

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

AB-8107

File: 20-366169 Reg: 02053776-

7-ELEVEN, INC., UJJAL SINGH CHAWLA, and SATINDER KAUR-
dba 7-Eleven #2237-22541 D-
2515 East McKinley Avenue, Fresno, CA 93703,-
Appellants/Licensees-

v.-

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,-
Respondent-

Administrative Law Judge at the Dept. Hearing: Sonny Lo-

Appeals Board Hearing: November 13, 2003-
San Francisco, CA-

ISSUED DECEMBER 23, 2003

7-Eleven, Inc., Ujjal Singh Chawla, and Satinder Kaur, doing business as 7-Eleven #2237-22541 D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Patricia Biggins, having sold a 24-ounce can of Budweiser beer to Michelle Ceron, an 18-year-old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Ujjal Singh Chawla, and Satinder Kaur, appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated February 20, 2003, is set forth in the appendix.

Appellants' off-sale beer and wine license was issued on September 21, 2000. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on July 31, 2002.

An administrative hearing was held on December 11, 2002, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of the decoy, Michelle Ceron, and Fresno police detectives Ken Dodd and Jacky Parks. Appellant Ujjal Chawla testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven, and that appellants had failed to establish any affirmative defense under Rule 141.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(2) was violated; and (2) Rule 141(b)(5) was violated.

DISCUSSION-

I-

Appellants contend that the decoy did not display the appearance which could generally be expected of a person under 21 years of age, as required by Rule 141(b)(2), because she wore makeup and had been a decoy for two years.

The administrative law judge (ALJ) made the following findings (IX through XII) concerning the appearance of the decoy:

The decoy was 5' 4 ½" tall and weighed 114 pounds on July 31, 2002. She wore a blue T-shirt, blue jeans, lip gloss and eye shadow, and no jewelry. Two photographs of the decoy (Exhibits 2 and 3) taken on July 31 show the decoy displayed the physical appearance which could generally be expected of a person under twenty-one years old.

The decoy was 5' 4 ½" tall and weighed approximately 114 pounds on the day that she testified. Her appearance that day was essentially the same as that in the photographs. The decoy displayed the physical appearance which could

generally be expected of a person under twenty-one years old when she testified. She spoke softly, and appeared a little nervous.

The decoy had been on more than twenty decoy operations prior to July 31. With this extensive experience, the decoy probably was not as nervous while in Respondent's store as she would be if she were less experienced. However, no evidence was presented to show that this experience made the decoy appear older, or younger, than her age.

The Administrative Law Judge observed the decoy's mannerisms, demeanor, poise, and maturity while she testified. Based on this observation, the testimony about the decoy's appearance, and the photographs, the Administrative Law Judge finds that the decoy displayed the appearance which could generally be expected of a person under twenty-one years old when she purchased the beer from Ms. Biggins.

Appellants place great emphasis on the fact that the decoy acknowledged that she was wearing lip gloss and eye makeup at the time of the decoy operation. Their contention that the makeup "significantly altered her apparent age and overall appearance" overstates the case. The decoy testified that the lip gloss caused her lips to appear shiny, and that the eye makeup brought her eyes out more. We do not see how either effect is likely to create an appearance of an older person, nor did the ALJ.

Appellants cite *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339], and suggest that the court held that a female decoy should not use makeup or wear jewelry. The suggestion is unwarranted. When the court was speaking about makeup, it was part of a discussion of the Department's non-binding guidelines that were in place before Rule 141.

The Board is asked by appellants' counsel to accept his less-than-impartial characterization of the decoy's appearance in lieu of that of the experienced ALJ. We decline to do so. We have reviewed the record, and the photographs, and are satisfied that the ALJ carefully and properly considered the issue of the decoy's appearance.

We are not persuaded by appellants' arguments.

II

Appellants also attack the ALJ's finding that there was compliance with Rule 141(b)(5). That part of the rule requires the peace officer to reenter the premises and have the decoy make a face-to-face identification of the seller. All three of the Department witnesses testified that this was done. Appellants argue that, because the clerk may not have been aware she was being identified, the identification did not comply with the rule.

Appellants cite *Chun* (1999) AB-7287, a case where the Board explained that "face to face" meant

that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Findings of Fact IV through VIII satisfy us that the *Chun* test was met:

After paying for the beer, the decoy exited the store with it. Fresno Detective Ken Dodd, who was in the store and witnessed the sale, approached Ms. Biggins and informed her she had just sold an alcoholic beverage to a minor. At about that time, the decoy reentered the store with Fresno detective Jacky Parks, who had been waiting outside. Detective Parks asked the decoy if Ms. Biggins was the person who sold the beer to her. The decoy pointed to Ms. Biggins and said "Yes." During the identification, Detective Parks, Detective Dodd, and the decoy stood approximately four feet from Ms. Biggins, separated by the counter. Ms. Biggins, who was on the clerk's side of the counter, was facing the decoy and the detectives.

The decoy testified that someone was taking a photograph of Ms. Biggins during the identification. This testimony is rejected as erroneous, since both detectives testified that the photographs of Ms. Biggins were taken after the identification had taken place.

Ms. Biggins may have been looking for her identification card while the decoy identified her as the seller. Considering that the detective had just informed her about her sale of beer to the minor, and that this minor and two detectives were standing on the other side of the counter from her, it would have been impossible

for Ms. Biggins not to see the decoy during the identification or not to be aware of the identification.

A television employee with a video camera was in the store during the identification. Since Ms. Biggins did not testify, there is no evidence whether she was distracted by the television employee, although it is reasonable to assume that she briefly took her eyes off the decoy and the detectives to look at that person.

The decoy's identification of Ms. Biggins as the seller of the beer was in compliance with the Department's Rule 141(b)(5). After the identification was made, a citation was issued to Ms. Biggins.

Appellants suggest that there must be some sort of "mutual acknowledgment" under the *Chun* test. We think that reads too much into the decision, and stretches the case farther than the Board ever intended.

The facts of this case are quite similar to those in *Prestige Stations, Inc.* (2001) AB-7764, where the Board rejected an argument much like that made here:

There is no question that the decoy made the identification while within reasonable proximity to the clerk. Her awareness, only minutes earlier, that she had made an unlawful sale, followed by the appearance of the decoy to within six feet of her, is probably sufficient, given her proximity to the decoy, to satisfy both the rule and the Board's interpretation of "face-to-face" in *Chun*.

In *Prestige Stations, Inc., supra*, the Board examined a number of its decisions which addressed the adequacy of the face to face identification, and concluded:

It is clear that the Board believes that the focus must be on the decoy's identification of the seller. That approach reduces to an absolute minimum the possibility that an innocent clerk, one who had no involvement in the transaction, will be falsely accused. And, since the practical requirement of the identification process is to return the decoy to the store shortly after his or her purchase, the likelihood that his or her renewed presence, accompanied by police officers, will go unnoticed by the selling clerk is virtually non-existent.

Finally, we must reject appellants' contention that the identification failed because there was no evidence the clerk was aware she was being identified for still another reason. The ALJ concluded, from the fact the clerk had just been informed she

had sold to a minor, and the clerk's presence on the other side of the counter from the minor during the identification that it was "impossible for Ms. Biggins not to see the decoy during the identification or not to be aware of the identification." This was a reasonable inference to be drawn from the evidence, and there was no testimony to refute it.

ORDER-

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.