

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

AB-8197

File: 20-353424 Reg: 03054887

7-ELEVEN, INC., AJAYPAL SINGH SIDHU, and RAMANDEEP KAUR SIDHU
dba 7-Eleven #2237-16999D
396 West Gettysburg Avenue, Clovis, CA 93612,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: October 7, 2004
San Francisco, CA

ISSUED DECEMBER 9, 2004

7-Eleven, Inc., Ajaypal Singh Sidhu, and Ramandeep Kaur Sidhu, doing business as 7-Eleven #2237-16999 (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 24-ounce can of Budweiser beer to Stephen Dunn, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Ajaypal Singh Sidhu, and Ramandeep Singh Sidhu, 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, Robert Wieworka.

¹The decision of the Department, dated September 18, 2004, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 8, 1999. On April 22, 2003, the Department instituted an accusation against appellants charging that, on December 21, 2002, appellant's employee, Gursharn Singh Bedi sold an alcoholic beverage to Stephen Dunn, a minor.

An administrative hearing was held on August 5, 2003, at which time oral and documentary evidence was received. At that hearing, Stephen Dunn, the minor, and Don Ciavaglia, a Clovis police officer testified in support of the charge of the accusation. Appellants presented no witnesses on their behalf.

Appellants thereafter filed a timely appeal in which they contend that the administrative law judge (ALJ) failed to make appropriate findings regarding the appearance of the 18-year-old decoy.

DISCUSSION

Rule 141(b)(2) requires a decoy to display an "appearance which 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 alleged offense."

The only finding relating to the appearance of the decoy was finding 6:

The driver's license that Dunn showed the clerk on December 21, 2002, clearly indicated that on said date, Dunn was only 18 years of age, and the evidence established that Dunn's appearance on that date was so consistent with his actual age that no reasonable person would have estimated him to be more than 19 years of age.

Appellants assert that the absence of any explanation for the ALJ's finding compels the conclusion that he failed to consider any non-physical traits of the decoy. Thus, appellants argue, there has not been a sufficient showing of compliance with Rule 141(b)(2).

Appellants cite the Board's decision in *Circle K Stores, Inc.* (1999) AB-7122,

where the Board said, in the course of reversing the Department's decision:

While an argument can be made that when the ALJ uses the term "physical appearance" he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what the ALJ did in this case. We see the distinct possibility that the ALJ may have placed too much emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.

The Board's concerns, in that and similar cases, was that the burdens imposed upon the Department by Rule 141, imposed for the purpose of making a more fair decoy operation, were being overlooked by a mechanical assessment of the decoy's appearance based only upon how the decoy looked from a physical point of view, one which ignored other indicia of age that may have shifted the balance, if considered.

At the outset of the hearing, as Department counsel elicited the decoy's testimony about his height, weight, manner of dress, and facial hair, the ALJ commented [RT 12]: "I make the observation that, as testified you have three or four days of facial hair growth now, it is very short and sparse. I'm able to see the flesh of your face clearly through the growth."

Then, after hearing the closing argument of counsel for appellants, the ALJ stated:

I would take notice on the record that, in my opinion, the decoy in this matter, even today, has such youthful appearance that is only consistent with somebody under the age of, let's say, 19, let alone 21. So if I were to look at that young man, even today, with what he tells us is three days growth of facial hair, I would not find him to be more than 18 years old. His appearance is totally consistent with his chronological age and no more than that.

The ALJ's finding with respect to the decoy's appearance is little different from his remarks during closing argument, except for the added reference to the "clear" indication of age on the decoy's driver's license.

The Department argues that, since the ALJ gave no indication that his assessment of the decoy's apparent age was limited to physical aspects of his appearance, it follows that it would be speculative to assume he limited his assessment in that manner.

Our concern is that the opposite is just as true - since he gave no indication of what factors he considered, other than those to which he made specific reference, it follows that he may well have considered only the decoy's physical appearance. While we cannot speculate as to the ultimate outcome, we think this case must be reversed and remanded to the Department for further findings by the ALJ concerning the decoy's appearance, with specific reference to factors considered.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for such further proceedings as may be appropriate in light of our comments herein.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.