

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

AB-8218

File: 20-284066 Reg: 03055185

7-ELEVEN, INC., MANMEET NIJJAR, and RAJVINDER NIJJAR
dba 7-Eleven #2172-17006
2910 South Main Street, Santa Ana, CA 92707,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: November 4, 2004
Los Angeles, CA

ISSUED JANUARY 10, 2005

7-Eleven, Inc., Manmeet Nijjar, and Rajvinder Nijjar, doing business as 7-Eleven #2172-17006 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, E. Uddin Ahmed ("Ahmed"), having sold a six-pack of Budweiser beer to Eligio Sanchez ("Sanchez" or "the decoy"), an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Manmeet Nijjar, and Rajvinder Nijjar, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated December 11, 2003, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 19, 1993. The Department instituted an accusation against appellants on June 17, 2003, charging the sale of an alcoholic beverage to a minor by Ahmed.

An administrative hearing was held on October 22, 2003. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and that appellants had failed to establish any affirmative defense.

Appellants have filed a timely appeal, and raise a single issue, claiming there was no compliance with Rule 141(b)(2).²

DISCUSSION

Appellants contend that the administrative law judge (ALJ) was unable to accurately assess the appearance of the decoy presented to the seller at the time of the incident, because there had been a significant change in appearance between the incident and the hearing.

The ALJ addressed the decoy's appearance in Findings of Fact 5 and 14:

Sanchez appeared at the hearing. He stood about 5 feet, 7 or 8 inches tall and weighed about 160 pounds. His brown hair was gelled, worn close to his head and was not clean cut around the ears and back. Since January 17, 2003, Sanchez had grown an inch or two in height, put on about 15 pounds and his hair on that date, based on the Exhibit 2A photograph, was trimmed shorter. At the Licensed Premises, Sanchez wore a long-sleeved T-shirt, dark jeans and dark running shoes. (Exhibits 2A and 2B.) Sanchez appeared to be clean-shaven. (*Id.*) At the hearing, Sanchez looked substantially the same as he did at Respondents' Licensed Premises on the date of the decoy operation, despite

² Rule 141(b)(2) requires that the decoy "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 beverages at the time of the alleged offense."

the minor changes in his height and weight and his having attained the age of 19 years.

...

Sanchez was a competent witness. Based on his overall appearance, *i.e.*, physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of clerk Ahmed at the Licensed Premises on January 17, 2003, Sanchez displayed the appearance that could generally be expected of a person under 21 years of age under the actual circumstances presented to Ahmed. Nothing apparent at the Licensed Premises or at the hearing caused Sanchez to appear different from his true age.

Appellants' line of reasoning is as follows (see App. Br., pp. 6-7): given the changes in the decoy's height and weight, the ALJ could not have evaluated the decoy's appearance at the time of the sale; therefore, his evaluation must have been as of the time of the hearing and not as of the time of the sale or on the basis of photographs taken at the time of the sale; if the evaluation was as of the time of the hearing, it did not address the only relevant time period, *i.e.*, the time of the sale; reliance only upon photographs to evaluate his appearance at the time of the sale is insufficient. Thus, say appellants, findings based either upon an evaluation as of the time of the hearing, or one based on photographs as of the time of the sale are both lacking in substantial evidence.

We have problems with the appellants' compartmentalization of the ALJ's analysis. Properly, we must look at what he did overall, which was to observe a teenager who, as might be expected, grew in height and weight in the 10 months between the time of the sale and the time of the hearing. Photographs taken 10 months earlier would have shown the same person, and the difference in height, weight, and hair style might have been observable to some degree.

To suggest that the ALJ could only have made one analysis or the other is

simply mistaken. Neither approach is mutually exclusive. It seems to us much more likely that the ALJ evaluated the decoy's apparent age from several viewpoints, including, but expressly not limited to, physical appearance, changes in physical appearance, and the other indicia of age stated in his findings.

We think it unlikely that the combination of the passage of almost a year, and the gain in height and weight, would have resulted in the decoy displaying a younger appearance at the time of the hearing than at the time of the sale.

We have said many times that we will not substitute our judgment for that of the ALJ in the absence of extraordinary circumstances, none of which are present here.

ORDER

The decision of the Department is affirmed.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.