

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

AB-8064

File: 20-360202 Reg: 02053277

7-ELEVEN, INC., HARMINDER S. NAGRA, and MANJIT K. SUNNER,
dba 7-Eleven Store # 2133-25194
620 West Ocean Avenue, Lompoc, CA 93436,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED JANUARY 20, 2004

7-Eleven, Inc., Harminder S. Nagra, and Manjit K. Sunner, doing business as 7-Eleven Store # 2133-25194 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Harminder S. Nagra, and Manjit K. Sunner, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Roxanne B. Paige.

¹The decision of the Department, dated November 21, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 5, 2000. On July 2, 2002, the Department filed an accusation against appellants charging that, on May 17, 2002, appellants' clerk, Mohinder Singh Padda (the clerk), sold an alcoholic beverage to 18-year-old Suzie Valenzuela. Although not noted in the accusation, Valenzuela was working as a minor decoy for the Lompoc Police Department at the time.

At the administrative hearing held on October 10, 2002, documentary evidence was received, and testimony concerning the sale was presented by Valenzuela (the decoy); by Kristie Colombo, a Lompoc police officer; and by co-appellant Harminder Singh Nagra.

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

Appellants filed a timely appeal contending that Finding of Fact I, paragraph D.1, is erroneous and not supported by substantial evidence, and Rule 141(b)(2)² was violated.

DISCUSSION

I

Appellants contend that the decision must be reversed because in paragraph D.1 of Finding I, the ALJ stated the decoy's height as five feet, when the decoy testified that her height was five feet, three inches. Therefore, appellants assert, substantial evidence does not exist to support the finding. Appellants argue that the decoy's height "is clearly important" for the ALJ's determination that the decoy displayed the

²References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

appearance of a person under the age of 21, appellants "simply [are] unable to determine if the ALJ's findings of compliance with Rule 141(b)(2) would be different if he had correctly noted the true height of this decoy," and the discrepancy "is prejudicial to Appellant[s]." (App. Br. at pp. 5-6.)

The ALJ discussed the decoy's appearance in Finding of Fact I.D (Fn. omitted.):

D. The overall appearance of the decoy including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation.

1. The decoy is five feet in height and she weighs one hundred twenty pounds. On the day of the sale, she was wearing the same clothing that she was wearing at the time of the hearing. This clothing consisted of a black shirt under a red sweater, black pants and black shoes. The decoy was not wearing any jewelry on the day of the sale. The only makeup that she was using on the day of the sale was light mascara similar to the mascara she was wearing at the hearing.

2. The decoy testified that she was a community services officer and that she worked as a front desk clerk. She had participated in four prior decoy operations. Two of these operations dealt with alcoholic beverage sales and two dealt with tobacco sales.

3. There was nothing remarkable about the decoy's nonphysical appearance. She provided straightforward answers during her testimony.

4. Exhibit 6 was taken on the night of the sale before going out on the decoy operation. After considering the photograph depicted in Exhibit 6, the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

The decoy testified that she was five feet, three inches, in height both at the time of the sale and at the time of the hearing. [RT 43.] Obviously, the ALJ erred in writing that the decoy was five feet in height. However, we do not find that to be a reason to reverse the Department's decision.

As the Department points out in its brief, whether the decoy is described as five feet in height, or five feet, three inches, she is clearly small in stature. The ALJ's determination of the decoy's appearance at the time of the sale must be based, in large part, on his impression of the decoy's apparent age at the hearing. (See, e.g., *Circle K Stores, Inc.* (2000) AB-7265, fn. 2.) Even if the ALJ thought the decoy said she was five feet tall, his observation of her told him that her appearance was that of a person under the age of 21.

This Board has considered in prior decisions assertions that substantial evidence did not support the ALJ's finding regarding the decoy's apparent age. In *Circle K Stores, Inc.* (2001) AB-7498, the Board declined to find that substantial evidence of the decoy's apparent age was lacking, saying, "The decoy himself provides the evidence of his appearance." In *The Southland Corporation/Amir* (2001) AB-7464a, the Board responded to the argument by saying: "We simply do not agree that an administrative law judge who must determine the apparent age of a decoy, and actually sees the decoy in person, lacks substantial evidence to make such a determination."

The ALJ considered more than just the decoy's height, as evidenced by the numerous physical and nonphysical aspects he described in Finding I. If the erroneous height were stricken, the decision would still contain substantial evidence supporting the findings and determinations.

The erroneous height stated in the decision is immaterial. Perhaps appellants are unable to determine if the decision might have been different had the ALJ written the correct height, but this Board has no trouble determining that the discrepancy makes no difference. Appellants have not specified in what way they were prejudiced by the error, and we see none.

II

Rule 141(b)(2) provides that a decoy must display an appearance that could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller at the time of the sale. Appellants contend that this rule was violated because the decoy wore makeup that made her appear older and because of her experience, eagerness, and self-assurance.

Appellants argue that "It is well established that makeup enhances ones [sic] appearance, giving the illusion of a mature older look." (App. Br. at p. 6.) Even if this broad generalization were true, which it is not, the decoy testified that the only makeup she was wearing during the decoy operation was light mascara. It verges on the absurd for appellants to be arguing that the decoy appeared older to the clerk because she was wearing mascara.

The decoy's experience consisted of her participation in two previous alcoholic beverage decoy operations, visiting 10 to 15 licensed premises each time, and two tobacco decoy operations. Appellants assert in their brief that "this depth of experience" gave the decoy "the demeanor, poise and confidence of someone over . . . twenty-one years of age." (App. Br. at p. 7.)

Appellants speculate that the decoy's interest in becoming a law enforcement officer would have made her eager "to carry herself as a professional, . . . enhancing her poise, demeanor and confidence," making her appear to be over 21 years of age. They also assert that straightforward answers such as the decoy gave at the hearing are characteristic of a self-assured, confident person more than 21 years old.

This Board rejected the contention that a decoy's experience necessarily made the decoy appear to be over the age of 21 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.* [Emphasis added to last sentence.]

Our response to appellants' speculations and assertions about how eagerness and straightforwardness might make a person appear to be over the age of 21 is similar to our response in *Azzam, supra*, to the appellants' contentions that the decoy's experience must have made her appear to be over 21. It is unavailing to argue that the decoy's eagerness to appear professional or her directness in answering questions would have given her the poise and demeanor associated with someone at least 21, without some evidence that the decoy's poise and demeanor actually made her appear to be 21 years of age or older.

The ALJ considered the decoy's demeanor, poise, mannerisms, experience, and straightforwardness in reaching his conclusion that the decoy displayed the appearance of a person under 21 years of age. 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. Under the circumstances, we are not in a position to second-guess the trier of fact. In any case, appellants have not presented us with evidence or a compelling argument that causes us to question the ALJ's findings.

ORDER

The decision of the Department is affirmed.³

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

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.