

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

AB-8065

File: 20-236303 Reg: 02052804

7-ELEVEN, INC., and HOSSEIN VAMEGHI, dba 7-Eleven # 2173-26166
1117 West Manchester Boulevard, Inglewood, CA 90301,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Paul M. Hogan

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

ISSUED FEBRUARY 11, 2004

7-Eleven, Inc., and Hossein Vameghi, doing business as 7-Eleven # 2173-26166 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending 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., and Hossein Vameghi, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated November 21, 2002, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 21, 1989. On April 19, 2002, the Department filed an accusation against appellants charging that, on December 12, 2001, appellants' clerk, Kay Nishimoto (the clerk), sold an alcoholic beverage to 19-year-old Rafael Villarreal. Although not noted in the accusation, Villarreal was working as a minor decoy for the Inglewood Police Department at the time.

At the administrative hearing held on August 2, 2002, documentary evidence was received, and testimony concerning the sale was presented by Villarreal (the decoy); by Lester Iguchi, an Inglewood police officer; and by the clerk.

The decoy entered the premises, selected a six-pack of Budweiser beer from the cooler, and took the beer to the counter. The clerk asked for his identification, and he gave her his California driver's license. The clerk looked at for a few seconds before handing it back to him and completing the sale.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants' appeal raises the following issues: (1) The administrative law judge (ALJ) did not fairly and accurately assess the apparent age of the decoy, and (2) the decoy operation was not conducted in a fashion that promoted fairness.

DISCUSSION

I

Appellants contend that the record does not support the ALJ's determination that the decoy complied with Rule 141(b)(2),² which requires that the decoy display, at the

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.

time of the unlawful sale, an appearance which could generally be expected of a person under the age of 21.

In Finding of Fact 8, the ALJ said:

A photo was taken of Mr. Villarreal and Ms. Nishimoto in the store (Department's Exhibit #2). Mr. Villarreal is shown wearing tennis shoes, worn jeans, a checked shirt, and a nylon jacket, clothing not unusual for a young man to wear. His hair is more clearly a youthful fashion; he wore it short and spiked with an oily hair dressing. A second photo (Exhibit #3) taken before the purchase shows him appearing even more youthful.

In Conclusion of Law 6, the ALJ said that the police had complied with rule 141, and,

[n]otwithstanding Ms. Nishimoto's view of Mr. [Villarreal] as having exhibited the self confidence of an adult, the record, taken as a whole, and with special regard for the facts set forth in Finding 8, support a determination that Mr. [Villarreal]'s physical appearance, clothing and behavior were those of a person under 21 years of age under the actual circumstances presented at the licensed premises on the evening in question.

Appellants contend that the ALJ's analysis of the decoy's apparent age was insufficient and erroneous, because he considered only the decoy's physical appearance as shown in two photographs. They assert that the only evidence of the decoy's non-physical appearance was the clerk's testimony that the decoy appeared to her to be 23 or 24 years old, self-assured, confident, and strong, which does not support the ALJ's conclusion.³

³Appellants bring up the decoy's "success rate" of sales to him that night, but there was no evidence presented of any "rate" at all. The noun "rate" means "[a] quantity measured with respect to another measured quantity" or "[a] measure of a part with respect to a whole; a proportion." (American Heritage Dict. (4th ed. 2000).) The only evidence adduced at trial was that the decoy was able to purchase alcoholic beverages at five premises during that decoy operation; no evidence was presented of the total number of establishments where he attempted to purchase. We do not know whether he was able to purchase in five out of six attempts or in five out of 50 attempts, so we know nothing about his "success rate."

Finding 8 mentions only how the decoy appeared in two photographs taken the night of the unlawful sale. It describes the decoy's clothing and hair, and describes him generally as a "young man" and "youthful." However, no mention is made in the finding of the decoy's behavior or demeanor, either at the time of the sale or at the hearing.

