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

**AB-7786**
File: 20-301796 Reg: 00049739

KYUNG H. KIM and SEUNG I. KIM dba Santa Ana Shell
8275 East Santa Ana Canyon Road, Anaheim, CA 92808,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 6, 2001
Los Angeles, CA

**ISSUED JANUARY 29, 2002**

Kyung H. Kim and Seung I. Kim, doing business as Santa Ana Shell (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 20 days for their clerk having sold an alcoholic beverage to a minor, 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).

Appearances on appeal include appellants Kyung H. Kim and Seung I. Kim, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Kim.

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[1]The decision of the Department, dated March 15, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 7, 1995. Thereafter, on October 17, 2000, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage (beer) to Albert Herrera, a minor, by appellant's clerk, Alvaro H. Munoz ("the clerk"), on July 7, 2000. Although not disclosed in the accusation, Herrera was acting as a decoy for the Anaheim Police Department.

An administrative hearing was held on December 29, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Herrera ("the decoy") and by Tony Montanarella, an Anaheim police officer who was participating in the decoy operation. Seung Kim testified on behalf of appellants.

Subsequent to the hearing, the Department issued its written decision sustaining the charge of the accusation and rejecting appellants' defenses.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(5) was violated; (2) Rule 141(b)(2) was violated; and (3) the Department failed to make proper findings regarding credibility.

DISCUSSION

I

Appellants contend that Officer Montanarella issued the citation to appellants' clerk before conducting the face-to-face identification required by Rule 141(b)(5).

Rule 141 (b)(5)provides:

> "Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the premises and have the minor decoy who purchased the alcoholic

> beverages to make a face to face identification of the alleged seller of the alcoholic beverages."

The rule further provides that a failure to comply with it shall be a defense to any action brought pursuant to Business and Professions Code §25658, subdivision (a).

"The Department's increasing reliance on decoys demands strict adherence to the rules adopted for the protection of licensees , the public, and the decoys themselves." (Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr. 126].) It follows that, if appellants are correct in their contention, reversal would be in order.[2]

The ALJ found that the citation was issued after the identification. (Finding of Fact V.) This finding was based upon the testimony of Officer Montanarella that he filled out and issued the citation after the decoy had identified the clerk [RT 43, 44].

Appellants contend, in effect, that Officer Montanarella committed perjury - "Montanarella had a reason to twist the facts in order to make it appear that the operation was a success" (App.Br., at page 6) - when he testified that "[the citation] was issued after the decoy had identified him as the person who sold him the beer." [RT 43].

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[2] We have serious doubts that appellants preserved this issue. Other than having elicited testimony on the subject of identification, appellants' counsel said nothing to suggest he considered the timing of the issuance of the citation to be flawed. The closest he came to saying anything about the police officer's involvement was at the beginning of his closing argument, when he said:

> "The first thing, and it's ... the first thing is going to be very brief. Just ask the Court to take a look at the officer directing the decoy issue. The main issue in this case really is the appearance of the minor ... ."

Nonetheless, for the benefit of any reviewing court, we have considered the contention.

Appellants theorize that Montanarella could have accomplished in mere seconds his stated objective of confronting the clerk. Hence, they suggest, he must have used the two to five minutes he waited for the decoy to return to the store and identify the selling clerk to write and issue the citation to the clerk.

Appellants rely on testimony elicited during the decoy's cross-examination about his reentry into the store:

> "Q. ... Who asked you to go back inside of the store?
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> "A. Once the investigator that's citing the suspect, or the clerk, I should say, calls for me to come back in to identify, like, I was brought in by Sgt. West.
>
> "Q. Okay. So Investigator Montanarella is doing the citation thing inside, and then he calls you back in.
>
> "A. Yes."

Even assuming that "doing the citation thing inside" could be equated with writing and issuing a citation, it is readily apparent that the decoy's response to a clearly leading question is no more than conjecture. Hence, while the decoy may have had no reason to lie, his response is hardly the kind of evidence upon which to accuse Officer Montanarella of falsifying his testimony. There are any number of possible reasons why minutes passed before the decoy's return to the store, but we can think of no reason why it would necessarily follow that Officer Montanarella must have written and issued a citation before the decoy's return.

Of course, if the facts really were as appellants contend, they could have presented the testimony of the clerk, who, at least as of the time of the hearing, was still in their employ. We can only infer, from their failure to do so, that he would not have confirmed counsel's view of the facts.

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

We are satisfied that there was compliance with Rule 141(b)(5).

II

Appellants contend that "the overwhelming weight of the evidence ... indicates that [the decoy] had the looks and demeanor of an individual who appeared over 21 years of age at the time of the sale." (App.Br., at page 7). They refer to three factors: the weight of the decoy - 230 pounds - which they say "alone indicates someone over the age of 21; his extracurricular activities as a Police Explorer; and his success at purchasing alcoholic beverages at six of the sixteen locations he visited during the decoy operation. Appellants also claim that the Administrative Law Judge (ALJ) violated Government Code §1515 by making a finding which necessarily required him to take judicial notice of certain underlying facts, without having given notice to the parties that he intended to do so. Specifically, appellants claim there is no record support for the finding that "cargo pants" are not such unusual dress for 18- and 19-year olds so as to render the decoy operation unfair.

