decoy for his identification. The decoy presented his identification to the clerk. Upon examining the identification, the clerk told the decoy he recalled the decoy from school. The decoy said "Really?" There was no further discussion between them. The clerk did not ask the decoy any questions regarding the decoy's age. The decoy paid for his beer, received some change, and exited the store.

---

2. At several points in his testimony, the decoy—the only witness—seemed uncertain whether the operation was conducted by the Department of Alcoholic Beverage Control or the Merced Police Department. (Compare, e.g., RT at p. 12 [stating he was working with the Department] with RT at p. 14 [report produced by Merced PD].) Upon questioning by Department counsel, however, the decoy stated the operation was conducted by the Merced Police Department. (RT at p. 33.)

Once outside the store, the decoy gave the can of beer and the change he received from the clerk to an awaiting police officer. The decoy remained outside the store as that officer entered the store. Within a few minutes, the decoy was escorted back inside the store by a different officer.

Upon his reentry, the decoy went to an office area inside the store where the store clerk and one or two officers were already present. The decoy came to hold his identification and the beer he purchased. He told the clerk that he, the decoy, was 19 years old and that the clerk had sold him a beer. Either immediately prior to or just after the decoy identified the clerk, a photo of the decoy and the clerk was taken.

After the hearing, the Department issued a decision determining that the violation charged was proved and no defense was established.

Appellants then filed this appeal contending the record does not support the ALJ's finding that a face-to-face identification took place.

#### DISCUSSION

Appellants contend no face-to-face identification took place. They claim the decoy testified that "rather than identifying the clerk he posed for a picture and 'gave his line,'" which they argue is insufficient to satisfy the rule. (App.Br., at p. 4.) Appellants draw a distinction between the delivery of the decoy's so-called "line" and a legitimate face-to-face identification. (See App.Br., at p. 5.)

Appellants claim there is a "split of opinion" in the courts regarding rule 141(b)(5). (App.Br., at p. 6.) They compare the Second District Court of Appeal's decision in *Acapulco* and its much-cited "strict adherence" language with the Third District's decision in *Garfield Beach CVS*, which held, according to appellants, that the face-to-

face identification "could be done in pieces" provided the clerk knew or ought to have known he was being pointed out as the seller. (App.Br., at p. 7, comparing *Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126] with *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Garfield Beach CVS, LLC)* (2017) 18 Cal.App.5th 541 [226 Cal.Rptr.3d 527].)

This Board is bound by the factual findings in the Department's decision as long as those findings are supported by substantial evidence. The standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. [Citations.] The function of an appellate board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Rule 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.

(Code Regs., tit. 4, § 141(b)(5).) The rule provides an affirmative defense. The burden of proof is on the licensee to show noncompliance.

Appellants see a split of opinion where none exists. In *Acapulco*, it was undisputed that no face-to-face identification took place. (*Acapulco, supra*, at p. 579.)

The court rejected this Board's decision, which found that the rule applied "only when it is necessary to prevent a mistake in the description of the seller" and that no face-to-face identification was therefore required where "the officer was present at the time of the sale." (*Ibid.*) In essence, the Department, and the Board in upholding the Department's decision, had concluded that rule 141(b)(5) "applies in some situations but not others," and it was this position that the court overruled with its "strict adherence" language. (See *id.* at p. 581 [holding that the Department "does not have the right to ignore a duly adopted rule"].)

In *Garfield Beach CVS*, the court discussed *Acapulco* and its inapplicability to the facts of the case before it. As the *Garfield Beach CVS* court observed,

We do not disagree with the holding in *Acapulco*, based, as it is, on the dispositive and indisputable fact that the minor decoy did not identify the seller as plainly required by rule 141. Our disagreement is not with *Acapulco*, but with CVS's application of the case to the facts presented here. Indeed, the court in *Acapulco* acknowledged the limited scope of its holding. The court explicitly stated, "The concession in this case that no attempt was made to comply with rule 141, subdivision (b)(5), makes it unnecessary to decide what would constitute a sufficient effort to reenter or what would constitute a face-to-face identification by the decoy."

(*Garfield Beach CVS, supra*, at pp. 545-546.)

The court went on to reject the notion that rule 141(b)(5) requires any rigidly specific set of circumstances in order to satisfy the rule. It referred to the Fourth District Court of Appeal's decision in *7-Eleven, Inc.*, which held,

[Rule] 141, subdivision (b)(5), ensures—admittedly not as artfully as it might—that the seller will be given the opportunity, soon after the sale, to come "face-to-face" with the decoy. For reasons left to the sound discretion of the peace officer alone, or in conjunction with the business owner, [Rule] 141, subdivision (b)(5), does not require the identification be done on the premises where the sale occurred.

