

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

AB-7740

File: 20-232890 Reg: 00048186

7-ELEVEN, INC., WILLIAM T. SMITH, and DIANE C. SMITH dba 7-Eleven #13603
4983 Cass Street, San Diego, CA 92109,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 16, 2001
Los Angeles, CA

ISSUED DECEMBER 12, 2001

7-Eleven, Inc., William T. Smith, and Diane C. Smith, doing business as 7-Eleven #13603 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Noel Bender, having sold an alcoholic beverage (a 12-pack of Miller Genuine Draft beer) to Luis Sotelo, a minor, 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).

Appearances on appeal include appellants 7-Eleven, Inc., William T. Smith, and Diane C. Smith, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated November 16, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 23, 1989.

Thereafter, the Department instituted an accusation against appellants charging an unlawful sale of an alcoholic beverage to a minor on November 13, 1999. Although not stated in the accusation, the minor was acting as a decoy for the San Diego Police Department.

An administrative hearing was held on October 6, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Luis Sotelo ("Sotelo") and San Diego Police officer Kerry Mensior.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and ordered a 15-day suspension.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the decoy operation was unfairly conducted because of the active participation of a second decoy lacking the appearance required by Rule 141(b)(2); (2) the Administrative Law Judge (ALJ) impermissibly made findings of fact based upon evidence from an unidentified prior hearing; (3) the Department is barred by the doctrine of judicial estoppel from concluding that a decoy presents the appearance required by Rule 141 after it has previously adopted a proposed decision to the contrary; and (4) the Department is collaterally estopped from finding that the decoy who accompanied Sotelo presented the appearance required by Rule 141(b)(2). These issues all turn on the involvement of the second decoy, and will be discussed as one.

DISCUSSION

The evidence revealed that when Sotelo purchased the beer in question, he was

accompanied at the counter by a second decoy, Crystal Hernandez ("Hernandez").² Although Sotelo paid for the beer, the purchase also included Doritos and sunflower seeds. The sunflower seeds were brought to the counter by Hernandez, who stood next to Sotelo at the counter. Hernandez might have engaged in conversation with Sotelo while the transaction was taking place. Sotelo was not asked about his age or for identification.

Appellants do not contend that Sotelo lacked the appearance required by Rule 141(b)(2). Instead, they contend that the presence of Hernandez rendered the operation unfair, because she did not present the requisite appearance under the rule. Appellants call the Board's attention to the Department's decision in Jug Liquor Limited Partnership, August 31, 2000 (Registration No. 00048164), where the Administrative Law Judge said this about Hernandez:

"There are, of course, other 19-year old females who have physical characteristics similar to those of the decoy's. However, in the context of promoting fairness, and in the application of a 'strict adherence' standard to Rule 141, the Administrative Law Judge concludes that the decoy, with her relatively large physical stature and her mature and serious countenance did not display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to Respondent's clerk at the time of the sale of the beer."³

² The ALJ refused to permit Sotelo to testify whether Hernandez accompanied him on his visits to four other premises, at two of which he was able to purchase alcoholic beverages.

³ The ALJ's decision in Jug Liquor Limited Partnership was clearly influenced by the fact that Hernandez was successful in purchasing an alcoholic beverage at fifty percent of the premises she visited. In the instant case, Sotelo was successful in three of five attempts. The record does not show whether Hernandez accompanied Sotelo on any of his other attempts, because the ALJ excluded, erroneously, we believe, any testimony on that subject.

Appellants also cite the Board's decision in Hurtado (2000) AB-7246, where the decoy and an undercover police officer sat together at a table, and each ordered a beer. In Hurtado, the Board concluded that the decoy operation was conducted unfairly:

"Here consideration of another person is essential for disposition. Certainly, if the officer ordered the beers that would completely taint the decoy operation. Even if he did not order the beer for the minor, we find the officer's active participation in the decoy operation to be highly likely to affect how the decoy appeared and to mislead the seller. We conclude that the officer accompanying the decoy as a companion was unfair and violated Rule 141."

The Board only recently remanded to the Department another case in which Crystal Hernandez was involved, because an ALJ in an unrelated case had found her appearance incompatible with Rule 141. In Star & Crescent Boat Company (June, 2001) AB-7637, the Board stated:

"[W]e think it is incumbent upon the Department to reconsider this matter, taking into account its certified decision in Registration No. 00048164.⁴ When the appearance of a decoy is such that an administrative law judge concludes that the requirement of Rule 141(b)(2) has not been met, considerable doubt has been cast upon any other decoy operation involving that decoy."

The Department argues that Hernandez had at most a passive involvement in the matter, since her companion conducted the entire transaction with the clerk. However, the Department ignores the fact that Hernandez placed one of the items involved in the transaction on the counter, and may have engaged in conversation with Sotelo while the transaction was occurring.

⁴ Jug Liquor Limited Partnership, (August 31, 2000.) It is this case upon which the present appellants also rely.

As in Hurtado, supra, "consideration of another person is essential for disposition" of this matter. The "active participation" of Hernandez and the appearance that she and Sotelo were a couple may well have affected how the decoy appeared to the clerk. The possibility that this situation might mislead the seller is increased by the questions raised about Hernandez's appearance. We do not believe the ALJ's finding regarding Hernandez's appearance is entitled to any weight. He based his finding on "evidence presented at the prior hearing," without identifying the hearing in question or the evidence relied upon. Without questioning his good faith, we simply cannot justify a procedure which bases a finding on what is admittedly outside the record.

We also note, with some disapproval, the instructions given to the decoys to purchase items other than alcoholic beverages. Whether so intended, the impression is created that the purpose was to mislead or distract the seller - certainly Sotelo's testimony [RT 43] suggests such a possibility:

"Q. What were you specifically instructed to purchase besides beverages?

"A. Not to get - just to get something like chips, something that might go with alcohol, so they wouldn't be - I don't know. Just to mix it up, so - more items on the counter."

The combination of all these factors in the decoy operation and their potential, if not their intention, to be misleading is sufficient, in our mind, to have tainted the decoy operation.

It can be said that Rule 141's paramount criterion is that a decoy operation be conducted fairly. Where a decoy operation is rife with questionable practices, as this one is, the decoy operation cannot be said to be conducted "in a fashion that promotes fairness."

Under the circumstances, we find it unnecessary to determine whether the Department is barred by the doctrines of collateral estoppel or judicial estoppel.

ORDER

The decision of the Department is reversed.⁵

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ 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.