

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

AB-7828

File: 20-335676 Reg: 00049818

7-ELEVEN, INC., RAGINI V. MANDANIA, and VIJAY J. MANDANIA
dba 7-Eleven #2021-21787
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: April 4, 2002
Los Angeles, CA

ISSUED MAY 31, 2002

7-Eleven, Inc., Ragini V. Mandania, and Vijay J. Mandania, doing business as 7-Eleven #2021-21787 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold an alcoholic beverage to a minor, 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., Ragini V. Mandania, and Vijay J. Mandania, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated May 24, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 12, 1997. On October 30, 2000, the Department instituted an accusation against appellants charging that, on July 25, 2000, their clerk, Laura Bonde ("the clerk"), sold an alcoholic beverage (beer) to Mindy Bergman,² a person then approximately 17 years of age.

An administrative hearing was held on April 3, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the decoy and the clerk.

The decoy testified that she was 17 years of age on the night of the transaction. She testified that she entered the store at approximately 6 p.m. El Cajon police officer Steve Kirk had entered the store earlier. The decoy took a six-pack of Coors Light beer, in bottles, from the cooler and took it to the counter. There was no one in line ahead of her. Officer Kirk was the only person in line behind her. The clerk rang up the sale, accepted a \$20 bill from the decoy, gave her the change, bagged the beer, and the decoy left the store. The clerk did not ask her age, nor did she ask for identification.

The decoy was brought back into the store by Officer Kirk, and asked to identify the clerk who sold her the beer. She did so by pointing to the clerk and saying that she was the person who sold her the beer. She did not think there was any response from the clerk. The decoy then exited the store.

On cross-examination she testified that this was her first alcohol purchase as a decoy. She acknowledged that she had earlier participated in a decoy paraphernalia

² Although not stated in the accusation, Bergman was acting as a police decoy for the El Cajon Police Department. She will be referred to herein as "the decoy."

operation and a shoulder tap operation, and, in the current operation, had been successful in purchasing an alcoholic beverage at four of the twelve locations she visited. She also testified that she was a volunteer police cadet.

The clerk testified that she was first employed on June 8, 2000, which was approximately one and one-half months before the sale in question. She testified that she saw the decoy go to the cooler, and saw a man was standing about two feet from the decoy. She learned later that the man was a police officer. At that time she did not conclude that he was with the decoy. However, that same man was later ahead of the decoy in line. He remained in the store after making a purchase, and this led her to conclude he was with the decoy. In addition, there was another person in line behind the decoy, whom she also learned was another police officer. However, she concluded that this person was not with the decoy. She identified Officer Kirk, who was present at the hearing, as the man she thought accompanied the decoy, and who returned to the store and told her she had just made a sale to a minor. Contrary to the decoy's testimony, the clerk said there were five or six people in line at the register.

The clerk further testified that she thought the decoy appeared to be 22 or 23 years of age, because she appeared strong and confident, did not resemble the teenagers she usually saw in the store, and was accompanied by an older man. She was shown an Employee Awareness Form for Age-Restricted Sales, which required her to card people appearing to be under 27, but explained that she had not done so because she was in a hurry with the decoy and there was a long line and she wanted to get the customers out before they became grumpy. She further testified that she overrode the feature of the cash register which called for the entry of the purchaser's

birth date. She admitted that the decoy was the person who placed the beer on the counter, who tendered the purchase money, and who was given the change.

On cross-examination, the clerk testified that she remained an employee of the store. Over objection, she testified that, even if there was a long line, she was required to check credit card signatures against a driver's license or other form of identification, unless the customer was known to her.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation, and rejected the defenses asserted by appellants.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) The police officer was standing with the decoy at the time of the purchase, leading the clerk to think the two were together; (2) the Department failed to prove that the issuance of the citation followed the face to face identification, as required by Rule 141(b)(5); and (3) the decoy appeared to be older than 21 years of age, in violation of Rule 141(b)(2).

DISCUSSION

I

Appellants contend that the decoy operation was unfair because the police officer and the decoy stood together both at the cooler and later at the counter, and led the clerk to believe they were together. In addition, they assert that, because there was a long line of customers, the clerk was led to rely on a visual inspection of the decoy rather than ask her for identification.

The Administrative Law Judge concluded that the evidence did not establish that

the clerk was misled, because the clerk explained her failure to card the decoy because she was busy.

There was no explicit testimony from the clerk blaming her failure to ask for identification on her belief that the undercover police officer who had been in line ahead of the decoy was accompanying the decoy. Instead, as her testimony indicates, the transaction took only seconds - "... it was a matter of seconds from when I saw her, asked how she was doing, and did the transaction. ... Because it was busy at that moment, there was a long line in the store. And unfortunately, my main concern at the time was to get everybody out before they got grumpy."

Appellants assume that the ALJ was obligated to draw the inference that the clerk made the sale because of her belief that the customer who preceded the decoy in line had accompanied her to the store. However, given the absence of testimony from the clerk actually claiming that to have been the case, the inference is weak at best.

On the whole, the clerk's actions seem to have been dictated by expediency. She was in a hurry because she was busy; she disregarded store policy of carding anyone appearing to be under 27; and she overrode the feature on the register that required a date of birth be entered.

This case is not like Hurtado (2000) AB-7246, where the police officer sat at a table with the decoy in an on-sale premises, and the fact that they were together was beyond cavil.

II

Appellants contend that the Department failed to prove that the face to face identification preceded the issuance of the citation, as required by Rule 141(b)(5).

Appellants elicited testimony from the clerk that she had been issued a citation. She was not asked whether its issuance preceded or followed the face to face identification, which appellants concede was made.

Appellants argue that a strict application of Rule 141, as required by the holding in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App. 4th 575 [79 Cal.Rptr. 126], obligates the Department to prove that the issuance of the citation followed the face to face identification.

Appellants are mistaken. Rule 141 is an affirmative defense, and the burden of proof is on the licensee. Since the record is silent as to when the citation was issued, appellants have not satisfied their burden. It should be noted that appellants could have resolved the issue by simply asking their witness about the sequence of events.

III

Appellants contend that Rule 141(b)(2) was violated because the decoy lacked the appearance of a person under 21 years of age.

This claim is made in virtually every Rule 141 case which comes before this Board.

It is plain from the many decisions of this Board that, except in extraordinary cases, the Board will accept the factual conclusion of the ALJ that the decoy presented the appearance required by the rule - one "which could generally be expected of a person 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."

All we have in this case is the claim of the clerk that, because the decoy did not act like other teenagers, she assumed the 17-year-old decoy was 22 or 23 years of

age. Against this must be weighed her testimony about being in a hurry, disregarding store policy, and overriding the control feature of the register, so that customers would not become grumpy.

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older. In this case, the evidence indicated appellants' policy to be that persons appearing to be under 27 years of age were to be carded.

We think it worth noting that we hear many appeals like this where, despite the supposed existence of such a policy, the evidence reveals that the seller made the sale in the supposed belief that the minor was in his or her early or mid-20's, and for that reason did not ask for identification and proof of age. It is in such cases, and in those where there is a completed sale even though the buyer - not always a decoy - displayed identification which clearly showed that he or she was younger than 21 years of age, that engenders the belief on the part of the members of this Board that many sellers, or their employees, do not take sufficiently seriously their obligations and responsibilities under the Alcoholic Beverage Control Act.

ORDER

The decision of the Department is affirmed.³

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

³ 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.