

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

AB-8094

File: 20-349503 Reg: 02053872

7-ELEVEN, INC., and JIVTESH SINGH GILL, dba 7-Eleven # 2237-32263
2360 West Grantline Road, Tracy, CA 95377,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stephen J. Smith

Appeals Board Hearing: January 8, 2004
San Francisco, CA

ISSUED APRIL 21, 2004

7-Eleven, Inc., and Jivtesh Singh Gill, doing business as 7-Eleven # 2237-32263 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days, with 10 days stayed for a probationary period of one year, for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code² section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Jivtesh Singh Gill, 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, Dean R. Lueders.

¹The decision of the Department, dated February 6, 2003, is set forth in the appendix.

²Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 6, 1999.

Thereafter, the Department instituted an accusation against appellants charging that, on July 4, 2002, their clerk (the clerk), sold an alcoholic beverage to 16-year-old Nicole Johnson.

At the administrative hearing held on December 20, 2002, documentary evidence was received, and testimony concerning the sale was presented by Johnson and by Anthony Shememan, a Tracy police officer. Appellant Jivtesh Gill testified regarding the store's training policies.

Johnson went to appellants' premises on July 4, 2002, to purchase a Slurpee. While she was at the counter making her purchase, the clerk offered to sell her an alcoholic beverage. He told her it would be okay because it was a holiday. She declined the offer, and later told her mother what had occurred. Her mother called the Tracy Police Department, and the police asked if Johnson would be willing to go back to the premises and attempt to purchase an alcoholic beverage. Johnson agreed and was given a \$10 bill to use for the purchase.

Johnson returned to the premises with police officers, and they waited outside while she went in. She picked up a six-pack of Bud Light beer and took it to the counter. The clerk was not the same one who had previously offered to sell to her. He asked if she were going to a party, and she said she was. She added that she had been in before and the other clerk was going to sell it to her but she didn't have enough money then. He said "It's cool," and sold her the beer without asking her age or for identification.

Johnson left the store and gave the beer to the police officers waiting outside. They escorted her back into the store, where she identified both the selling clerk and the clerk who had offered to sell to her earlier. The selling clerk was cited.

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' appeal raises the following issues: 1) The administrative law judge (ALJ) erred in determining that rule 141³ did not apply to the sale; 2) the ALJ erred by not making a finding regarding the decoy's appearance at the time of the sale; 3) the decoy violated rule 141(b)(4); 4) the decoy's identification of the clerk as the seller did not comply with rule 141(b)(5); and 5) the Department abused its discretion in imposing the penalty.

DISCUSSION

I

Appellants contend the ALJ erred by determining that Department rule 141 did not apply to this transaction. In Legal Conclusion 4, the ALJ states:

Legally, there is no showing that the Tracy Police Department should be bound by the Department's rule regarding its own operations when the Tracy Police sought to use the minor to try to follow through and make a controlled buy of alcohol Mr. Gill's clerk offered to sell her earlier that day. Rule 141 is a Department rule, and does not govern the conduct of local law enforcement operating on their own. Rule 141 does furnish some guidance in which the fairness of the transaction can be evaluated when the results of a local law enforcement operation are sought to be enforced in a Department action against one of its licensees. But there is no indication in the Rule itself and no legal authority was advanced by counsel for 7-Eleven and Mr. Gill that the Rule is binding where a minor is involved but the Department is not in the operation leading to the action. Counsel invited the Administrative Law Judge without citation to any authority to extend the reach of the Rule to this transaction, apparently by

³References 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.

fiat. Absent a showing of fundamental unfairness, Rule 141 does not furnish a legal basis for disallowing a local police controlled buy operation such as this one, where the Department has no involvement in organizing or structuring the transaction.

Rule 141 was promulgated pursuant to subdivision (f) of section 25658, which provides, in relevant part:

Persons under the age of 21 years may be used by *peace officers* in the enforcement of this section to apprehend licensees, or employees or agents of licensees, who sell alcoholic beverages to minors. Notwithstanding subdivision (b), any person under the age of 21 years who purchases or attempts to purchase any alcoholic beverage while under the direction of a *peace officer* is immune from prosecution for that purchase or attempt to purchase an alcoholic beverage. Guidelines with respect to the use of persons under the age of 21 years as decoys shall be adopted and published by the Department in accordance with the Administrative Procedure Act [Italics added.]

