ISSUED JANUARY 7, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GUADALUPE GODOY dba Wally's Liquor 1955 South San Pedro Street Los Angeles, California 90011, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-6992 File: 21-009214 Reg: 97039254 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: December 2, 1998 Sacramento, CA

Guadalupe Godoy, doing business as Wally's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] pursuant to Government Code §11517, subdivision (c), which suspended her off-sale general license for 20 days, with 10 days thereof stayed for a probationary period of one year, for appellant's clerk, Jose Alfredo Gonzalez Ramos, having sold an alcoholic beverage (a 40-ounce bottle of "Olde English 800") to Gerardo Gomez, a minor participating in a decoy operation being conducted by the Los Angeles Police

[1]The decision of the Department, dated November 26, 1997, and the proposed decision dated June 4, 1997, are set forth in the appendix.

Department, such a sale 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 Guadalupe Godoy, appearing through her counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

On March 11, 1997, the Department instituted an accusation against appellant charging that she, through her clerk, violated Business and Professions Code §25658, subdivision (a), by selling beer to a minor. A hearing was held on the accusation on June 3, 1997, at which time Los Angeles police officer Rafaele Echavarria and the minor, Gerardo Gomez, testified concerning the purchase by Gomez of a 40-ounce bottle of "Old English 800." [2]

Following the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, recommending the dismissal of the accusation, finding that there had been no evidence introduced of the contents of the bottle of "Old English 800."

The Department declined to adopt the proposed decision. Instead, in its decision issued pursuant to Government Code §11517, subdivision (c), the Department adopted all but one (the most critical) of the ALJ's findings:

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[2] It was not until the Department's decision entered pursuant to Government Code §11517, subdivision (c) that the "Olde" spelling was used.

I (appellant's prior disciplinary history); II (the filing of the accusation charging the sale of an alcoholic beverage to a minor); III (the purchase by the decoy of the bottle of Olde English 800); and V (that the clerk did not ask the minor his age or for identification). The Department did not adopt finding IV, in which the ALJ had found evidence of the contents of the bottle lacking. Instead, the Department made a new finding, that the minor, pursuant to police instructions to select some type of alcoholic beverage, entered the premises, went to the cooler, selected a bottle of "Olde English 800," the label of which had a specific design and color, and displayed the words "Olde English 800," took the bottle to the counter, purchased it from the clerk, left the store, and handed the bottle, which was cold to the touch and on which its cap remained, to the police officer.

On the basis of its findings, the Department made the determination that there was substantial evidence from the testimony and the minor to establish that the minor purchased an alcoholic beverage. Relying on Government Code §11513, which provides that administrative proceedings are not governed by technical rules of evidence, the Department rejected appellant's arguments based upon the best evidence rule under Evidence Code §1500. Citing Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 [301 P.2d 424], and Wright v. Munro (1956) 144 Cal.App.2d 843 [301 P.2d 997], the Department concluded:

> "The bottle of Olde English 800, whose purchase was established by the testimony, is presumed to contain what it purports to contain ... Licensee offered no evidence to contradict either the testimony of the Department's

witnesses or the presumption that the bottle contained an alcoholic beverage."

Appellant filed a timely notice of appeal, in which she raises two issues: (1) there was a failure of proof that what was purchased was an alcoholic beverage; and (2) the police failed to comply with Rule 141, subdivision (b)(2), in that the minor, who was 6'2" and weighed 250 pounds, did not present the appearance which could generally be expected of a person under the age of 21.

DISCUSSION

I

Appellant contends that the Department failed to prove that the beverage purchased by the decoy was alcoholic. She argues that the Department relied on evidence that was not presented at the administrative hearing, namely, its knowledge and understanding as to what Olde English 800 is.[3]

The Department based its finding and determination that the product was an alcoholic beverage on the testimony of the police officer and the minor, and on the presumption that a bottle contains what it purports to contain. Appellant argues that before the presumption applies, the purported contents of the bottle must be known, and, appellant argues, the record lacks such evidence.

There is no direct testimony that Olde English 800 is an alcoholic beverage. Nor is there any testimony that the label states anything regarding alcoholic

[3] Appellant suggests that the Department's use of the spelling "Olde," rather than "Old" as used in the transcript and in the proposed decision, reflects this enhanced knowledge concerning the nature of the product.

content. The bottle and the label were never introduced into evidence.

Police officer Echavarria testified that he instructed the decoy to select "some type of alcoholic beverage and attempt to purchase it" [RT 8]. The decoy was to "go to the cooler to select the alcoholic beverage" [RT 10]. Echavarria saw the decoy select a 40-ounce bottle of "Old English 800" [RT 11]. He described the label on the bottle as "[t]he certain design, certain color and words "Old English 800" [RT 14].

At this point, appellant's counsel objected on hearsay grounds. The ALJ overruled the objection, stating [RT 15]:

> "It will be overruled because what the label said is not being used, as far as I know, to prove the truth of what the label says. It really doesn't matter what was in the bottle. If the label said Old English 800, that is sufficient for me to make a finding based on case law that what is inside the bottle is what the label says.

