

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

LUCKY STORES, INC.	)	AB-7028
dba Lucky Store	)	
4155 Tweedy Boulevard	)	File: 21-250557
South Gate, CA 90280,	)	Reg: 97039587
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	October 7, 1998
	)	Los Angeles, CA
	)	Re-submitted January 6, 1999

Lucky Stores, Inc., doing business as Lucky Store (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its license for 15 days for appellant's employee having sold an alcoholic beverage (beer) to a 19-year-old police decoy, 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).

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<sup>1</sup>The decision of the Department, dated January 8, 1998, is set forth in the appendix.

Appearances on appeal include appellant Lucky Stores, Inc., appearing through its counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

#### FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 8, 1991. Thereafter, the Department instituted an accusation against appellant charging that appellant's clerk had, on December 6, 1996, sold beer to a 19-year-old police decoy.

An administrative hearing was held on October 9, 1997, at which time oral and documentary evidence was received. At that hearing, testimony was presented for the Department by the decoy, Jason Gonzalez, and the arresting officer, Sonia Ayestas, and for appellant by the clerk, Arturo Arce, and one of appellant's managers, Guillermo Gasteiulum. These witnesses testified regarding the transaction at issue, the decoy operation conducted by the South Gate Police Department (SGPD), and the training received by appellant's employees concerning sales of alcoholic beverages.

Subsequent to the hearing, the Department issued its decision which determined that appellant's employee had sold beer to the decoy as alleged, and that no defense pursuant to Rule 141(c) (4 Cal.Code Regs., §141, subd. (c)) had been proven.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issue: The decoy operation was not conducted "in a fashion that promotes fairness" in that 1) the decoy's identification lacked a red stripe warning that the decoy was under 21, and 2) the decoy was large, confident, and mature looking.

#### DISCUSSION

Appellant contends the SGPD did not conduct the decoy operation "in a fashion that promotes fairness" as required by Rule 141 and, therefore, appellant has a defense to the accusation. Appellant argues that the Rule 141 violation arose from a combination of 1) the lack of a red stripe on the decoy's identification warning that the decoy was under 21 and 2) the use of a decoy who was large, confident, and mature looking.

Appellant, relying on Walsh v. Department of Alcoholic Beverage Control (1963) 59 Cal.2d 757 [31 Cal.Rptr. 297], argues that penal statutes, such as Business and Professions Code §25658, are to be construed liberally so that accused appellants receive the benefit of "every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute." (Walsh, supra, 31 Cal.Rptr. at 301, quoting People v. Ralph (1944) 24 Cal.2d 575, 581 [2], which quoted from Ex parte Rosenheim (1890) 83 Cal. 388, 391.) Because Rule 141 provides a defense to actions brought pursuant to §25658 and was "intended to promote fairness to

the licensees who are caught in police decoy operations, appellant argues, Rule 141 must also be construed most favorably to the licensee.

Walsh, supra, cited by appellant, is not applicable. It dealt with the prohibition of Penal Code §172 against selling alcoholic beverages “within one mile of the grounds” of UC Berkeley and the point from which the one mile should be measured. In the present appeal, no penal statute is being interpreted or applied. Appellant does not dispute its violation of §25658, subdivision (a), and we need not construe that statute. Here we consider Rule 141, which appellant has raised as a defense, and this rule is clearly not a penal statute.

Contrary to appellant's contention that this Board must give the appellant in a license disciplinary case the same benefit of the doubt accorded a criminal defendant, the Appeals Board is bound to resolve any conflicts in the evidence 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] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); 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].)

Appellant contends that the red stripe on a driver's license was designed to warn retailers that the person to whom the license was issued is under 21 and, therefore, the lack of a red stripe on a decoy's license is unfair and a violation of Rule 141.

While the red stripe may have been intended to make it easier for retailers to spot persons under 21, there is no evidence that it was designed to substitute for checking the date of birth of the holder. No evidence was presented regarding the implementation date of the statute authorizing the red-striped license, how or when red-striped licenses were issued or what percentage of licenses held by persons under 21 at the time of the violation did not have red stripes. It is fair to assume that persons under 21 were not required to obtain new licenses with red stripes as soon as the legislation was implemented. Red-striped licenses would presumably be issued to drivers as their existing licenses expired. Until all those holding licenses at the time the legislation was implemented had renewed their licenses and received new ones with red stripes, there would be licenses without red stripes held by people under 21. Appellant's clerk acted at his own risk when he failed to check the decoy's birth date because he saw no red stripe.

Rule 141 requires that decoy operations be conducted in a manner that promotes fairness, and sets out minimum standards for the conduct of these operations. The rule states that a "decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no

identification;" there is no requirement in the rule that the identification carried be a California driver's license with a red stripe.

We find no merit in appellant's argument about the lack of the red stripe. All the clerk had to do was to look at the date of birth and he failed to do so.

Appellant's clerk contends that he did not check the date of birth because, along with the lack of a red stripe, the decoy looked over the age of 21.

The decoy was said to be about 5'10" or 5'11" and weighed about 220 pounds. The ALJ stated the decoy did not look 16 or 17, but "he did present the appearance of one under the age of 21." (Dept. Decision, Det. of Issues, p. 5; Finding of Fact III, p. 2.) The ALJ had the decoy before him, and this Board will ordinarily defer to the superior opportunity of the ALJ to make this kind of judgment. In this appeal, this Board had available a color photograph of the decoy (Ex. 3) and we cannot say we disagree with the conclusion of the ALJ. However, although we firmly believe licensees and their employees have the responsibility to ask for identification and to look at the information on the identification presented to determine if the person is 21, we are disturbed by the number of police departments running decoy operations using decoys who are large, mature-looking, and confident. In this case, we do not find the appearance of the decoy to cross the line into unfairness, but this decoy is not far from it. We urge the Department to carefully examine decoy operations and to provide guidance and instruction as

necessary to police departments to ensure that the operations are conducted fairly and in the spirit of Rule 141.

ORDER

The decision of the Department is affirmed.<sup>2</sup>

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

JOHN B. TSU, MEMBER, did not participate in the oral argument or decision in this appeal.

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<sup>2</sup>This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.