An amendment effective in 1999 provides that "the *law enforcement agency* using the decoy" is to notify licensees of the results of a decoy operation. It appears from the use of the term "peace officers," which encompasses police and sheriffs as well as Department investigators, the Legislature intended the Department guidelines, now rule 141, to apply to decoy operations conducted by any type of peace officers.

In *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575, 580, fn. 6 [79 Cal.Rptr.2d 126], the court noted: "As a matter of 'policy,' the Department does not use or employ decoys to conduct enforcement activities involving the sales of alcoholic beverages to minors." It is local law enforcement agencies that conduct decoy operations, with or without the involvement of the Department.

The rule itself begins with: "A law enforcement agency may" Nowhere in the statute or the rule is there any indication that rule 141 applies only if the Department is involved in the decoy operation. Clearly the rule is intended, both by its own terms

and by the statute under which it was promulgated, to apply to a decoy operation conducted by any local police or sheriff's department.

The question here, however, is not whether the local law enforcement agency was "bound" by the Department's rule; it is whether the Department may discipline the licensee. If the police violate rule 141 when a minor decoy purchases an alcoholic beverage, the licensee has a defense to the Department's sale-to-minor charge: "Failure to comply with this rule shall be a defense to any action brought pursuant to Business and Professions Code 25658."⁴ (4 Cal. Code Regs., §141, subd. (c).)

Rule 141 only applies when the police use a decoy. We are convinced that Johnson was a decoy in this instance: She was a minor used by the Tracy Police Department to attempt to purchase an alcoholic beverage; the police gave her the money to purchase the beer; the police monitored her while in the store; the police conducted her back into the premises to identify the seller; and the police did not charge her with violating subdivision (b) of section 25658 by her purchase. Rule 141 applies to this transaction, and if it is shown that any of its requirements were violated, appellants have a defense to this disciplinary action.

II

Rule 141(b)(2) requires that the decoy "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 do not contend that the decoy's appearance failed to comply with

⁴The defense of rule 141 is limited to administrative action by the Department and does not apply to criminal prosecutions. (*People v. Figueroa* (1999) 68 Cal.App.4th 1409 [81 Cal.Rptr.2d 216].)

the rule, but allege error because the ALJ did not analyze the decoy's appearance as of the time of the unlawful sale.

The ALJ discussed the decoy's appearance in Factual Finding 6:

The minor female is obviously a minor by physical appearance and demeanor. She looks even a bit younger than her stated age of 16 years. The Tracy Police Department detective took a color photograph of the minor female at the store just after she made the purchase on July 4, 2002.⁵ The minor female appeared at the evidentiary hearing to look very similar to how she appears in the photograph, except her dress in the photograph is more characteristic of a young teen than her dress at the evidentiary hearing. The minor female is an attractive, blonde, fair skinned teenager, with a shy but winsome smile and behavior and demeanor characteristic of a 16-year-old teenaged girl. She does not appear sophisticated in speech or demeanor, was evidently nervous and a bit reticent in her presentation of herself, and did not wear any makeup other than a bit of lip gloss at the time of the sale. There is no evidence of any makeup, clothing, jewelry, accessories or other aspects of her dress or demeanor that made her appear any older than her stated age at the time she made the purchase.

Appellants did not raise this issue at the hearing and are not entitled to raise it for the first time on appeal. In any case, we believe the rule was satisfied.

The ALJ described the decoy's physical appearance and demeanor at the hearing, and concluded that her overall appearance then was characteristic of, at most, a 16-year-old girl. He noted that no evidence was presented indicating she appeared any older at the time she purchased the beer. Because she appeared to be 16 at the time of the sale, her appearance at that time was necessarily that which could generally be expected of a person under the age of 21.

Rule 141(b)(2) is an affirmative defense, and it is appellants' responsibility to prove that the rule was violated. They did not do so.

⁵This is incorrect. The photograph (Exhibit 4) was taken by a Department investigator at Johnson's home on August 16, 2002.

