

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

AB-9133

File: 20-432262 Reg: 10073014

7-ELEVEN, INC., and ANU MARKETING, INC., dba 7-Eleven Store #2173-13735F
3735 Emerald Street, Torrance, CA 90503,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: September 1, 2011
Los Angeles

ISSUED OCTOBER 10, 2011

7-Eleven, Inc., and ANU Marketing, Inc., doing business as 7-Eleven Store #2173-13735F (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 15 days for their clerk, Ivana Lemus, having sold a 12-pack of Budweiser beer in cans to Arturo Diaz, an 18-year-old minor decoy working with the Torrance Police Department, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and ANU Marketing, Inc., appearing through their counsel, Soheyl Tahsildoost and Jessica Cohen, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated October 21, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 1, 2005. On May 3, 2010, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a person under the age of 21.

At the administrative hearing held on September 1, 2010, documentary evidence was received and testimony concerning the violation charged was presented by Mark Ponagalek, a Torrance police officer, and Arturo Diaz, a minor decoy. Appellants presented no witnesses.

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 any affirmative defense under Rule 141.

Appellants have filed an appeal making the following contention: The decoy operation was not conducted fairly, in violation of Rule 141(a), because it utilized a decoy who did not display the appearance required by Rule 141(b)(2)

DISCUSSION

Appellants contend (App. Br., p. 1) that “[a] six foot tall minor decoy with four years of experience as a police explorer, substantial training in law enforcement operations, and an otherwise mature demeanor cannot exhibit the appearance generally expected of a person under the age of 21.”

Rule 141(a) provides that a law enforcement agency may only use a person under the age of 21 to attempt to purchase alcoholic beverages “in a fashion that promotes fairness.” Rule 141(b)(2) requires that the decoy display an appearance which could generally be expected of a person under 21 years of age. Appellants contend that both Rule 141(a) and 141(b) have been violated in this case by the

Torrance Police Department's use of a person whom appellants describe as "yet another professional decoy employed by law enforcement" (App. Br., p. 5.)²

The administrative law judge (ALJ) heard and rejected the same arguments that appellants are now making. He observed the decoy as he testified, and concluded in Finding of Fact 9 that the decoy displayed the appearance required by Rule 141(b)(2):

Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Lemus at the Licensed Premises on November 13, 2009, Diaz displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to [the clerk].

As with so many other cases heard by this Board, appellants are asking us to substitute our views regarding a decoy we have never seen for those of the trier of fact who observed the decoy as he testified. We cannot substitute our factual determinations for those of the ALJ.

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

² Diaz testified that he had participated in two decoy operations prior to his visit to appellants' premises. Appellants have not favored us with what it is that makes a decoy a professional.

(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.

(Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, 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.