

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

AB-7754

File: 20-242073 Reg: 00049329

7-ELEVEN, INC., CHI PEI TUAN, and LIH RU TUAN dba 7-Eleven #16995
2222 West Commonwealth Avenue, Fullerton, CA 92633,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

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

ISSUED NOVEMBER 29, 2001

7-Eleven, Inc., Chi Pei Tuan, and Lih Ru Tuan, doing business as 7-Eleven #16995 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days for appellants' clerk selling an alcoholic beverage to a minor decoy, 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).

Appearances on appeal include appellants 7-Eleven, Inc., Chi Pei Tuan, and Lih Ru Tuan, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Kim.

¹The decision of the Department, dated December 21, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 18, 1990. Thereafter, the Department instituted an accusation against appellants charging that, on April 20, 2000, appellants' clerk sold an alcoholic beverage to a person under the age of 21.

An administrative hearing was held on November 14, 2000, at which time documentary evidence was received, and testimony was presented by Tim Suh, the minor, who, at the time of the sale, was acting as a minor decoy for the Fullerton Police Department (FPD); and by Fullerton police officer Donald Bair, concerning the transaction.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been established as charged and that no defenses had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the ALJ erroneously failed to include proper findings regarding his determination of the credibility of witnesses; (2) Rule 141(b)(2) was violated in that the minor appeared older than 20 years of age; and (3) the ALJ violated appellants' due process rights by not permitting appellants' counsel to ask questions regarding the minor decoy's background.

DISCUSSION

I

Appellants contend that the Administrative Law Judge (ALJ), in making a credibility determination, is obligated to make specific findings which explain why one

witness's testimony is deemed credible and that of another not. They cite a federal court of appeals case, Holohan v. Massanari (2001) 246 F.3d 1195 (9th Cir.), involving a claim for Social Security benefits, where the appellate court so held.

The Board considered this question recently in 7-Eleven, Inc. and Huh (8/16/01) AB-7680, and rejected it, saying:

"We have reviewed the decision in [Holohan], and the court decisions cited in support of that portion of the court's holding, and are satisfied that the view expressed by the court is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California. While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed."

We reject the contention here as well.

II

Appellants contend that decoy Suh appeared to be over the age of 20, in violation of Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)), which states that the decoy must "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 describe Suh as "a large male individual with gelled-back hair who was likely unshaven, with stubble growth indicating a beard, mustache, and sideburns," and contend that "this is certainly **not** the appearance of someone 'generally [to] be expected under 21 years of age,'" (Emphasis in original.)

The ALJ found the following regarding the decoy's appearance (Finding VI):

"A. On April 20, 2000, decoy Suh was 5 feet, 9 or 10 inches tall and weighed approximately 170 pounds. His black hair was cut short on the sides and in the back and was gelled and combed straight back on top. (Exhibit 3.) He wore black

jeans, an orange t-shirt and tennis shoes. (Id.) He did not wear the blue/orange jacket shown in Exhibit 3. Decoy Suh wore a wristwatch and, regardless when he last shaved, was clean shaven. (Id.) His appearance on the morning of April 20, 2000, was as is shown in photographs, Exhibit 3.

"Based on the photographs, Exhibit 3, and Suh's testimony, decoy Suh looked substantially the same on the day of the decoy operation as he did at the hearing. At the hearing, Suh had become 20 years of age. He also weighed as much as 185 pounds. He dressed as he had dressed in [appellants'] store on April 20. Based on physical appearance alone, that is, as he appeared before clerk Vazquez and as he appeared at the hearing, Suh displayed the appearance generally expected of a person under 21 years of age.

"B. April 20, 2000, was the first time Tim Suh worked as a decoy. He testified that he was nervous while testifying and also while inside [appellants'] store on April 20. His nerves were apparent at the hearing as he had difficulty limiting his answers to the question asked, instead, appearing in a rush to get out everything which had happened, all at once. Decoy Suh had been employed as a paid cadet working with the Fullerton Police Department.

