

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

AB-7779

File: 20-289190 Reg: 00048905

PAWAN KUMAR and POONAM KUMAR dba Ray and Clara's Neighborhood Store
20903 Roscoe Boulevard, Canoga Park, CA 91304,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 4, 2001
Los Angeles, CA

ISSUED NOVEMBER 29, 2001

Pawan Kumar and Poonam Kumar, doing business as Ray and Clara's Neighborhood Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days, with 5 days thereof stayed for a probationary period of one year, for appellants' clerk selling an alcoholic beverage to a minor 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).

Appearances on appeal include appellants Pawan Kumar and Poonam Kumar, appearing through their counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated February 22, 2001, is set forth in the appendix.

Appellants' off-sale beer and wine license was issued on February 16, 1994. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to 19-year-old Kathryn Paschal. Paschal was acting as a minor decoy for the Los Angeles Police Department (LAPD) at the time of the sale.

An administrative hearing was held on January 9, 2001, at which time documentary evidence was received and testimony was presented by LAPD officer Michael Piceno, by Paschal ("the decoy"), and by co-licensee Pawan Kumar. Subsequent to the hearing, the Department issued its decision which determined that the violation had been established as charged.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the Department failed to prove that the requirements of Rule 141(b)(3)² were met; (2) Rule 141(b)(2) was violated; (3) Rule 141(b)(5) was violated; (4) the Department did not prove that the beverage sold to the decoy was an alcoholic beverage; and (5) the penalty imposed is excessive.

DISCUSSION

I

Appellants contend the Department failed to prove that the decoy carried either her own true identification or no identification, as required by Rule 141(b)(3). They contend that the Department must prove this in spite of the fact that the clerk did not ask the decoy her age or for her ID.

Rule 141(b)(3) states:

²Rule 141 is found in title 4, §141, of the California Code of Regulations.

"A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages."

No testimony was presented regarding whether or not the decoy carried any identification, undoubtedly because the testimony established that the clerk did not ask her for any.

The focus of subdivision (b)(3), when read as a whole, is the requirement that, if a seller asks a decoy for identification, the decoy must not mislead the seller by showing identification that is not the decoy's or does not have the decoy's correct date of birth. If a seller does not request identification from the decoy, it is irrelevant what identification is carried by the decoy, since it cannot affect the fairness of the decoy operation. Rule 141 must be strictly adhered to, but common sense must not be abandoned in doing so.

The only element that the Department could conceivably be obliged to establish with regard to subdivision (b)(3) is whether or not the decoy showed his or her identification when and if the seller asked for it. If the seller did not ask for it, it would be an empty exercise for the Department to prove that the identification not asked for and not shown was the decoy's own, or to prove that the identification not asked for and not shown was not carried by the decoy. In other words, if the seller does not ask for identification, the question of whether or not the decoy carried identification is, as we said above, irrelevant.

II

Appellants contend the decoy did not comply with Rule 141(b)(2) in that she did not have the appearance expected of a person under the age of 21. Appellants state that the decoy was 5' 5" tall, weighed about 150 pounds, and the photograph of her on the date of the decoy operation (Exhibit 2) "is certainly not in any way '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.' " They present no other evidence or argument.

The ALJ discussed the decoy's physical and non-physical appearance, and determined that she did comply with the requirement of Rule 141(b)(2). (Finding V.) This Board is not in a position to second-guess the ALJ's determination, when he had the opportunity, which this Board has not, of observing the decoy in person. Certainly appellants' bald assertion does not present this Board with any reason to inquire further into the ALJ's determination.

III

Appellants contend that the evidence regarding the face-to-face identification required by Rule 141(b)(5) is "equivocal and confusing" and that the officer had no personal recollection at the time of the hearing that the identification was made.

The officer testified that he had no present independent recollection during the hearing about the face-to-face identification, but he relied on his report that he made within hours of the decoy operation, which was admitted into evidence under an exception to the hearsay rule, as past recollection recorded. In that report, he recorded that Detective McElroy entered the premises with the decoy and asked her to identify the seller, which she did. The decoy testified that she returned to the counter where

Detective McElroy asked her to identify the seller, which she did. The clerk was facing her as she identified him.

There clearly was sufficient evidence for the finding (Finding IV) that the face-to-face identification was made in compliance with Rule 141(b)(5).

IV

Appellants contend that the Department failed to produce the can purchased by the decoy and did not provide any proof that the can contained an alcoholic beverage.

The officer and the decoy both testified that the decoy removed a can of Budweiser beer from the cooler and took it to the counter, where she purchased it. Exhibit 2 is picture of the clerk with the decoy, who is holding in her hand the can she purchased, which is clearly labeled Budweiser beer.

Appellants presented no evidence refuting the normal presumption that arises that a can labeled Budweiser contains beer, an alcoholic beverage. The ALJ properly determined that the decoy purchased an alcoholic beverage. (Determination I.)

V

Appellants contend that the penalty imposed, a 25-day suspension with 5 days stayed, is unfair and unreasonable "in light of the official misconduct herein and appellant's [sic] very substantial efforts to preclude any such violation by continuing employee education and a machine verification device."

There was no official misconduct, and the ALJ obviously considered appellants' evidence in mitigation, because he stayed 5 days of the 25-day suspension recommended by the Department. This was appellants' second sale-to-minor violation within 29 months. The penalty was not excessive, but was well within the bounds of the Department's discretion.

ORDER

The decision of the Department is affirmed.³

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

³This 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.