

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

AB-8280

File: 20-328410 Reg: 03056328

7-ELEVEN, INC., CHARNJIT K. SANDHU, and PARAMPAL S. SANDHU,
dba 7-Eleven Food Store
10545 Slater Avenue, Fountain Valley, CA 92708,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: February 3, 2005
Los Angeles, CA

ISSUED AUGUST 15, 2005

7-Eleven, Inc., Charnjit K. Sandhu, and Parampal S. Sandhu, doing business as 7-Eleven Food Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 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., Charnjit K. Sandhu, and Parampal S. Sandhu, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Stephen A. Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

¹The decision of the Department, dated April 22, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 17, 1997. On November 25, 2003, the Department filed an accusation against appellants charging that, on August 19, 2003, appellants' clerk sold an alcoholic beverage to 18-year-old James Marquez. Although not noted in the accusation, Marquez was working as a minor decoy for the Fountain Valley Police Department at the time.

At the administrative hearing held on February 20, 2004, documentary evidence was received and testimony concerning the sale was presented by Marquez (the decoy) and by Sandra Bodnar, a Fountain Valley police officer.

The Department issued its decision which determined that the violation charged had been proven, and no defense had been established. Appellants filed an appeal contending that rule 141(b)(2)² was violated.

DISCUSSION

Appellants contend that the ALJ erred when he concluded that the decoy complied with rule 141(b)(2). This rule requires that "[t]he decoy shall 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 argue that the decoy's demeanor at the time of the sale was not that of a person under the age of 21 because of his experience as a police explorer and as a loss prevention and security agent for a Target store. The ALJ failed to consider this experience in evaluating the decoy's appearance, according to appellants. In addition,

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.

appellants assert that the decoy's physical appearance was not that of a person under the age of 21.

The ALJ, who listened to and observed the decoy as he testified, and who examined a photograph of the 18-year-old decoy taken on the day of the decoy operation, concluded that the decoy 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 5 and 11-14):

5. Marquez appeared at the hearing. He stood about 5 feet, 11 inches tall and weighed about 185 pounds. His dark brown or black hair was closely cut and worn with short spikes. There had been no change in Marquez's height or weight since August 19, 2003. At Respondents' Licensed Premises he was dressed as is shown in Exhibit 2, with either blue jeans or khakis and black Nike shoes. Both at the hearing and while at Respondents' Licensed Premises on August 19, 2003 (Exhibit 2), decoy Marquez was clean-shaven. At the hearing, Marquez looked substantially the same as he did at Respondents' Licensed Premises on the date of the decoy operation.

11. Decoy Marquez has worked with FVPD as a police explorer for about 4 years. In that capacity he works 2-3 hours a week. As an explorer he has participated in training, including a 5-day academy on basic criminal law and procedure. He also participates in physical training including doing push-ups, sit-ups and moderate weight training. He has learned some about traffic control, control of suspects and believes his self-confidence has been improved as a result of his service with FVPD. Decoy Marquez has graduated from high school and presently works part-time at Target Stores in loss prevention.

12. Marquez testified that he was somewhat comfortable with the decoy program, knowing that police officers were monitoring his activities. He presented himself at the hearing as a reasonably well-spoken young man who presents the appearance of one his age. Clerk Gill most likely had no occasion to hear Marquez speak prior to selling him the beer since he did not engage Marquez in any conversation.

13. Decoy Marquez had shaved at approximately 8:00 a.m. the morning of the hearing. Respondents attempted to make an issue of a suggested "distinct line" of the decoy's beard and mustache. Respondents

suggested that the decoy's facial appearance was that of an "adult" male. No such distinct beard [or] mustache line was more visible in person than that shown in Exhibit 2. Neither does the decoy have the body of a body-builder. His visible muscles and neck simply are not out of the ordinary. (Exhibit 2.) Decoy Marquez is an adult male who appears his age. He is no more muscular nor hirsute than could reasonably be expected of one his age.

14. Based on his overall appearance, *i.e.*, physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of clerk Gill at the Licensed Premises on August 19, 2003, Marquez displayed the appearance that could generally be expected of a person under 21 years of age under the actual circumstances presented to Gill.

We do not accept appellants' contention that the ALJ failed to consider the decoy's prior experience, because he specifically addressed this in the proposed decision. It is also difficult to understand how the decoy's lack of nervousness enhanced his apparent age when the record indicates he never spoke to the clerk.

We have often said we are not inclined to substitute our judgment for that of the ALJ on the question of the decoy's apparent age, absent very unusual circumstances, none of which are present here. In the appeal of *Idrees* (2001) AB-7611, we said:

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, that he or she possessed 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.

This Board is not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy did not have the appearance required by the rule, and an equally partisan response that she did.

Similarly, this Board has previously addressed the contention that a decoy's experience necessarily made him or her appear to be over the age of 21. The Board rejected this type of contention 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.

Appellants ignore the language in *Azzam, supra*, which makes clear that there must be evidence presented that the decoy's experience actually made the decoy appear to be 21 years of age or older. The ALJ apparently saw no evidence of this at the hearing and appellants have not pointed to any evidence that might tend to support their assertion.

Appellants argue that the decoy's physical appearance also made him appear to be over 21, asserting that the decoy had "visible beard and mustache growths" and was in "good physical shape" from weight training. The ALJ addressed, and rejected, these contentions in Conclusion of Law 5:

5. Respondents argued that the defense provided by sections 141(a) and 141(b)(2) of title 4, California Code of Regulations [Rule 141], apply [sic] to the facts of this case. Therefore, the matter should be dismissed. Respondents described decoy Marquez as having such a distinct beard and mustache line that he appeared 27 or 28 years of age. Therefore, Respondents argue, Marquez did not present the appearance required by Rule 141(b)(2). The apparent age of decoy Marquez was addressed above in Findings of Fact, paragraphs 5 and 11 through 14. Marquez's appearance in front of clerk Gill and at the hearing fully complies with the rule. (Findings of Fact, ¶¶ 5 and 11 through 14.)

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. We are not in a position to second guess his evaluation of the decoy.

From all we can tell, this is a typical rule 141(b)(2) case. The clerk chose not to ask for identification, and his mistake was costly. As this Board noted in *Prestige Stations, Inc.* (2000) AB-7248 (at ft. 2), “A licensee cannot escape liability by employing clerks unable to make a reasonable judgment as to a buyer’s age.”

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, 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.