ISSUED JUNE 9, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

SANDRA HONG LEE dba Golden Keg Liquor 1336 East Huntington Drive Duarte, CA 91010 , Licensee, Appellant,	)	AB-6709 File: 21-281132 Reg: 96035129
v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: April 2, 1997 Los Angeles, CA

Sandra Hong Lee, doing business as Golden Keg Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered her license suspended for 60 days, with suspension of 30 days thereof stayed for a probationary period of one year for her employee having sold an 18-year-old police decoy a 40-ounce bottle of Miller's beer, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

[1] The decision of the Department dated July 25, 1996, is set forth in the appendix.

Appearances on appeal include appellant Sandra Hong Lee, appearing through her counsel, Ralph B. Saltsman; and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 18, 1992. Thereafter, the Department instituted an accusation alleging that on September 22, 1995, appellant's clerk sold an alcoholic beverage (beer) to an 18-year-old minor.

An administrative hearing was held on June 11, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the purchase of the beer by the minor. Subsequent to the hearing, the Department issued its decision which determined that appellant's clerk neither asked for nor was shown any documentary evidence of majority before making the sale. The Department further found that the overall appearance of the minor was that of an individual who could reasonably be taken to be under 21 years of age at the time of the purchase. The Department specifically rejected as not credible and having no basis in fact the contention that the minor displayed to the seller the appearance of an individual who was in his late twenties or early thirties. Appellant thereafter filed a timely notice of appeal.

In her appeal, appellant raises the following issues: (1) the decoy operation violated Rule 141, which applies retroactively; and (2) the penalty is excessive.

DISCUSSION

I

Appellant contends that Rule 141, although not having become effective at the time the sale took place, should be applied retroactively, and that the decoy operation violated the rule by reason of the police officer's failure to return the minor to the store to confront the seller after the purchase was made.

Appellant argues that even though Rule 141 was not yet effective at the time of the decoy operation, the voluntary effort of the Los Angeles County Sheriff's Department to comply with its terms is reason to apply the rule retroactively, and, presumably, afford appellant a full defense to the accusation.[2] The Department contends that the rule has only prospective application, and, in any event, there is no evidence the Sheriff's Department was attempting to comply with Rule 141, rather than informal Department guidelines that pre-dated Rule 141.

Although appellant's brief does not so state expressly, the implication is that if the Board agrees that the rule should be applied retroactively, then, pursuant to subdivision (c), the failure of the Sheriff's Department to comply with the rule is a defense to the charge that §25658, subdivision (a), was violated.

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[2] Appellant also asserts that the minor did not display the appearance of a person under the age of 21. As noted, the ALJ specifically rejected the testimony of both the manager and the clerk to the effect that the minor appeared to be in his late twenties or early thirties. He apparently found unpersuasive the idea that the wearing of a baseball cap altered the appearance of an 18-year old so drastically.

The claim that Rule 141, if applicable, was violated, is based on the testimony of the minor that, after making the purchase and leaving the store, he did not return to the store with the police officers, but instead remained seated in the patrol car. Thus, appellant contends, the police officer failed to enter the premises with the decoy so that he could make a face-to-face identification of the clerk who sold him the liquor.

The face-to-face identification issue posed by appellant is hypertechnical, at best. The record discloses that another deputy sheriff was inside the store, with an unobstructed view of the minor and the clerk and within hearing distance when the sale took place, and observed the entire transaction [RT 28-30]. Additionally, the record reveals that after the citation was written, the clerk left the store and himself identified the minor as the purchaser who was responsible for his being cited [RT 32-33].

Appellant argues that courts regularly allow and require retroactive application of judicially-imposed rules. Aside from the fact that Rule 141 is not a judicially-imposed rule, the case law appellant cites is patently unreliable. For example, appellant cites a Court of Appeals decision in Public Resources Protection Association of America v. Department of Forestry and Fire Protection. However, this decision, involving the northern spotted owl, was reversed when it reached the California Supreme Court. (Public Resources Protection Association v. Department of Forestry and Fire Protection (1994) 7 Cal.4th 111 [27 Cal.Rptr. 2d 11].) The case involved the question whether emergency regulations adopted to protect the spotted owl invalidated a previously

approved timber harvesting plan. The specific result reached by the Court turned on a distinction between a timber harvesting plan and a timber harvesting operation, and does not really have much application to Rule 141. However, some of the Court's language seems to be pertinent:

> "We conclude, however, that both the parties and the Court of Appeal erred in assuming that [Public Resources Code] section 4583 provided a rule of interpretation that would resolve the question of whether an approved timber harvesting plan was required to conform to rules enacted by the board after its approval. The correct answer to that question lies not in the provisions of section 4583, but in the language of the rules themselves. It is the text of the rule that determines how it is to be applied. ..."

There is no language in Rule 141 indicating it was intended to be applied retroactively. Nor are we aware of any court decision holding that the rule has retroactive application. Business and Professions Code §25658, subdivision (e), adopted by the Legislature in 1994, which directed the Department to adopt and publish guidelines in accordance with the rule-making portion of the Administrative Procedures Act, contained a savings clause which authorized law enforcement-initiated minor decoy programs in operation prior to the effective date of the regulatory guidelines "as long as the minor decoy displays to the seller of alcoholic beverages the appearance of a person under the age of 21 years."

Here, the ALJ, who viewed the minor and heard his testimony, found that he displayed the appearance of a person under the age of 21, and specifically rejected as not credible the testimony of appellant's manager (and daughter) [at RT 55] that the

minor looked like he was in his late twenties, and the testimony of her clerk (appellant's son-in-law) that the minor appeared to be the same age as the clerk, 34 [RT 64].

Appellant's Rule 141 contentions lack merit .

II

Appellant contends that the penalty - a 60-day suspension, with 30 days thereof stayed for a probationary period of one year - is an abuse of discretion.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

At the administrative hearing, Department counsel explained the Department's recommended penalty as reflecting its policy of imposing gradually increasing penalties for repeated violations in order to deter further violations. In this case, the licensee had in 1994 incurred a 60-day suspension with 40 days thereof stayed, for a sale to a minor. Thus, as pointed out by Department counsel, its current recommendation reflected an increase in the net period of suspension from 20 days to 30 days, assuming the licensee does not commit another offense within the probationary period.

Appellant challenges what is essentially an exercise of the Department's discretion in determining the appropriate penalty to fit the violation. The Department implicitly acknowledges that the period of suspension may appear to be on the high side, but defends it on the ground that it would make no sense to impose progressively smaller penalties for successive violations. Appellant committed an earlier sale-to-minor violation on May 17, 1994. A 60-day suspension, with 40 days of the suspension stayed, was ordered. Appellant served the net 20-day suspension in March 1995. With the present penalty, appellant's license will be suspended for a net of 30 days. Given that this was appellant's second sale to a minor in a span of approximately 15 months, and that we lack knowledge of the circumstances of the earlier sale, we are unable to say that the penalty imposed by the Department is excessive.

CONCLUSION

The decision of the Department is affirmed.[3]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[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 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.