

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

AB-7746

File: 20-333787 Reg: 00049270

7-ELEVEN, INC. dba 7-Eleven #2011-25818
2255 Mission Avenue, Oceanside, CA 92054,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: October 4, 2001
Los Angeles, CA

ISSUED NOVEMBER 29, 2001

7-Eleven, Inc., doing business as 7-Eleven #2011-25818 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk, Regulo J. Contreras, having sold an alcoholic beverage (beer) to Jacob T. McGovney, an eighteen year-old minor, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, by reason of a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant 7-Eleven, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 11, 1997. Thereafter, the Department instituted an accusation against appellant charging an unlawful sale of an alcoholic beverage to McGovney. Although not stated in the accusation, McGovney was acting as a decoy for the Oceanside Police Department.

An administrative hearing was held on September 29, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by McGovney and by Julian Hutzler, an Oceanside police officer. Appellant presented no witnesses. McGovney testified that he purchased a six-pack of Bud Light beer after having displayed to the clerk his California driver's license; the license showed McGovney's age as 18, and bore a red stripe stating "21 in 2002." Both Hutzler and McGovney testified that McGovney identified Contreras as the clerk who made the sale.

Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale had occurred as alleged in the accusation, and imposed the suspension from which this timely appeal has been taken.

Appellant now contends that the finding of the Administrative Law Judge that, at the time of the sale, McGovney displayed an appearance which could generally be considered that of a person under 21 years of age, is not supported by substantial evidence, because there was no photograph of his appearance at the time of the sale placed in evidence.

DISCUSSION

Appellant describes the ALJ's finding as the product of imagination and guesswork, blaming it on the Department's failure to present any "meaningful substantial" evidence of what the decoy looked like during the transaction at issue. Appellant seems to rely primarily on the fact that McGovney's hair was long at the time of the sale, but much shorter at the time of the hearing, such that the ALJ needed a photograph of McGovney's appearance at the time of the sale in order to make a determination that there had been compliance with Rule 141(b)(2).

This Board said, in Circle K Stores, Inc. (2000) AB-7265:

"We are well aware that the rule requires the ALJ to undertake the difficult task of assessing [the] appearance [of a decoy] many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date. A specific finding by the ALJ to the effect that the minor's appearance was substantially the same at both times shows that the ALJ was aware of, and took into consideration, the rule's requirement that the minor's apparent age must be judged as of the time, and under the actual circumstances, of the alleged sale."

In the present case, the decoy indicated that his hair had been shorter at the time of the decoy operation - "it wasn't long or combed back." While this may well be a discernible change, it does not appear to be one which would manifestly alter the apparent age McGovney would have displayed, especially in light of the fact he was only 18 years of age at the time. In any event, it was the ALJ who observed the decoy as he testified, and concluded that, despite a change in hair style, the decoy more likely than not conveyed the same basic appearance at both the time of the sale and the time of the hearing [Finding of Fact 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 an eighteen year old and his appearance at the time of the hearing was substantially the same as his appearance on the day of the decoy operation except that his hair was a little shorter.”

Our impression of this case, based upon our reading of the record, is that a properly-conducted decoy operation encountered a negligent clerk who simply looked at the decoy’s driver’s license and ignored what he saw. We see no basis for any relief for appellant under Rule 141(b)(2) or any other rule or statute.

ORDER

The decision of the Department is affirmed.²

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

² 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.