

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

AB-8045

File: 20-232963 Reg: 020528786

7-ELEVEN, INC., and HAMID R. and MINNIE SHARIFINEJAD dba 7-Eleven
1679 North Glassell Street, Orange, CA 92867,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Frank Britt

Appeals Board Hearing: August 14, 2003
Los Angeles, CA

ISSUED OCTOBER 8, 2003

7-Eleven, Inc., and Hamid R. and Minnie Sharifinejad, doing business as 7-Eleven (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold a six-pack of Budweiser beer to a 19-year-old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Hamid R. and Minnie Sharifinejad, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 26, 1989.

¹The decision of the Department, dated October 17, 2002, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellants charging that appellants' agent, employee or servant, Paramjit Singh, sold an alcoholic beverage to Manuel Ybarra, a person then approximately 19 years of age.

An administrative hearing was held on September 6, 2002. The Department presented the testimony of David Nichols, an officer of the Orange Police Department, and Ybarra, who was acting as a police decoy when he purchased the Budweiser beer. Paramjit Singh, appellants' clerk, and Hamid Sharifinejad testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged, and that appellants had failed to establish an affirmative defense under Rule 141.

Appellants thereafter filed a timely appeal in which they contend that the use of a decoy who was a reserve police officer violated both Rule 141(b)(2) and the fairness aspect of Rule 141(a).

DISCUSSION

Appellants argue that the use of a decoy who is a reserve police officer, who wears a police uniform, carries a badge and a gun, is authorized to make arrests, and manifests a level of composure gained by extensive police training rendered the case unfair.

Of course, the decoy was not wearing a police uniform or carrying a badge and a gun, or arresting anyone when he purchased the beer. He was casually dressed in civilian clothes (see Exhibits 1 and 2), so nothing in his outward appearance suggested he was a police officer. Appellants argue that the confidence he acquired through his

police training permitted him to display an appearance of maturity sufficient to delude their clerk into believing the decoy was of legal age.²

The administrative law judge (ALJ) rejected appellants' argument, finding as to the decoy (Factual Findings 8-10):

Ybarra's physical description of 5 feet 7 inches tall and 137 pounds as shown on his California driver's license is essentially the same as it was when he purchased the beer on December 14, 2001, albeit he is currently about 15 pounds heavier. He then had, and continues to have, a short military-type hair cut as shown in the photograph on his license.

Based on the evidence presented in this matter, including Ybarra's physical appearance and demeanor at the hearing and photographs taken of him shortly after the sale, it was concluded that the minor's appearance at the time of the sale was that of a person who would generally be expected to be under 21-years [sic] old. Moreover, on December 14, 2001, the day of the beer purchases at the premises, Ybarra, as a minor decoy, also attempted to purchase alcoholic beverages at 11 other licensed premises in the City of Orange. Ten of these locations refused to sell him alcoholic beverages.

Respondents argue that using Ybarra as a minor decoy does not promote fairness within the meaning of Rule 141, because Ybarra is not only a police cadet, but also a reserve police officer who has peace officer powers and academy training with the Orange Police Department. Respondents assert that because of the decoy's police officer status and training he is necessarily more confident and mature in his appearance and demeanor during decoy operations at a licensed premises.

Respondents' argument is without merit. There is no evidence that the minor said anything to Singh during the sales transaction other than perhaps a greeting. Nor was there evidence that the minor's appearance and demeanor were anything other than what would reasonably be expected of a youthful appearing person being asked to produce identification before being sold an alcoholic beverage.

The ALJ clearly considered the decoy's training and experience and found that they did not cause him to appear older than his actual age at the time he purchased the

² It is worth noting that the clerk twice examined Ybarra's driver's license, each time focusing his attention only on the picture on the license, and ignoring the red stripe with the legend "21 in 2003."

beer. Nothing indicates that the ALJ's determination in this regard was inadequate.

We have said many times that we are not inclined to substitute our judgment for that of the ALJ on the question of the decoy's apparent age, absent very unusual circumstances, none of which are present here. In the appeal of *Idrees* (2001) AB-7611, we said:

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 he or she testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he or she possessed 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.

This Board is 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 did not have the appearance required by the rule, and an equally partisan response that she did.

Similarly, this Board has previously addressed appellants' contention that the decoy's experience necessarily made him appear to be over the age of 21. The Board rejected this type of contention in *Azzam* (2001) AB-7631:

Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

We find nothing that persuades us that the ALJ was mistaken in his assessment of the decoy's appearance and his determination that the decoy's appearance

comported with Rule 141(b)(2).

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.