

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

SAIF ASSAEDI	)	AB-7144
dba A&A Market	)	
2221 Cutting Boulevard	)	File: 20-286986
Richmond, CA 94805,	)	Reg: 97042092
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Jeevan S. Ahuja
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	March 4, 1999
	)	Sacramento, CA
	)	

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Saif Assaedi, doing business as A&A Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which revoked his off-sale general license for appellant selling an alcoholic beverage to a person under the age of 21 years, 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 appellant Saif Assaedi, appearing through his counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

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<sup>1</sup>*The decision of the Department, dated May 14, 1998, is set forth in the appendix.*

## FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 29, 1993. Thereafter, the Department instituted an accusation against appellant charging that appellant had sold an alcoholic beverage to a person under the age of 21 years.

An administrative hearing was held on March 25, 1998, at which time oral and documentary evidence was received.

Subsequent to the hearing, the Department issued its decision which determined that the license should be revoked. Appellant's licensing history shows that there were three prior sales to persons under the age of 21 years, not including the present matter: July 8, 1994,<sup>2</sup> April 13, 1996, and June 1, 1996. The present incident occurred on November 28, 1997.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the Department used an incorrect test of the apparent age of the minor decoy; (2) the decoy program was not conducted in a fashion which promoted fairness; and (3) the Department failed to use the strict application of the statute as required by law.

## DISCUSSION

## I

Appellant contends that the Department used an incorrect finding as to the apparent age of the minor decoy.

California Code of Regulations, title 4, §141, subdivision (a)(1) (Rule 141),

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<sup>2</sup>*Business and Professions Code §25658.1, subdivision (b), states: "the department may revoke a license for a third violation of Section 25658 that occurs within 36 months of the initial violation." Section 25658.1 is not applicable to the 1994 violation as the statute did not become effective until January 1, 1995.*

states in pertinent part:

“(a) A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages ... to apprehend licensees ... who sell alcoholic beverages to minors (persons under the age of 21) ... in a fashion that promotes fairness.”

Rule 141(b) states in pertinent part:

“The following minimum standards shall apply to actions filed ....”

Subparagraph (1) under 141(b) further states: “At the time of the operation, the decoy shall be less than 20 years of age ....”

The decoy was born on March 10, 1980, which would make him 17 years of age at the time of the sale [RT 7].

However, the Administrative Law Judge (ALJ), contrary to the rule,<sup>3</sup> found that the decoy “... whose physical appearance is such that although he did appear older than his age, did not appear to be older than twenty-one years of age.”

(Finding I and V.)

Apparently the ALJ could not find the decoy looked under the age of 21 years as required by the rule, but found that the decoy did not look older than 21 years. This finding is not proper and leaves the decision in such a state of ambiguity and confusion that the decision is contrary to the rule. The recent case of Acapulco Restaurants, Inc. v. Alcoholic beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126] reversed the decisions of the Department and the Appeals Board, ruling that conformity to the terms of the rule must be adhered to strictly.

## II

Appellant contends the decoy program was not conducted in a fashion which

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<sup>3</sup>Rule 141(b)(2), states in pertinent part: “The decoy shall 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;”

promoted fairness. Appellant argues that the decoy's appearance did not promote fairness, the decoy operation was conducted during rush hours, and appellant was distracted during the sale.

The decoy was a male, 6 feet, one and one-half inches in height, weighing 185-190 pounds, and had a mustache. The mustache was shorter at the time of the violation than at the time of the administrative hearing [RT 34-35].

The Department's Decoy Program Guidelines states: "Male decoys should not be large in stature or have a beard or mustache." While the Department has over the years, ignored deviations by police departments' decoy activities from the guidelines, arguing that the guidelines are merely that, guidelines -- apparently with no legal impact -- this decoy operation crossed over the line of a fair test of a willingness to sell to a minor, almost to a "trick" played upon the seller.

While the guidelines in the view of the Department are "suggestions only," they are widely promulgated to police departments and licensees. It seems reasonable to assume that licensees may be less vigilant where a person like the present matter's decoy appears -- essentially lulled, so to speak, into a false sense of security and a lack of alertness, directly because of the guidelines promulgated are official views of the Department, taught and explained to licensees in Department programs.

Additionally, the police owe a duty to so conduct their decoy operations in a reasonable fairness mode, so that sellers are not tricked by decoys who are so close to the line of looking over the age of 21 years, that the test of whether a licensee is lax, or does not care, or sells to whoever is in front of that seller, is fairly tested.

The decoy operation took place at approximately 6 p.m. on Friday night [RT 10, 23, 49]. While officer Joel Thompson estimated there was only one customer in the premises at the time, appellant testified there were nine to ten customers [RT 49, 75].

While the guidelines allude to not using rush hour times, it appears appellant has not sustained his burden to show the time of the decoy was actually a “rush hour” sufficient to make the decoy operation unfair. Additionally, the ALJ made a credibility determination against appellant’s testimony on the subject.

During the time of the sale, appellant testified that he was distracted by two customers who he feared were attempting either a robbery or theft [RT 50].

The alleged possible theft in a premises like this and any other premises, is just a fact of life. Since the sale of alcoholic beverages to minors is specifically prohibited in the State Constitution, it has a high priority and some distractions cannot be used to thwart sanctions against sellers who violate the Constitution and the law by such sales, in the absence of such overwhelming unfairness or a specific finding that the seller was incapacitated to such a degree as to be possibly excused from the illegal sale.

### III

Appellant contends that the Department failed to use the strict application of the statute as required by law.

Appellant argues that penal statutes, such as the statute being considered in the present appeal, should be strictly applied with construction in favor of an accused licensee, and, under that statute, appellant should be given the benefit of “every reasonable doubt, whether it arises out of a question of fact ....” Apparently appellant would have the Appeals Board apply criminal-type safe guards to civil-type administrative hearings.

Administrative hearings are conducted under the rule of “preponderance of the evidence,” a question of being more convinced by a certain line of evidence rather than other evidence. The criminal law is guided in the main by the concept of “convinced beyond a reasonable doubt” standard, a very high standard.

Appellant cites the case of Walsh v. Department of Alcoholic Beverage Control (1963) 59 Cal.2d 757, 764-765 [31 Cal.Rptr. 297, 299, 301]. The Walsh case has little applicability in the present appeal.<sup>4</sup> The issue before the Walsh court was:

“The sole contested issue which was before both the department and the court [superior court] is one of law [footnote citation omitted]: how should Penal Code section 172 (ante, fn. 1) be construed in determining the point from which the one-mile statutory limit around ‘the grounds belonging to the University of California, at Berkeley’ is to be measured?”

But more to the point, the Walsh case applied to a criminal statute, not a rule of the Department. In these proceedings, it is the license that is being civilly sanctioned under the Business and Professions Code. While the seller and the owner of the license are the same person, the present civil proceeding is to control the license and appellant’s authority to do business under that license. That is the gist of the present proceedings.

#### ORDER

Based upon the views expressed in this decision, that the decision as written is contrary to Rule 141 and the decoy operation was not conducted in a fashion to promote fairness, the decision of the Department is reversed.<sup>5</sup>

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<sup>4</sup>*The rule set forth in an appellate decision is based upon the facts in the particular case. The rule from the cited case must be cautiously used within a reasonable context of the factual similarities between that cited case and the matter under present review. (Harris v. Capital Growth Investors N.G. (1991) 52 Cal.3d 1142, 1157 [278 Cal.Rptr. 614].)*

<sup>5</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.*

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