"C. The court has observed the decoy's overall appearance, considering his physical appearance, his dress, his poise, demeanor, maturity and mannerisms as shown at the hearing. The court has considered the photographs, Exhibit 3, and the other evidence concerning Suh's overall appearance and his conduct at [appellants'] store on April 20, 2000. In the court's informed judgment, decoy Suh gave the appearance at the hearing and before [appellants'] clerk which could generally be expected of a person under the age of 21 years."

Appellants' biased "description" of the decoy's physical appearance comports with neither the exhibits, the ALJ's reasoned analysis, nor the testimony at the hearing. As an example, Exhibit 3 (color photocopies of color photographs taken on the day of the decoy operation, a few hours, at most, before Suh entered appellants' premises), shows no evidence of any "stubble growth indicating a beard, mustache, and sideburns," as alleged by appellants. Appellants somehow wrest their contention that the decoy was "likely unshaven," with the stubble growth just mentioned, from the decoy's testimony that he thought, but was not absolutely certain, that he had shaved the night before the decoy operation, that he shaved every three or four days, and that

at the end of a three or four day period without shaving, he would have a "little bit" of facial hair. [RT 24-25.] Appellants' argument about the decoy's physical appearance, although only one page long, has several such twisted interpretations of the testimony.

Appellants' "argument" regarding the decoy's demeanor is similarly shallow and misleading. They state only that Suh was a decoy for the FPD, that he had received training for the decoy operation, and "***he was paid for his work on the decoy operation.***" (Emphasis in original.) The latter statement, to which appellants apply all the argumentative force of italics, boldface type, and underlining, is derived from Suh's testimony that, as a paid cadet for the FPD at the time, he was excused from the normal work he was scheduled for that day so that he could participate in the decoy operation, but he still was paid for his normal shift. [RT 35-36.] Appellants also allege that Suh's "adult appearance" was (somehow) evidenced by previous visits to appellants' premises outside the scope of his work as a cadet, and his purchase of a single can of beer from a 6-pack container, rather than the whole 6-pack.

Appellant seeks to have this issue retried by the Appeals Board. The Appeals Board is not in a position to second-guess the trier of fact, who has had the opportunity, which the Board has not, of observing the overall appearance of the decoy in person as he testified at the hearing. Certainly, there is nothing in appellants' presentation of this issue that would compel, or even tempt, this Board to re-examine the ALJ's determination in this regard. The ALJ made a reasonable evaluation of the decoy's appearance and provided appropriate detail in articulating his evaluation. Under the circumstances, we readily defer to his judgment.

III

Appellants contend that their due process rights were violated when the ALJ "expressly prohibited" their counsel from questioning the decoy about whether he was, at the time of the administrative hearing, a cadet in the FPD's Police Academy, thereby preventing them from "uncover[ing] potential conflicts-of-interest," specifically financial interests, "in the outcome of the hearing." This contention verges on the frivolous.

The "express prohibition" apparently occurred when Department counsel objected, on the basis of relevance, to appellants' counsel's question to the decoy, "Have you applied to the police academy?" [RT 35]. The ALJ sustained the objection, appellants' counsel said, "I think it goes to bias," and the ALJ said, "Overruled." Appellants' counsel then stated he had no further questions.

As a preliminary matter, we note that counsel's question was not, as stated by appellants in their brief, about whether the decoy was "currently a cadet in the [FPD]'s Police Academy," but about whether he had applied to the [unnamed] police academy. If even application to, or enrollment in, a police academy, constitutes a conflict of interest, then all police officers have conflicts of interest. And if paid employment by a law enforcement agency creates a financial interest in the outcome of a hearing, then all law enforcement officers must have such a financial interest. Without some articulable basis for believing that this decoy was in fact biased somehow because of a desire to become a police officer, counsel's question was, as the ALJ ruled, irrelevant.

ORDER

The decision of the Department is affirmed.²

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

²This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.