

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

AB-8083

File: 20-372080 Reg: 01051661

7-ELEVEN, INC., and SAHNI ENTERPRISES dba 7-Eleven Store #2136-19133
1611 West Olive Avenue, Burbank, CA 91506,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Joseph D. Montoya

Appeals Board Hearing: December 2, 2003
Los Angeles, CA

ISSUED FEBRUARY 11, 2004

7-Eleven, Inc., and Sahni Enterprises, doing business as 7-Eleven Store #2136-19133 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days for their clerk, Golan Rabani, having sold a six-pack of Miller Lite beer to Carmen Hernandez, an 18-year-old police decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Sahni Enterprises, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 31, 2001. On

¹The decision of the Department, dated January 16, 2003, is set forth in the appendix.

October 5, 2001 the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor, in violation of Business and Professions Code section 25658, subdivision (a).

An administrative hearing was held on August 27, 2002, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Carmen Hernandez, the minor decoy, and Omar Rodriguez, a Burbank police officer, who witnessed the transaction. Swarnjit Sahni, a principal of appellant Sahni Enterprises, testified regarding measures he has taken to ensure compliance with the law with respect to sales to minors. The clerk, Golan Rabani, although still in appellants' employ, did not testify.

Hernandez and Rodriguez each testified that the clerk asked Hernandez for her identification, and that she presented the clerk with her California driver's license. The license showed Hernandez's birth date of January 19, 1983, and contained a red stripe with bold white letters across it saying : "AGE 21 IN 2004." The clerk examined the license and went forward with the sale.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged, and no affirmative defenses had been established.

Appellants thereafter filed a timely appeal in which they contend that Rule 141(b)(2) and Rule 141(b)(5) were violated.

DISCUSSION

Appellants contend that the decoy did not present the appearance required by Rule 141(b)(2), i.e., that she 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 beverage at the time of the alleged offense. It is appellants' contention that the decoy, because she wore makeup, jewelry, and a bandana on her head, displayed the general appearance of a person over the age of 21. Further, appellants contend, the administrative law judge (ALJ) based his determination that the decoy's appearance complied with Rule 141(b)(2) solely on her physical appearance, and failed to consider all other indicia of age. This, say appellants, was contrary to the teachings of the Board in *Circle K Stores, Inc.* (1999) AB-7122.

In *Circle K Stores, Inc.*, the Board stated:

The Department's use of the term "physical appearance", appellant contends, is a departure from, and violation of Rule 141(b)(2), because the rule uses only the term "appearance." While it is true that the ALJ and the Department employ words and terms that are not expressly in the rule, the issue is not so simplistic.

Nonetheless, while an argument might 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 well 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.

It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.

The ALJ found as follows with respect to the decoy's appearance (Factual Finding 8):

Ms. Hernandez appeared at the hearing essentially as she had on the evening of May 10, 2001, with the exception that on the evening in question she was wearing a bandana on her head. She is five feet three inches tall, and weighs about 135 pounds, as she did at that time. The description of her appearance at the hearing is consistent with the information on her driver's license, and the picture on her license closely approximates her appearance at the hearing. (Her license was issued March 29, 2001, about six weeks before she bought the beer from Respondent.) And, at the hearing Ms. Hernandez was wearing braces on her teeth, as she was at the time of purchase. A photo taken on the evening in question shows a person with the appearance of a minor, and of what could be expected generally of a person less than twenty-one years of age. As the clerk, Mr. Rabani, did not appear and testify, there is no evidence to refute the evidence that Ms. Hernandez displayed the appearance of a person under twenty-one years of age and what one would expect of such a person, when she purchased the beer in question from Respondents.²

² Further to provide a driver's license that clearly shows the holder to be eighteen years old is to give the appearance which could generally be expected of a person less than twenty-one years old.

Except for his footnoted comment about the significance of the decoy's driver's license, it must be conceded that the ALJ did not discuss any indicia of age other than the decoy's physical appearance.² We note that the ALJ, who was assigned to this case by the Office of Administrative Hearings, appears to be a relative newcomer to ABC litigation, and, perhaps, unfamiliar with the Board's decisions regarding Rule 141(b)(2). We note also that the transcript does not reveal any attempt on the part of Department counsel to educate him with respect to the various indicia of age the Board has indicated should be considered in an assessment of a decoy's appearance under

² There should be little doubt that acceptance of the display of identification (disclosing the decoy to be under the age of 21) as irrefutable proof of appearance under the age of 21 would save a lot of time, both at the hearing level and at the Appeals Board. Countless cases come to the Board where proper identification was displayed and yet a sale was made to a minor. If the law were as stated in the ALJ's footnote, neither the Department nor the Board would need to consider any other aspect of the decoy's appearance. We have uniformly refrained from ruling in the manner suggested in the ALJ's footnote, but we could be wrong. Out of respect to the admonition in *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126] that the rule be adhered to strictly, we have interpreted 141(b)(2) as having an independent existence. Perhaps an appellate court may see things differently.

Rule 141(b)(2).

Just as in *Circle K Stores, Inc., supra*, we see the distinct possibility that the ALJ may well 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, and mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration. Therefore, the case should be reversed.

Appellants also contend that the police conducted "an impermissibly suggestive one-person line up" when the decoy was asked, upon her return to the store, if Rabani was the person who sold to her. As a result, appellants contend, there was no compliance with Rule 141(b)(5), citing *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339] ["*Keller*"].

In *Keller*, the clerk had been taken out of the store, where he was then identified as the seller. The court found nothing in the way the identification was conducted that impaired its validity under Rule 141(b)(5).

Our review of the record in this case does not reveal any conduct on the part of the police officers that could be described as unduly suggestive. At most, Rodriguez or another officer asked the decoy if Rabani was the person who sold to her. Given the brief passage of time between the purchase and the identification, it is simply unlikely that the decoy could have been misled into identifying the wrong person simply by having been asked if Rabani was the seller.

ORDER

The decision of the Department is reversed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, 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.