

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

**AB-7800**

File: 20-214671 Reg: 00049900

7-ELEVEN, INC., and C BAR J RANCH, INC. dba 7-Eleven #21834  
108 West Washington 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: March 7, 2002  
Los Angeles, CA

**ISSUED MAY 7, 2002**

7-Eleven, Inc., and C Bar J Ranch, Inc., doing business as 7-Eleven #21834 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 15 days for appellants' clerk selling an alcoholic beverage to a 17-year-old 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., and C Bar J Ranch, Inc., appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Matthew Gorman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne Paige.

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<sup>1</sup>The decision of the Department, dated April 5, 2001, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988.

Thereafter, the Department instituted an accusation against appellants charging the sale-to-minor violation noted above.

An administrative hearing was held on February 23, 2001, at which time documentary evidence was received and testimony was presented by Mindy Bergman ("the decoy") and by El Cajon police officers Paul Winslow and Stephen Kirk concerning the transaction. Subsequently, the Department issued its decision which determined that the violation occurred as charged and no defense was established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the decision did not include proper credibility findings; (2) the decoy operation violated the fairness requirement of Rule 141(a); and (3) the decoy's appearance violated Rule 141(b)(2).

## DISCUSSION

## I

Appellants contend that the decoy's testimony was not believable. Because the ALJ based his decision on the decoy's testimony and there was no evidence to corroborate her testimony, appellants argue, the ALJ was required to explain why he accepted that testimony.

Appellants mention only two bases for their "credibility concerns" about the decoy's testimony. First, they argue that the testimony of the decoy that she went to the register on the left because she didn't see that the one on the right was open cannot be believed because the second register was only five feet away and the decoy let other

customers pass in front of her to be waited on by the clerk at that register. Appellants assert the decoy "targeted" the register on the left because she knew that the clerk at that register was a trainee. The decoy testified that, although she knew there was another register, she did not realize it was open, and while she was standing there nervously, "All of a sudden people just started coming in and out. They just came in front of me and that's how it happened" [RT 41]. The second instance of the decoy's unbelievable testimony, appellants urge, was her statement that she was very nervous while she was in the store. They contend that this cannot be true, given her prior experience as a decoy and her participation as a Cadet with the El Cajon Police Department.

Appellants base their contention that the ALJ committed reversible error in not making explicit findings regarding the credibility of the minor's testimony on Government Code §11425.50 and provisions in other statutes and case law requiring findings in administrative adjudicatory decisions.

Government Code §11425.50, subdivision (a), requires a written decision that includes "a statement of the factual and legal basis for the decision." Subdivision (b) provides, in pertinent part:

". . . . If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it."

The code section is silent as to the consequences which flow from an ALJ's failure to articulate the factors mentioned. However, we do not think that any failure to comply with the statute means that the decision must be reversed. It is more

reasonable to construe this provision as saying simply that a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all.<sup>2</sup>

Obviously, the ALJ found that the decoy's testimony was credible. Having reviewed the decoy's testimony, we cannot say that the ALJ's determination was in any way unreasonable or that any failure which there may be to comply with Government Code §11425.50 warrants reversal.

This Board has consistently rejected counsel's insistence that the federal appeals court case of Holohan v. Massanari (9th Cir. 2001) 246 F.3d 1195 requires reversal of a decision that does not explicitly explain the basis of a credibility determination. (See, e.g., 7-Eleven and Huh (2001) AB-7680.) There is no reason to decide differently in the present appeal.

Appellants also rely on the case of McBail & Co. v. Solano County Local Agency Formation Com. (1998) 62 Cal.App.4th 1223, 1227 [72 Cal.Rptr.2d 923], in which the appellate court remanded to the Local Agency Formation Commission its decision denying the plaintiffs' annexation petition. The court stated that the agency must articulate the basis for its decision in order for a reviewing court to apply the substantial evidence rule in a meaningful way. This case is inapposite because it deals with a

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<sup>2</sup> The Law Revision Comments which accompany this section state that it adopts the rule of Universal Camera Corp. v. National Labor Relations Board (1951) 340 U.S. 474 [71 S.Ct. 456], requiring that the reviewing court weigh more heavily findings by the trier of fact (here, the administrative law judge) based upon observation of witnesses than findings based on other evidence.

legislative act of an agency, not a judicial one, and it has nothing to do with the credibility of a witness.

This Board previously rejected counsel's argument that a deficiency in explanation regarding a credibility determination required reversal (7-Eleven and Huh, supra) and what the Board said in that earlier case applies equally well here:

"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."

As noted above, the ALJ obviously concluded that the decoy's testimony was credible, and we cannot say that his conclusion was unreasonable. Therefore, the basis for appellants' contention on this issue is lacking. We also note that Rule 141 is an affirmative defense, and appellants cannot prevail without presenting some evidence that the rule was not complied with. Rank speculation is not the sort of evidence that fulfills appellants' burden.

## II

Appellants contend the fairness requirement of Rule 141(a) was violated because the decoy "targeted a trainee sales clerk during the height of the store's business." (App. Br. at 10.)

Appellants' characterization of the actions and testimony of this 17-year-old decoy is so extreme it verges on misrepresentation. There is absolutely no basis for their assertion that the decoy "targeted" this trainee or that this was "the height of the store's business." The evidence does not support either their argument that these circumstances existed or that the decoy operation was conducted unfairly.

Appellants made this argument before the ALJ, who rejected it in Finding II.F.:

"The [appellants'] attorney contends that the premises was very busy at the time of the decoy operation, that the decoy knew that one of the two clerks was a 'trainee,' that the decoy deliberately waited to be helped by the 'trainee' rather than the second clerk and that because of this, the decoy operation violated the fairness provisions of Rule 141 of Chapter 1, Title 4, California Code of Regulations. This contention is rejected because the preponderance of the evidence does not support this contention. The preponderance of the evidence does not support a finding that the decoy operation was conducted in an unfair manner as suggested by the [appellants'] attorney."

Appellants ask this Board to review the same facts reviewed by the ALJ and reach a contrary conclusion. This we are neither empowered, nor inclined, to do, absent some compelling evidence of an abuse of discretion by the ALJ and the Department in reaching the conclusions they did. Such compelling evidence is simply not present here.

### III

Appellants contend that "The overwhelming weight of the evidence presented at the hearing indicates that [the decoy] had the looks and demeanor of an individual who appeared over 21 years of age at the time of the sale, in violation of Rule 141(b)(2)." Appellants point to her prior experience as a decoy and her status as a police cadet, and argue that these factors preclude any possibility that the decoy could have displayed the appearance of a person under 21 years of age.

Appellants recite the same physical features and experience factors of the decoy that the ALJ discussed in Findings II.D and II.E, where the ALJ found that the decoy displayed an appearance that complied with Rule 141(b)(2).

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 she testifies, and

making the determination whether the decoy's appearance met the requirement of Rule 141. 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.

Appellants have presented nothing indicating that we should reject the ALJ's finding and accept their opinion.

ORDER

The decision of the Department is affirmed.<sup>3</sup>

TED HUNT, CHAIRMAN  
E. LYNN BROWN, 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 §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.