(*Garfield Beach CVS, supra*, at p. 531, quoting *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (7-Eleven, Inc.)* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) The court adopted this interpretation and further held the rule "does not require the identification to be done within a certain distance." (*Garfield Beach CVS, supra*, at p. 531.)

Notably, the *Garfield Beach CVS* court emphasized the function of identification over the formality. The court wrote,

Here there is no violation of Rule 141, as explained above, because the decoy made a face-to-face identification by pointing out the clerk to the officer inside the store while approximately 10 feet from her, standing next to her when the officer informed her she had sold alcohol to a minor, and taking a photograph with her as the minor held the can of beer he purchased from her. She had ample opportunity to observe the minor and to object to any perceived misidentification. *The rule requires identification, not confrontation.*

(*Id.* at p. 547, emphasis added.)

On direct examination, the decoy testified to the events following the sale:

[BY MR. LEUDERS:] [D]id you ever go back into the store?

[THE DECOY:] Yes.

Q. And what did you do when you went back into the store?

A. Went into the office there and showed my ID again with the beer I had.

Q. And to whom did you show that ID and the beer?

A. To the clerk and told him what my line was.

Q. What did you tell him?

A. I told him I'm 19 and he just sold me a beer.

Q. And that occurred in the offices?

A. Yes.

Q. Was there anyone else inside the offices other than you and the clerk when you told him that?

A. Just the officers.

(RT at p. 10.) Based on this testimony, the ALJ made the following factual findings:

Upon his reentry, the decoy went to an office area inside the store where the store clerk and one or two officers were already present. The decoy came to hold his identification and the beer he purchased. He told the clerk that he, the decoy, was 19 years old and that the clerk had sold him a beer. Either immediately prior to or just after the decoy identified the clerk, a photo of the decoy and the clerk was taken.

(Findings of Fact, ¶ 8.) Based on this finding, the ALJ reached the following conclusion of law:

Respondents argued the decoy did not make an appropriate face-to-face identification of the clerk as required by Rule 141(b)(5). That contention has no merit. The evidence was that after the decoy purchased his beer, he exited the store. A few minutes later, he, escorted by a police officer, re-entered the store and went directly to an office area in the store. At that point, he informed the clerk that he was nineteen years old, and that he, the clerk, had just sold him, the decoy, the single can of beer. A photo of the decoy and clerk was taken immediately prior to or just after the decoy made his identification. (Exhibit 3.) Under these circumstances, the clerk knew, or should have known, that he was being identified by the decoy as a person who sold beer to the decoy. The clerk did not testify at the hearing so as to provide any evidence to support a contrary finding. During his testimony, the decoy did indicate that he did not identify the clerk when he re-entered the store. However, in the context of his entire testimony, it was clear the decoy meant that he did not immediately identify the selling clerk upon his re-entering the store, but that the face-to-face identification occurred a few moments later when the decoy, police officers, and clerk were all gathered together in the office of the 7-Eleven store.

(Conclusions of Law, ¶ 7.)

Appellants maintain that no identification took place. They argue,

Here we have a situation where there is no evidence that [the] decoy ever actually identified the clerk at all. It remains a mystery how the officer knew what clerk sold the decoy the beer and ended up in the office with him. Indeed, it is unclear that they had the correct clerk. [The decoy] testified very clearly that he did not describe the clerk to the officers or

give the officers the clerk[']s name. He also testified that he did not identify the clerk to the officers ever after re-entering the premises. He testified that he posed for a picture and delivered a "line" but he never testified that he identified the clerk.

(App.Br., at p. 7.) Appellants demand the rigid formality rejected in *Garfield Beach CVS*.

There is no evidence the clerk was misidentified, and appellants made no such contention at the administrative hearing. Moreover, there is no evidence that the clerk objected to the decoy's "line" identifying him as the seller. In fact, this so-called "line," which brought the decoy and the clerk face-to-face *and* clearly identified the clerk as the seller, was itself sufficient to satisfy the requirements of the rule. Appellants' insistence otherwise is without merit.

#### ORDER

The decision of the Department is affirmed.<sup>3</sup>

BAXTER RICE, CHAIRMAN  
PETER J. RODDY, MEMBER  
JUAN PEDRO GAFFNEY RIVERA, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

---

3. This 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.

Appendix  
AB-9577

The following pages have not been remediated to be accessible for the disabled:

- Certificate of Decision (File # 20-408729 on March 18, 2016)
- Proposed Decision (File # 20-408729 on January 27, 2016)

You have two options.

- 1) You can display the unremediated document right now by clicking the request [link](#).
- 2) You can request the missing documents to be made accessible by answering the questions below and pressing **submit**.

Your Name:

Your Email (required):

Your phone:

Any comments: