

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

**AB-8945**

File: 20-375343 Reg: 07066833

7-ELEVEN, INC. and SUSAN L. PEARMAN, INC., dba 7-Eleven Store 2121 13666  
11610 Riverside Drive, Lakeside, CA 92040,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 5,  
2011 Los Angeles, CA

**ISSUED JUNE 17, 2011**

7-Eleven, Inc. and Susan L. Pearman, Inc., doing business as 7-Eleven Store 2121 13666 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 10 days for their clerk having sold 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 Susan L. Pearman, Inc., appearing through their counsel, Ralph Barat Saltsman and Sohey Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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<sup>1</sup>The decision of the Department, dated September 16, 2008, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 15, 2001. On September 18, 2007, the Department filed an accusation against appellants charging that, on June 21, 2007, appellants' clerk, Michele Plouffe (the clerk), sold an alcoholic beverage to 16-year-old Chad T. Meyers. Although not noted in the accusation, Meyers was working as a minor decoy for the San Diego County Sheriff's Department at the time.

At the administrative hearing held on July 25, 2008, documentary evidence was received and testimony concerning the sale was presented by Meyers (the decoy) and by John West and Robert Robertson, III, San Diego County Sheriff deputies.

The Department's decision determined that the violation charged was proven and no defense to the charge was established.

Appellants have filed an appeal making the following contentions: The Department violated the Administrative Procedure Act (APA) and General Order No. 2007-09 (1) by allowing its investigative and prosecutorial unit, the Hearing and Legal Unit, to act as decision-maker in this matter, and (2) by allowing the ex parte transmission to the Director of documents containing substantive information; appellants also maintain (3) that Rule 141(a)<sup>2</sup> was violated.

Appellants filed a Motion to Augment Record, requesting augmentation of the record with the ABC-309 form, General Order No. 2007-09, and numerous other documents.

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<sup>2</sup>References 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.

## DISCUSSION

## I

Appellants contend that the Department violated the separation of functions mandated by the APA and the California Supreme Court's decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*), because the Hearing and Legal Unit includes the Department's prosecutorial branch and also was the adjudicator in this case. In addition, they assert, it must be assumed that the Department violated prohibitions against ex parte communications because the Hearing and Legal Unit acted as both prosecutor and decision maker.

Appellants argue that the Hearing and Legal Unit was the adjudicator in this case because the Certificate of Decision was signed by Helen McConville, the supervisor of the Hearing and Legal Unit at the time. They also assert that "[i]f the Department contends that the Hearing and Legal Unit's signature and execution of the Certificate of Decision is the mere transmission of the Director's Decision, it is incumbent upon the Department to show how the Director reviewed the Decision and how it communicated its Decision to the Hearing and Legal Unit." (AOB at p. 6.)

The Certificate of Decision states:

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by an Administrative Law Judge of the Administrative Hearing Office, adopted said proposed decision as its decision in the case therein described on September 16, 2008.

A certification is a clerical act attesting to the truth of the fact or facts stated in the document, "a written testimony to the truth of any fact." (*Donnellan v. City of*

*Novato* (2001) 86 Cal.App.4th 1097, 1106 [103 Cal.Rptr.2d 882].) It seems obvious to the Board that the person signing the certification is simply stating that the Department, i.e., the Director or his designee, adopted the administrative law judge's (ALJ's) proposed decision as its own.

Appellants do not provide any authority for their contention that someone in the Hearing and Legal Unit was the decision maker in this case, nor do we think they could. Appellants cite Evidence Code section 622 and two California appellate court cases for the proposition that "[w]here a document is signed . . . by an individual . . . , the facts recited in that document are conclusively presumed to be true as between the parties thereto." (AOB at p. 6.) From that statement, they leap directly to the conclusion that "the Decision signed and executed by the Hearing and Legal Unit establishes that the Decision was made by the Hearing and Legal Unit on behalf of the Department."

The statute and cases they cite are almost certainly not applicable to a document like the Certificate of Decision. Evidence Code section 622 states,

The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.

This section is said to codify the common law doctrine of "estoppel by contract" and the word "instrument" usually refers to a contract or other document that reflects an agreement between two parties. (*Plaza Freeway v. First Mt. Bank* (2000) 81 Cal.App.4th 616, 626 [96 Cal.Rptr.2d 865].)

Even if the authorities cited by appellants somehow did apply to the Certificate of Decision, they are not authority for the conclusion reached by appellants, that the signature by someone in the Department's Hearing and Legal Unit "establishes" that the person signing was the decision maker.

Appellants' contention that "it must be assumed that the Department violated prohibitions against ex parte communications because the Hearing and Legal Unit acted as both prosecutor and decision maker" is also unsupported. Since they did not establish that Ms. McConville was the decision maker, they have not shown that the Hearing and Legal Unit was both prosecutor and adjudicator.