This Board has reversed decisions in cases where the ALJ based his assessment of the decoy's apparent age solely on the decoy's physical appearance (e.g., *Circle K Stores, Inc.* (1999) AB-7080), and where the ALJ relied solely on photographs of the decoy (e.g., *Circle K Stores, Inc.* (2000) AB-7378). In AB-7080, the Board was faced with a finding that discussed only physical attributes of the decoy, with no indication that characteristics such as poise, demeanor, maturity, and mannerisms had been considered. In AB-7378, the ALJ appeared to have relied solely on a photograph of the decoy in determining that the decoy's appearance complied with rule 141(b)(2), despite the decoy having been before him in person at the hearing. The Board said that the decision:

falls short of giving any assurance that the ALJ considered more than just the decoy's physical appearance when he stated that the decoy "appeared to be under 21 years old." Even though the ALJ had the opportunity to see the decoy at the hearing, he relied for his finding entirely on the photograph taken of the decoy the night of the decoy operation. It is hard to see how he could have considered anything other than physical appearance under these circumstances.

In that case, the Board remanded the matter to the Department to allow a proper analysis of the decoy's appearance.

The present decision does not provide any real analysis of the decoy's appearance and does not indicate in any way that non-physical attributes of the decoy were taken into consideration. Although Conclusion of Law 6 states that the ALJ relied on "the record, taken as a whole," and refers to the decoy's "physical appearance,

clothing and behavior," there is no finding regarding the decoy's behavior and no finding regarding his physical appearance except for that based on the photographs. Under the circumstances, the matter will be remanded to the Department for further findings.

II

Appellants contend the decoy operation was not conducted fairly, basing their contention primarily on an alleged unfair identification by the decoy of the seller.⁴ They assert the officer identified the seller for the decoy, rather than the decoy identifying the seller for the officer, when the officer questioned the clerk before the decoy made his identification. They argue that this created an unfair identification process.

The Department contends that, since appellants did not raise this issue at the administrative hearing, they should be precluded from raising it now on appeal. Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (See, e.g., *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Harris v. Alcoholic Bev. Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167]; *Islam* (2000) AB-7442.)

⁴Appellants also say that the decoy had trouble remembering what occurred at the premises and assert that "there was something suspicious about the [decoy's] apparent age" because at four of the five locations where he was able to purchase alcoholic beverages, he was not asked for identification. Appellants state these contentions, but do not explain them. The Board is not obligated to take vague suggestions of error and develop them into legal arguments for appellants. We are entitled to treat these contentions as waived (see, e.g., *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545, 546 [35 Cal.Rptr.2d 574]; *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 [33 Cal.Rptr.2d 838]; *In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164 [238 Cal.Rptr. 12]), and we do.

Even if the Board were to consider this argument, it would fail. The Board has addressed the issue before, rejecting the argument in the context of rule 141(b)(5), which requires a police officer to make “a reasonable attempt to enter the premises” and “have the minor decoy . . . make a face to face identification of the alleged seller.” In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board said:

The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.) ¶ . . . ¶ As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

Appellants cite *Department of ABC v. ABC Appeals Bd. & 7-Eleven/Keller* (2003)109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339] (*Keller*). In *Keller*, the Court of Appeal annulled the decision of the Appeals Board⁵ that found a violation of rule 141(b)(5) where the decoy remained outside, the officer brought the clerk outside, and the decoy then identified the clerk as the seller. The court said, at page 1698:

We note that single person show-ups are not inherently unfair. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal. Rptr. 447].) While an unduly suggestive one person show-up is impermissible (*ibid.*) in the context of a decoy buy operations [sic], there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

This does not support appellants' contention. While an "unduly suggestive" identification might be impermissible, appellants presented no evidence that the identification was unduly suggestive.

⁵ *7-Eleven/Keller* (2002) AB-7848.

ORDER

The decision of the Department is reversed and the matter is remanded to the Department for such further proceedings as are necessary in light of the comments herein.⁶

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

⁶This 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.