

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

AB-7464a

THE SOUTHLAND CORPORATION, RIGA AMIR, and TAWAB AMIR
dba 7-Eleven Store #2011-21795
1595 East Vista Way, Vista, CA 92084,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-284495 Reg: 99045891

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: August 17, 2001
Los Angeles, CA

ISSUED OCTOBER 25, 2001

The Southland Corporation, Riga Amir, and Tawab Amir, doing business as 7-Eleven Store #21795 (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 minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a). This is the second appeal to the Appeals Board involving this matter.

Appearances in the present appeal include appellants The Southland Corporation, Riga Amir, and Tawab Amir, appearing through their counsel, Ralph

¹The decision of the Department, dated February 1, 2001, is set forth in the appendix.

Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

Appellants' off-sale beer and wine license was issued on June 2, 1991.

Thereafter, the Department instituted an accusation against them charging that, on November 20, 1998, their clerk sold an alcoholic beverage to a minor.

An administrative hearing was held on June 24, 1999, following which the Department, on July 29, 1999, entered its decision sustaining the charge of the accusation and ordering a 15-day suspension. That decision was appealed, and while the appeal was pending, the Department stipulated that the Administrative Law Judge failed to address the issue of the decoy's appearance, and appellants stipulated that, for purposes of that appeal, the California Supreme Court, in Provigo Corp. v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561 [28 Cal.Rptr. 638], held the Department guidelines invalid. The Board then, in reliance upon the Department's stipulation, entered an order remanding the case to the Department for reconsideration of the issue involving the appearance of the decoy.

Following the decision of the Appeals Board, the Department, on November 21, 2000, in a Decision Following Appeals Board Decision, ordered the matter remanded to the ALJ who presided over the initial hearing "for further proceedings as are necessary and appropriate with regard to the issue of the decoy's appearance."

Thereafter, Administrative Law Judge Lo issued a new decision, from which the present appeal has been taken, in which he again ordered a 15-day suspension, and discussed, among other things, the issue of the decoy's appearance as tested against the mandate of Rule 141(b)(2). He wrote (Findings of Fact VII-A and -B, and Determination of Issues, part III):

"On November 20, 1998, the decoy was 5'2" tall and weighed approximately 107 pounds. She wore a watch and a ring, but no make-up. A photograph (Exhibit 2) taken of the decoy on that day showed that she displayed the physical appearance which could generally be expected of a person under twenty-one years of age.

"The Administrative Law Judge observed the decoy's maturity, mannerism, poise, and demeanor when she testified. She did not appear nervous. There was nothing noteworthy about her non-physical appearance. While testifying, the decoy displayed the nonphysical appearance which could generally be expected of a person under 21 years old. Based upon the Administrative Law Judge's observation of the decoy, the Administrative Law Judge finds that the decoy displayed the non-physical appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Respondent's clerk at the time of the sale of the beer.

"... [T]he Administrative Law Judge, in compliance with the Appeals Board's and Department's remand orders, has found that the decoy displayed the physical appearance and non-physical appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Respondent's clerk at the time of the sale of the beer to the decoy."

Appellants contend once again that the decoy failed to present the appearance of a person under the age of 21, asserting that the issue must be resolved in their favor because the clerk was unusually busy, and because the Administrative Law Judge's findings on this issue were no more than conclusions,

and were not based upon substantial evidence.² In addition, appellants claim the Administrative Law Judge erred in his determination that the clerk's testimony that there were 14 people in line was not credible.

DISCUSSION

I

Appellants contend that the decoy operation took place shortly after 5 p.m. on a Friday, violating the Department guideline which discourages decoy operations during a "rush hour," and thus violating Rule 141(a) which requires that decoy operations be conducted in a manner that promotes fairness. Appellants appear to suggest that when a store is unusually busy, a decoy may be perceived as presenting a more mature appearance.