The Appeals Board has said on occasions too numerous to count that, except in rare and unusual instances, where circumstances warrant, it will not second guess an

administrative law judge who has considered relevant indicia of age and concluded that a decoy presented the appearance which could generally be expected to be displayed by a person under the age of 21 years. This is not such an occasion.

The ALJ made the following detailed findings (Finding of Fact VI) with respect to the decoy's appearance:

> "A. On July 7, 2000, decoy Herrera stood between 5 feet, 8 inches and 5 feet, 9 inches tall and weighed approximately 230 pounds. His dark brown hair was shaved close on the sides, was curly and not very long on top. (Exhibit 5.) He wore a button-front, collared, checked shirt and khaki colored 'cargo' trousers. (Exhibits 5 and B.) He was clean-shaven, regardless when he last shaved. (Exhibit 5.)
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> "Based on the photographs, Exhibits 5 and B, decoy Herrera looked substantially same on the day of the operation as he did at the hearing. He dressed in almost the same clothes, his height was within half an inch and his weight was within 5 pounds of his height and weight on July 7, 2000, in [appellants'] store. Based on physical appearance alone, that is, as he appeared before clerk Munoz and as he appeared at the hearing, Herrera displayed the appearance generally expected of a person under the age of 21 years. While Herrera appeared in person somewhat younger than he appears in the photograph, Exhibit 5, either way he appears under the age of 21 years.
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> "Herrera, while not very tall, is heavy for his height. While in high school he played football and wrestled. In person, he did not give the impression of one who is very muscular. Instead, he looked more 'chubby' than well built. The 'chubbiness' was particularly noticed around the face.
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> "B. July 7, 2000, was the first time Herrera worked as a decoy. He visited 16 stores and was able to purchase alcoholic beverages at 6 of those stores. He said he was nervous while working as a decoy and he was surely nervous at the hearing. He could not wait to provide volumes of information, when simple answers were requested. Moreover, his legs were constantly in motion as he sat in the witness chair.
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> "Albert Herrera has been a Police Explorer for about two years. His work in that volunteer capacity has ranged from directing traffic at an event or events to rolling fingerprints of children. On two occasions, Herrera and others were used in scouring areas near crime scenes for pieces of evidence that might have been located there. He occasionally rides along with sworn police officers. While doing the latter, he does not participate in conducting investigations.

> "C. The court has observed the decoy's overall appearance, considering his physical appearance, his dress, his poise, demeanor, maturity and mannerisms as shown at the hearing. The court has considered the photographs, Exhibits 5, A and B, and the other evidence concerning Herrera's overall appearance and his conduct at [appellants'] store on July 7, 2000. In the court's informed judgment, decoy Herrera gave the appearance at the hearing and before clerk Munoz that could generally be expected of a person under the age of 21 years."

Appellants simply disagree with the conclusions drawn from the evidence by the ALJ, and would have the Board disregard the ALJ's careful consideration of Herrera's appearance, demeanor, mannerisms, and other indicia of apparent age. We decline to do so.

Appellants also claim that the ALJ improperly found that cargo pants were not an unusual form of dress for 18- and 19-year-olds by taking judicial notice of that fact, without first notifying the parties of his intention to do so. Appellants' challenge is apparently directed at the following sentence in Determination of Issues I:

> "Similarly, as to dress, Herrera did not wear blue jeans and a T-shirt to [appellants'] store on July 7, 2000. What he did wear, however, is not such an unusual dress for 18 and 19-year olds as to render the decoy operation unfair or to make Herrera appear over the age of 20."

As we read what the ALJ wrote, he is saying no more than that, in his opinion, the clothes the decoy wore on the night in question did nothing to alter his apparent age so as to render the decoy operation unfair.

We could add, from our own observations, that cargo pants, as trousers with exterior pockets are commonly called, are fairly ubiquitous on high school and college campuses, and convey little as to the age of the wearer. We could also note, that at least in the mind of the decoy, there was little difference between khaki trousers and khaki cargo pants (see RT 10).

III

Appellants contend that the ALJ erred in accepting the testimony of Officer Montanarella as credible and rejecting the testimony of the decoy on the issue of whether the citation was issued before the decoy identified the clerk as the seller.

As explained in part I, supra, appellants' argument is premised on conjecture. There is nothing in the decoy's testimony that is inconsistent with Officer Montanarella's testimony that he wrote and issued the citation after the clerk was identified as the seller. Appellant's suggestion that there was no reason for Officer Montanarella to wait two to five minutes for the return of the decoy other than to use the time to write a citation, ignores the more obvious explanation - he was waiting for the decoy to return so he could issue the citation.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
E. LYNN BROWN, 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 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.