

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

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|---------------------------------|---|--------------------------|
| LONGS DRUG STORES CALIFORNIA, |) | AB-7251 |
| INC. |) | |
| dba Longs Drugs |) | File: 21-288721 |
| 4445 Mission Boulevard, Suite A |) | Reg: 98042382 |
| San Diego, CA 92109, |) | |
| Appellant/Licensee, |) | Administrative Law Judge |
| |) | at the Dept. Hearing: |
| v. |) | John P. McCarthy |
| |) | |
| |) | Date and Place of the |
| DEPARTMENT OF ALCOHOLIC |) | Appeals Board Hearing: |
| BEVERAGE CONTROL, |) | September 2, 1999 |
| Respondent. |) | Los Angeles, CA |
| |) | |

Longs Drug Stores California, Inc., doing business as Longs Drugs (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its off-sale general license for 25 days, for its clerk, Shannon Maxwell, having sold an alcoholic beverage to Amber Torbett, a 19-year-old minor participating in a decoy operation of the San Diego Police Department, such sale being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

¹The Department's Decision Pursuant to Government Code §11517, subdivision (c), dated November 5, 1998, together with the Proposed Decision, is set forth in the appendix hereto.

Appearances on appeal include appellant Longs Drug Stores California, Inc., appearing through its counsel, John A. Hinman and Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on September 24, 1994. Thereafter, the Department instituted a two-count accusation against appellant charging that appellant's clerk Shannon Maxwell, sold an alcoholic beverage to Amber Torbett, a 19-year-old minor (count 1), and that Maxwell, who was 16 years of age, had not been adequately supervised (count 2).

An administrative hearing was held on April 6, 1998, at which time oral and documentary evidence was received. Following the conclusion of that hearing, the Administrative Law Judge issued a proposed decision sustaining both counts of the accusation. In an exercise of the authority granted it in Government Code §11517, subdivision (c), the Department advised the parties of its intention not to adopt the proposed decision, and, after its review of additional written submissions, issued its own decision sustaining only count 1 of the accusation, that involving the sale to a minor.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises a single issue: whether the decoy displayed the appearance required by Rule 141(b)(2).

DISCUSSION

Appellant contends there was no compliance with Rule 141(b)(2), which requires that the decoy display the appearance which could generally be expected of a person under 21 years of age.

Appellant argues that the word “display” as used in the rule is a verb, and connotes active conduct. Appellant quotes a definition from Webster’s Ninth New Collegiate Dictionary, asserting the word means “exhibit,” or “show off,” and says this means the decoy must “tip a clerk to the fact that she is under 21” by exhibiting, showing off, or displaying the appearance “of a minor attempting to illegally purchase alcoholic beverages.” (App.Br., page 3.) From this, appellant concludes that since the decoy did not present any of the thirty or more physical characteristics listed in the Department’s LEAD guidelines, she did not display the requisite appearance.

We commend this argument as imaginative, but unpersuasive.

The rule does not require the decoy to do anything regarding his or her appearance other than simply display that which could reasonably be expected of a person under the age of 21 years. There is nothing in the rule that says the decoy must warn the clerk in some manner that the purchaser is a minor.

There are other definitions of the word “display.” Webster’s Third New International Dictionary (Unabridged), p. 654, offers several: “exhibit to the sight or mind;” “to spread before the view;” “give evidence of.”

The Board is familiar with the Department’s list of characteristics it believes are among those displayed by minors when attempting to purchase alcohol illegally, and acknowledges the distinct possibility that a seller who relies entirely and exclusively upon those as his or her guides might well be misled. These are only the most obvious of potential age indicators. One who does not exhibit those characteristics may still,

through appearance, mannerisms and overall impression, display the appearance which could reasonably be expected of a person under the age of 21.

For example, the decoy testified that she may have been nervous when she was purchasing the beer, but did not believe she showed it. That does not mean her nervousness may not have been apparent to an observer, nor does the fact she may have exhibited a calm demeanor mean she did not appear to be under 21 years of age.

A clerk must rely on his or her judgment when deciding whether a prospective purchaser may legally purchase an alcoholic beverage. Exposure to the Department's list of clues may be helpful to some sellers, and not others. But where, as here, the seller had no familiarity with those guidelines, and had not undergone LEAD training, to suggest she might have been misled is simply without basis. Indeed, there is every possibility that the clerk's own immaturity may have contributed to her inability to see it in another.

The Administrative Law Judge (ALJ) observed the decoy when she testified, and viewed a photo of the decoy taken on the evening of the transaction. He was satisfied that she presented the appearance required by the rule.² There is nothing in the record to suggest he acted unreasonably in making that determination. Although the decoy may not have displayed the "juvenile characteristics" urged by appellant's counsel, neither was she dressed or made up in a manner calculated to make her look any older than her 19 years. We are not prepared to say that, given these circumstances, there was no compliance with Rule 141. A decoy is not required to present to everyone the appearance of a person under the age of 21, or that of a juvenile. His or her

² It is worthy of note that the ALJ specifically found (Finding V) that the clerk "unjustifiably" believed the decoy to be in her mid-twenties.

appearance must be one which *could* generally be expected of a person under the age of 21. Appellant has failed to show it was not.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
JOHN B. TSU, MEMBER
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ This 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.