III

Rule 141(b)(5) requires that after a sale, and before a citation is issued, the officer directing the decoy attempt to reenter the premises and have the decoy make a face-to-face identification of the person who sold to him or her. Again, appellants did not raise this at the hearing, nor did they show that the rule was violated.

Appellants contend the face-to-face identification was "unduly suggestive" because the police had everyone but the two clerks leave the store before the identification was made. However, in a recent case involving rule 141(b)(5), the Court of Appeal held that the face-to-face identification requirement was included so "that the seller will be given the opportunity, soon after the sale, to come 'face to face' with the decoy." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) By having everyone but the clerks leave, the purpose stated by the court was served as well as, and perhaps better than, it would have been if the clerks had not been singled out.

IV

Rule 141(b)(4) provides that "A decoy shall answer truthfully any questions about his or her age." Appellants contend that the "inaccurate and untrue" statements made by the decoy to the seller violated rule 141(b)(4), and that the ALJ also erred because he did not address this issue.

Regardless of what the minor said to the selling clerk, it could not violate rule 141(b)(4) because the clerk asked her no question about her age.

The statements to which appellants refer are those Johnson made in response to the selling clerk's question, "Are you going to a party?" She responded that she was going to a party (which was untrue); that she had been in earlier, and the other clerk

had said he would sell the alcoholic beverages to her (which was true); and that she did not have enough money with her to make the purchase before (which may or may not have been true). Contrary to appellants' assertion, the ALJ did address this issue in Factual Finding 7, saying:

The minor's conversation with the second clerk was in response to his question, and her false affirmative response regarding going to a party was in the context of her accurate response that the other clerk had offered to sell her the beer earlier in the day. . . . In its context, the minor's conversation with the second clerk does not appear to have influenced the clerk's evident predisposition to sell the minor the beer.

V

Appellants contend that the Department abused its discretion in ordering, for a first sale-to-minor violation, a 25-day suspension with 10 days stayed for a probationary period of one year. They argue that the penalty is improperly based on the conduct of the first clerk, who offered to sell to the minor but did not, rather than the circumstances of the sale made by the second clerk.

The Appeals Board may examine the issue of an excessive penalty if raised by an appellant (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183]), but it will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (*Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) The California Supreme Court has said that “[i]f reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion.” (*Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Legal Conclusion 5 of the decision states that "It would be contrary to public welfare and morals to permit the license to continue without the imposition of a disciplinary penalty reasonable and appropriate to the violation and in light of the aggravating and mitigating circumstances."

The factors in aggravation and mitigation are discussed in Legal Conclusion 6. The ALJ noted as items in mitigation the licensee's four-year history of no prior violations at either of his two licensed premises and his attempts to train his employees and set a policy to prevent sales to minors. No evidence of rehabilitation was presented. Factors in aggravation were the offer to sell and the sale of alcoholic beverages by the two clerks; the "rather vague" testimony about the nature and extent of the clerks' training; the "curious or convenient" failure of the surveillance videotape on that day; no evidence that either of the two clerks were terminated or disciplined; and no evidence of subsequent remedial action to ensure that other clerks would not engage in similar activities. The ALJ emphasized this was not simply negligent error by the clerk, but "an active solicitation to sell alcohol to an obviously underage but very attractive teen." These aggravating factors were found to outweigh the mitigating factors. The reason a portion of the suspension was stayed, the ALJ explained, was the licensee's lack of notice regarding the clerks' willingness to violate the law.

Appellants contend that the conduct of the first clerk, which they admit was reprehensible, should not have influenced the penalty because no sale was made by that clerk. However, aggravating factors frequently do "not immediately result in the sale taking place," just as mitigating factors often have no direct connection to the sale. The offer of the first clerk was the precipitating conduct for the minor's later supervised attempt to buy that resulted in the sale by the second clerk. Such a circumstance is

clearly part of the general context of the violation which the ALJ must consider, just as are the more attenuated mitigating factors of training and company policy.

Under the circumstances, we cannot say that the Department clearly abused its discretion in ordering this penalty.

ORDER

The decision of the Department is affirmed.⁶

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

⁶This 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.