

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

AB-8222

File: 20-320274 Reg: 03055080

7-ELEVEN, INC., PENGKIE KAUR, and INDNESH P. SINGH
dba 7-Eleven Store No. 2171-13976
16925 Randall Avenue, Fontana, CA 92335,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED JANUARY 10, 2005

7-Eleven, Inc., Pengkie Kaur, and Indnesh P. Singh, doing business as 7-Eleven Store No. 2171-13976 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days for their clerk, Rosario Cardinas, having sold a six-pack of Modelo beer to Edith Torres, a 16-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Pengkie Kaur, and Indnesh P. Singh, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated December 24, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 9, 1996. The Department instituted an accusation against appellants on June 11, 2003, charging the unlawful sale of an alcoholic beverage to a minor on December 31, 2002.

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 appellants had failed to establish any affirmative defense.

Appellants have filed a timely appeal, contending that there was no compliance with Rule 141(b)(2).

DISCUSSION

Rule 141(b)(2) requires that a 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. Appellants contend that there was no compliance with this rule because the decoy, based on her size and experience, appeared older than 21 years of age.

The administrative law judge (ALJ) found the following (Findings D-1 through D-4) with respect to the decoy's appearance:

D. The overall appearance of the decoy, including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that the highlights on her hair were thicker on the day of the sale so that her hair looked more blond than on the day of the hearing.

1. The decoy is an overweight six-teen [sic] year old who is five feet two and one half inches in height, who weighs one hundred eighty-five pounds and who has an extremely young looking face. On the day of the sale, her hair had blond highlights and was worn in a ponytail. Her clothing consisted of dark blue jeans

and a gray sweater that said “ Nautica Jeans” on the front. The decoy was not wearing any make-up or any jewelry on the day of the sale.

2. The decoy testified that she had participated in one prior decoy operation.
3. The decoy was found to be a credible witness. While she was testifying, she was observed to be fiddling with her hands, she giggled at times and she appeared nervous. Additionally, she testified that she was nervous while she was in the premises even though she was confident with the instructions given to her by the police officers.
4. Exhibit 2-B was taken at the premises on the night of the sale and it depicts what the decoy was wearing and how she appeared at the premises. After considering the photograph depicted in Exhibit 2-B, the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellant argues that the photo of the decoy, taken at the scene, clearly indicates the “mature and matronly appearance projected by this decoy.” This argument is one this Board hears frequently. Appellants are asking the Appeals Board to substitute its judgment for that of the ALJ, something this Board declines to do in the absence of extraordinary circumstances, none of which appear to be present here. The ALJ had the opportunity to observe the decoy as she testified, and his judgment as to her apparent age will not be disturbed.

Appellant points to hearsay testimony from another of appellants’ employees, that the clerk, who did not testify, thought the decoy to be older than 21, and that she thought the decoy was accompanied by an older man. The probative value of such testimony is minimal, especially when it is contrasted with the ALJ’s careful analysis of the 16-year-old decoy’s appearance. We are not persuaded that the result should be any different because of such testimony.

ORDER

The decision of the Department is affirmed.²

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

² 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.