

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

AB-8981

File: 20-409789 Reg: 07066834

7-ELEVEN, INC., and JAY & SONS, INC., dba 7-Eleven 21787
1253 West Main Street, El Cajon, CA 92020,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 5, 2010
Los Angeles, CA

ISSUED SEPTEMBER 29, 2010

7-Eleven, Inc., and Jay & Sons, Inc., doing business as 7-Eleven 21787 (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 Jay & Sons, Inc., appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

¹The decision of the Department, dated December 3, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 29, 2004. On September 18, 2007, the Department filed an accusation charging that appellants' clerk sold an alcoholic beverage to 18-year-old Christine Johnson on June 29, 2007. Although not noted in the accusation, Johnson was working as a minor decoy for the El Cajon Police Department at the time.

An administrative hearing was held on May 28 and October 17, 2008. Documentary evidence was received and testimony concerning the sale was presented by Johnson (the decoy). No other witnesses testified.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no affirmative defense was established by appellants. Appellants filed an appeal contending that the administrative law judge (ALJ) abused his discretion by finding that the decoy's appearance complied with rule 141(b)(2) (4 Cal. Code Regs., § 141, subd. (b)(2).)

DISCUSSION

Rule 141(b)(2) requires that a decoy "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." Appellants contend the ALJ abused his discretion in finding that the decoy's appearance complied with rule 141(b)(2) because he did not take into consideration the decoy's ability to purchase alcoholic beverages at 7 of the 15 licensed premises visited during the decoy operation. They assert in their brief that "[t]he 46% success rate of the decoy on the day of the operation and her high level of comfort with her duties as a

decoy prove that she did not display an overall appearance that can be expected of a person under 21."

Appellants rely on *7-Eleven, Inc./Dianne Corporation* (2002) AB-7835 (*Dianne*), in which the decoy had an 80 percent "success rate" during a decoy operation. They contend the Board must reverse the Department's decision in the present case as it did in *Dianne*.

Appellants ignore the later appeal of *7-Eleven, Inc./Jain* (2004) AB-8082 (*Jain*), in which the Board rejected the notion that *Dianne* created a per se rule that a violation of rule 141(b)(2) existed when a decoy achieved a certain "success rate" during a decoy operation.

Although an 80 percent purchase rate during a decoy operation raises questions in reasonable minds as to the fairness of the decoy operation, that by itself is not enough to show that rule 141(a) or rule 141(b)(2) were violated. Such a per se rule would be inappropriate, since the sales could be attributable to a number of reasons other than a belief that the decoy appeared to be over the age of 21.

The ALJ was aware of, and mentioned in the decision, that the decoy was able to purchase alcoholic beverages in 7 of the 15 licensed premises visited. It was a factor he considered, but it was not the only one.

We do not find the 46 percent purchase rate in the present case to be so high that it should raise the question of whether the decoy complied with rule 141(b)(2). Even if it did, however, the ALJ answered that question in his findings regarding the decoy's appearance. Nothing in those findings leads us to question the ALJ's conclusion that the decoy complied with the rule. We extend our usual deference to the judgment of the ALJ in making the finding as to apparent age, since the ALJ had the opportunity, which this Board does not, of observing the decoy in person.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.