Appellants' counsel, in his closing argument at the hearing, cited the Board's decision in Assaedi (1999) AB-7144, asserting the Board there ruled that it could be unfair for a law enforcement agency to engage in a decoy operation during a true rush hour circumstance.

Assaedi does contain broad language which suggests there may be circumstances when a violation of one of the Department's guidelines might render a particular decoy operation unfair when measured against Rule 141. We believe, however, that such an instance will be rare, because the guidelines are merely that, and

² We can dispose of this latter point quickly. We simply do not agree that an administrative law judge who must determine the apparent age of a decoy, and actually sees the decoy in person, lacks substantial evidence to make such a determination. The Board's concern throughout has been whether, in doing so, the administrative law judge has applied the correct standard under the rule.

are not written with sufficient precision to warrant their application as if they were rules of law.

The California Supreme Court, in Provigo Corp. v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561 [28 Cal.Rptr.2d 638], held that the Department's decoy guidelines are suggestions for police departments to follow, and failure to follow them does not provide a defense to a charge of sale to a minor.

The guideline at issue, which discourages the conduct of decoy operations during rush hour, is an example of imprecision. "Rush hour" is a term ordinarily used in connection with freeway traffic, and associated with commuters traveling to and from their workplace and residence. As applied to individual premises, the term has no practical meaning, and is of little use as a guideline.

The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy.

We believe it asks too much to require law enforcement to predict the time of day that, for a particular premises, would fairly be considered "rush hour."

It is conceivable that where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate.

There was no showing here that any law enforcement official acted improperly or unfairly in the course of the decoy operation. All the record fairly shows is that the

operation took place at a time when only one clerk was working and several customers were at the open register, in line to make purchases. There was no unfairness.

Tawab Amir testified that throughout November of 1998 only one clerk worked the 3:00 p.m. to 11:00 p.m. shift. He testified that Kinney was capable of handling that shift by herself [RT 108].

Officer O'Brien testified [RT 28-29] that there were three or four people in the store and one or two in line. "There was a continuous flow of people going in and out. At no time was there a long line." [RT 34].

The decoy thought there were two people in line [RT 48] when she went in the store, and one when she took the beer to the cash register [RT 49]. Later, she testified there was one person in front of her and one "or so" behind. After the sale, she noticed two or three people waiting in line until the officers finished with the clerk. [RT 66].

Jennifer Kinney testified that, at 5:00 p.m., just before Tammy, the other clerk (and manager) left for the day, the store was "really busy," with at least 14 people in line and 20 in the store altogether. She estimated that there were 10 to 14 people in her line when the decoy made her purchase, and that it was not unusual for her to be that busy.

The fact that sales were being made at one per minute is not particularly relevant without proof that the sale to the decoy was made during a period when that pace was being maintained. The decoy's purchase was not shown to be one of the transactions depicted on Exhibit C, which purported to show the one transaction per minute pace.

We do not have to agree with the Administrative law Judge's logic to uphold his determination that it was not unfair to conduct the decoy operation when the store might

have been busy.

Nor do we agree with the suggestion in appellants' brief that, when a store is busy, a decoy who otherwise presents the appearance of a young teenager, as does the decoy in this case (see Exhibit 2), will somehow appear to be older than 21.

II

Appellants contend that the Administrative Law Judge erred in rejecting the testimony of the clerk that there were 10 to 14 people in line when the decoy made her purchase.

Appellants concede the discrepancy between the testimony of the clerk and that of the decoy and the deputy. They assert that the register tape, which purports to show fourteen transactions in the same number of minutes, supports the clerk's testimony, while the testimony of the decoy and the deputy stands unsupported.

However, appellants have assumed that the decoy's purchase came during that fourteen minute span, or very close to it. (See App.Br., at page 7.) The record does not support this assumption.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

The Administrative Law Judge heard the testimony. We did not. We cannot say that he abused his discretion by accepting the estimates given by the decoy and the deputy, rather than the estimate from appellants' employee.

ORDER

The decision of the Department is affirmed.³

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

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.