The Appeals Board believes that the very foundation of appellants' argument is false. They assert that the Hearing and Legal Unit is the Department's "investigative and prosecutorial arm." (AOB at p. 5.) The Department has both a Hearing and Legal Unit, and a separate Legal Unit. As set forth in General Order 2007-09, the Hearing and Legal Unit consists entirely of clerical support staff positions; all the "prosecutorial" functions are conducted by the attorney staff of the Legal Unit. Therefore, even giving appellants' contentions every benefit of the doubt, neither the Hearing and Legal Unit, nor anyone in that unit, could be acting as both prosecutor and adjudicator.

The Department provided the declarations of Judy Carlton, Senior Legal Typist, and Helen McConville, Hearing and Legal Unit Supervisor, describing their purely secretarial roles, as scriveners rather than decision makers. As summarized in the Department's Reply Brief at page 5:

As stated in their declarations, neither Ms. McConville, Ms. Carlton nor the Hearing and Legal Unit played any role whatsoever in deciding whether to adopt or reject the proposed decision. They did not advise or consult with the Director or his designatee [*sic*] in any fashion on that issue. Ms. Carlton and Ms. McConville were merely informed that the Director or his designatee [*sic*] decided to adopt the proposed decision in this case. Ms. McConville prepared the Certificate of Decision stating that the proposed decision had been adopted by the Department and mailed it out with a copy of the adopted proposed decision. The Decision in this case was made by the Director or his designatee [*sic*] and was processed in accordance with General Order 2007-09.

We believe that appellants' contentions are unsupported and unsupportable because

the person certifying the Department's decision has not been proven to be the decision maker.

## II

Appellants contend secondly that the Department violated the APA and General Order No. 2007-09, by the Hearing and Legal Unit transmitting an ABC-309 form (309 form) to the Director without providing appellants with notice and an opportunity to be heard. They allege specifically that the 309 form "was transmitted from the Department District Office to '(1) Division Office, and (2) Director Via Hearing and Legal.'" (AOB at p. 8.) Appellants appear to base this allegation on preprinted routing information on the form showing the "Director Via Hearing And Legal" as a recipient.

The Board addressed, and rejected, this contention in the appeal of *Lee Vue* (2009) AB-8851 and more recently in the appeal of *7-Eleven, Inc., and Janizeh Corporation* (2011) AB-8931. The Board's conclusion in both cases was that, "regardless of the routing, the director is prevented from receiving the 309 reports by General Order No. 2007-09."

The Board discussed the origin and reasons for General Order No. 2007-09, which modified internal procedures of the Department to comply with the Supreme Court's decision in *Quintanar, supra*, 40 Cal.4th 1. The Board continued:

[W]e believe that the effect of language (italicized below) in paragraph 3 of the "Procedures" section is to prevent documents such as the 309 report from becoming *ex parte* communications:

The proposed decision and included documents as identified above shall be *maintained at all times in a file separate from any other documents or files maintained by the Department regarding the licensee or applicant*. This file shall constitute the official administrative record.

The documents included in the "official administrative record" are

specified in paragraph 2, and they do not include a 309 report, unless it should happen to be included for some reason as a hearing exhibit. Since it is only the "official administrative record" that goes to the director, the 309 report, even if it did find its way to the Hearing and Legal Unit, would be sequestered in a separate file.

Since the appellants in the present appeal make essentially the same argument as was made in *Lee Vue, supra*, and *7-Eleven, Inc., and Janizeh Corporation, supra*, the Board rejects the contention here as it did in those cases.

### III

Appellants contend lastly that the decoy operation did not comply with the fairness standards set forth in rule 141 because the decoy did not display the appearance required by the rule.

Rule 141(a) provides:

A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Rule 141(b)(2) provides:

The 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.

Appellant maintains that the decoy did not display the appearance which could generally be expected of a person under the age of 21, and therefore the decoy operation did not comply with the fairness standards required. Appellants' Opening Brief at page 10 describes the decoy's appearance:

The decoy employed had altered his appearance such that he had yellow curly hair and essentially looked like a clown at the time of the operation. He was wearing an AC/DC shirt, weighed 180 pounds, and was around 5'10" at the time of the operation. The strange appearance of this decoy

does not come close to meeting Rule 141's specific standards for decoys.

By contrast, the ALJ made the following finding (FF-II D):

The overall appearance of the decoy including his demeanor, his poise, his size, his mannerisms and his physical appearance were consistent with that of [a] person under the age of twenty-one and his appearance at the time of the hearing and on the day of the decoy operation was similar except that he was approximately twenty pounds lighter and his natural brown hair was bleached blond on the day of the sale.

[¶ . . . ¶]

4. After considering the photographs depicted in Exhibits 3-A and 3-B, the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

The ALJ was aware of the factors that appellants assert show that the decoy's appearance violated the rule. Appellants have given us no reason to depart from our general rule of deference to the ALJ's determination regarding the decoy's appearance.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he possessed 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.

We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

ORDER

The Motion to Augment Record is denied and the Decision of the Department is affirmed.<sup>3</sup>

FRED ARMENDARIZ, CHAIRMAN  
TINA FRANK, MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>3</sup>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.