

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

AB-8086

File: 20-359551 Reg: 02053367

7-ELEVEN, INC., NARINDER KAUR GARCHA, and RESHAM SINGH GARCHA
dba 7-Eleven #2173-27069
11666 Olympic Boulevard, Los Angeles, CA 90064,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

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

ISSUED FEBRUARY 11, 2004

7-Eleven, Inc., Narinder Kaur Garcha, and Resham Singh Garcha, doing business as 7-Eleven #2173-27069 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk, Kanwal Puri, having sold an alcoholic beverage (a six-pack of Corona beer) to Marlene Lopez, 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., Narinder Kaur Garcha, and Resham Singh Garcha, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated January 9, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 4, 2000. On July 18, 2002, the Department instituted an accusation against appellants charging the unlawful sale of an alcoholic beverage to a minor on April 3, 2002.

An administrative hearing was held on October 4 and December 5, 2002, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and which rejected appellants' claims that Rules 141(b)(2) and 141(b)(5) had been violated.

Appellants have now filed a timely appeal in which they contend that the decoy lacked the appearance required by Rule 141(b)(2).²

DISCUSSION

Appellants urge the Appeals Board to examine photographs of the decoy, contending that they depict a person who does not display the appearance which could generally be expected of someone under 21 years of age. Appellants also assert that the decoy's prior experience as a police decoy and police Explorer generated a high level of composure and confidence that resulted in a more mature appearance than

² Appellants' brief (App.Br., at page 2) asks the Appeals Board to reverse the decision of the Department for violations of both Rule 141(b)(2) and Rule 141(b)(5), but does not explain why Rule 141(b)(5) should be a ground for reversal. The Appeals Board is not required to make an independent search of the record for error not pointed out by appellants. It was their duty to show to the Appeals Board that the claimed error existed. Without such assistance, the Appeals Board may deem the general contentions waived or abandoned. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 139 [144 Cal.Rptr. 710] and *Sutter v. Gamel* (1962) 210 Cal.App.2d 529, 531 [26 Cal.Rptr. 880, 881].) Consequently, we decline to consider any issue under Rule 141(b)(5).

permitted by the rule.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.³

The administrative law judge, who observed the decoy as she testified and who considered the various indicia of age that the Appeals Board has said must be considered, rejected appellants' claims that the decoy lacked the appearance required by Rule 141(b)(2), i.e., that which could generally be expected of a person under 21 years of age. He wrote (Findings of Fact V through VIII):

The decoy was 5' 2" tall and weighed 125 pounds on April 3, 2002. She wore a brown shirt, black pants, a black coat, boots, and no makeup. Her hair was long and combed down. Two photographs of the decoy (Exhibit 3) and a photograph of the decoy with Mr. Puri (Exhibit 2) taken on April 3 show the decoy displayed the physical appearance which could generally be expected of a person under twenty-one years old.

The decoy was 5' 3" and weighed 140 pounds on October 4, 2002, the day that she testified. Her hair was shorter compared to her hair in the photographs. The decoy's increases in height and weight, and her shorter hair, did not make her

³The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

look older or younger compared to her appearance in the photographs. The decoy displayed the physical appearance which could generally be expected of a person under twenty-one years old while she testified.

The decoy spoke softly and matter-of-factly when she testified, answering many questions with brief answers. She did not appear nervous.

The Administrative Law Judge observed the decoy's mannerism, demeanor, poise, and maturity while she testified. Based on this observation, the testimony about the decoy's appearance, and the photographs, 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 Mr. Puri.

It cannot be said that there was not substantial evidence in support of the administrative law judge's (ALJ's) findings, since the person whose appearance he was describing testified in his presence. On the other hand, appellants would have this Board, which has not had the privilege of seeing or hearing the decoy in question, substitute its judgment for that of the ALJ on the basis of what appear to be poorly-lit photographs.

It is readily apparent from the decision that the ALJ, who observed the decoy as she testified, was satisfied from what he saw and heard that the decoy met the standard imposed by rule 141(b)(2). His proposed decision indicates that he took into consideration the same factors relied upon by appellants. It does not appear that there is any particular aspect of the decoy's appearance that compels a different result. As the Board has said many times, the ALJ is the trier of fact, and had the opportunity, which the Board does not, of observing the decoy as she testified. Under these circumstances, the Board is not in a position to second guess the ALJ. (See *7-Eleven, Inc./Gonser* (2001) AB-7750.)

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.