

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

AB-8213

File: 20-355455 Reg: 03055078

7-ELEVEN, INC., KRISTSNEE PHATIPHAT, and MARK PHATIPHAT
dba 7-Eleven #2136-16560
7400 Stewart and Gray Road, Downey, CA 90241,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: November 4, 2004
Los Angeles, CA

ISSUED JANUARY 7, 2005

7-Eleven, Inc., Kristsnee Phatiphat, and Mark Phatiphat, doing business as 7-Eleven #2136-16560 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold 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., Kristsnee Phatiphat, and Mark Phatiphat, 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, David W. Sakamoto.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 16, 1999.

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

Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor. An administrative hearing was held on October 10, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Jacqueline Diaz, the minor, and Kevin Kendall, a Downey police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and that appellants had failed to establish a defense under Rule 141(b)(2). Appellants thereafter filed a timely appeal in which they raise the following issues: (1) there was no compliance with Rule 141(b)(2); and (2) the penalty was imposed pursuant to an underground regulation.

DISCUSSION

I

Appellants argue that the decoy did not present the appearance required by Rule 141(b)(2), pointing to a number of factors that they say gave her the appearance of someone over 21 years of age: the decoy wore “extensive” makeup, including eye liner, mascara, blush, lip gloss, tattooed eyebrows, and professionally colored hair; and her physical appearance was enhanced by her experience and confidence acquired as a result of her paid employment by the Downey Police Department.

The Department argues that the administrative law judge’s (ALJ’s) assessment of the decoy’s appearance was correct, and consistent with prior decisions of the Appeals Board.

Rule 141(b)(2) requires that a 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.”

The ALJ, who listened to and observed the decoy as she testified, and who examined photographs of the 18-year-old decoy taken on the day of the decoy operation, concluded that she did display the appearance required by the rule. His findings and conclusions on this issue reflect a careful consideration of the factors the Board has said should be considered. He made the following findings regarding the decoy’s appearance (Findings of Fact IV through VII):

The decoy was 5' 8" and weighed 125 pounds on January 14, 2003. She wore dark blue jeans, a light blue sweatshirt with a picture of a monkey on it, white tennis shoes, and no jewelry. She had on eyeliner, mascara, blush, and lip gloss. Her hair was lighter than its regular dark brown and a little bit curly. Her eyebrows were tattooed. She felt “comfortable” while in the store.

Two photographs (State’s Exhibit 2) were taken of the decoy on the day of the decoy operation.

When the decoy was fifteen years old, she took acting lessons and modeling lessons. She appeared in a play when she was sixteen years old, and she has experience as a model.

Prior to January 14, 2003, the decoy had worked for approximately a year as a store clerk, and approximately seven months as a police aide.

The decoy was living at home with her mother in January 2003.

The decoy was 5' 8" and weighed “about the same” as 125 pounds on the day of the hearing. She sat erect as she testified. She appeared uncomfortable, but not nervous, responding to many questions with simple “Yes” or “No” answers. She wore the same sweatshirt that she wore on January 14. Her hair was darker and straighter than her hair as depicted in the photographs.

The ALJ addressed the arguments made by appellant at the hearing, stating, in

Determination of Issues III:

Contrary to Respondents’ argument, there is no evidence that the decoy’s makeup, hair, or eyebrows made the decoy appear older than her age. It would be just as valid to speculate that those things make people appear younger. If anything, the decoy on January 14 appeared like an eighteen-year old young woman whose hair was light brown and a little curly, who was wearing some

makeup, and whose eyebrows were tattooed – just as she described and just as she is depicted in the photographs taken that day.

Those photographs of the decoy are “arguably the most important piece of evidence in considering whether (she) displayed the physical appearance of someone under 21 years of age.” See Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (The Southland Corporation Real Party in Interest) (2002) 103 Cal.App.4th 1084, 127 Cal.Rptr.2d 652, 659. They clearly show a female who is under twenty-one years old.

The ALJ also considered and rejected appellants’ argument that the decoy’s experience as a store clerk, model, actress, and police aide made her appear older, citing Board decisions in *7-Eleven/Virk* (2001) AB-7597, *Prestige Stations, Inc.* (2002) AB-7802, *7-Eleven/Singh* (2001) AB-7559, and *7-Eleven/Azzam* (2001) AB-7631, all cases in which the Board held that the mere fact of the decoy’s experience was insufficient, by itself, to justify a finding of a violation of Rule 141(b)(2), and concluded, in Conclusion of Law V:

The Administrative Law Judge observed the decoy’s demeanor, mannerism, and poise while the decoy testified. Taking into consideration that observation, the photographs of the decoy, and the testimony about the decoy’s appearance on January 14, 2003, 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 Aguilar.

This Board has said many times that, in the absence of extraordinary circumstances, it will not second guess the ALJ on the issue whether the decoy’s appearance meets the standard set by Rule 141(b)(2). This is simply one more such case, and we are not persuaded that the result should be any different.

II

Appellants contend that the 15-day suspension cannot stand because it is based on an “underground regulation” in violation of the Administrative Procedure Act. (Gov. Code, § 11340 et seq. (APA).)

Government Code section 11340.5, subdivision (a), states: "No state agency shall utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter." Section 11342.600 defines regulation as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." Section 11425.50, subdivision (e), provides that "a penalty may not be based upon a guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule subject to Chapter 3.5 (commencing with section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with section 11340)."

In *Vicary* (2003) AB-7606a, the Board determined that the penalty guidelines found in the Department's Instructions, Interpretations and Procedures Manual (the Manual) were "underground regulations," i.e., regulations that have not been adopted as such under the provisions of the APA. Appellants allege that these same penalty guidelines were the basis for the penalty imposed in the present case.

Unlike other cases this Board has reviewed where this issue has been raised, the decision in this case strongly suggests that the ALJ felt himself bound by the schedule of penalties contained in the Department's Manual. The Department urged the ALJ to impose a suspension greater than the "standard" 15-day suspension, but

less than 25 days, because of a prior violation, the disposition of which was not yet final. Although the ALJ declined to do so, his several references to the Department's "customary penalty," i.e., that set forth in the Manual, lead us to conclude that the penalty he selected was not the product of his unfettered discretion. For that reason, we think it appropriate to reverse the decision as to penalty, and remand the case to the Department for reconsideration of the penalty.²

ORDER

The decision of the Department is reversed as to penalty, and the matter is remanded to the Department for reconsideration of the penalty.³

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

² We are aware that the Department's formally adopted regulation setting out its penalty recommendations still calls for a 15-day suspension for a "first strike" sale to a minor.

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.