Despite this clear recognition of the importance of the label to the outcome of the case, neither a bottle with a label on it, or a label alone, was placed in evidence.

Echavarria testified [RT 19] that he cited Ramos after Gomez identified him as the person who sold him the "alcoholic beverage." It is apparent that Echavarria has assumed (there is no record evidence that he knew) that Old English 800 was an alcoholic beverage because of his further assumption that Gomez had correctly followed his instructions.

The only reference in the decoy's testimony to the possibility that Old English 800 was an alcoholic beverage was his statement that officer Echavarria asked him "who was the clerk that sold me the beer" [RT 31].

It thus becomes apparent that to the extent the decision rests upon the testimony of the police officer and the decoy, it is premised on the unproven assumption that Gomez did as instructed and selected an alcoholic beverage from the cooler.

The Department's brief to the Appeals Board frames the issue as whether the Department must determine the alcoholic content of a labeled alcoholic beverage in order to sustain a finding under Business and Professions Code §25658, subdivision (a). This assumes what the evidence does not establish - that what was involved was a "labeled alcoholic beverage." Indeed, the Department's own finding IV stopped short of making that claim, stating only that "[t]he label on the bottle had a specific design and color and displayed the words "Olde English 800." What else, if anything, is on the label, is unknown.

The Department also suggests in its brief to the Appeals Board [at unnumbered page 4] that Old English 800 is universally known to be an alcoholic beverage, comparing it with Budweiser, and asserting [at unnumbered page 5]: "That Olde English 800 is an alcoholic beverage is a fact of generalized knowledge requiring nothing more than the application of average intelligence."

It may well be true, as the Department argues, that a fact known among persons of reasonable and average intelligence will satisfy the "universally known" requirement. However, what evidence is there to establish the foundational premise - that Old English is known among persons of reasonable and average intelligence to be an alcoholic beverage? We are inclined to agree with appellant

that the Department, in rejecting the proposed decision and adding new findings, is injecting its own knowledge into the record in lieu of evidence taken at the hearing.

If what the Department is saying is that everyone knows or should know that Olde English 800 is an alcoholic beverage, then this Board is compelled to disagree. Assuredly, Budweiser, Miller Lite, and certain other brands of beer which are widely advertised in newspapers, magazines and on national television, may enjoy such fame. Old (or Olde) English 800, at least in the experience of this Board, does not enjoy that degree of notoriety.

The cases on which the Department relies are distinguishable. In those cases, the patrons requested drinks by names which were generally understood to connote alcoholic beverages and were served drinks purportedly responding to what was requested. In the present case, appellant's clerk made no representation or suggestion that the beverage being sold was alcoholic in nature. Consequently, the presumption that the beverage is what it was held out to be has no basis in the testimony. While both the minor and the police officer may have presumed that what the minor had selected was an alcoholic beverage, there is no foundational evidence to show how they knew that purported fact.

This Board does not believe it should conclude that Olde English 800 is an alcoholic beverage simply because the Department believes it is. Yet, that is, in the last analysis, the sole support for the Department's decision.

II

Appellant also contends that the decoy operation was conducted unfairly, by the use of a decoy whose size and stature were such as not to present the appearance reasonably to be expected from a person under the age of 21. The decoy, who was three and one-half months short of his twentieth birthday, was 6'2" tall and weighed 250 pounds at the time of the purchase.[4]

The Department contends that there is no evidence that the decoy looked anything other than his true age, pointing out that since the clerk did not testify, what he may have thought about the decoy is unknown.

In a departure from most of the decisions in cases involving purchases by decoys, the decision is silent with respect to the decoy's appearance. A finding that the decoy presented the appearance of a person under the age of 21 ordinarily satisfies the requirement of Rule 141, in the absence of any facts in the record indicating that such a finding lacks evidentiary support. Here, the absence of such a finding is notable, in light of the height and weight of the decoy in question. There is no photo of the decoy in evidence to assist us, one way or the other.

The Department's point that, without the clerk's testimony, his reaction to the minor's appearance is unknown, ignores the possibility that the decoy's appearance was the reason the clerk did not ask for identification.

It is contrary to the spirit and intent of Rule 141 for the police to confront a store clerk with a decoy who presents the appearance of a person who is 21 or

[4] By his estimate. He estimated his weight at 268 pounds at the time of the hearing.

older. In this case, the clerk could well have concluded that the 6'2", 250 pound, decoy was old enough to purchase an alcoholic beverage. However, the clerk did not testify, so what he thought must be left to speculation.

Taking these considerations into account - the physical size of the decoy, the absence of any photograph of him, and the absence of any finding by the ALJ regarding his appearance - one could reasonably question whether there was compliance with Rule 141. However, we need not question the ALJ's determination on this issue, because the decision must be reversed for the reasons discussed in section I, supra.

ORDER

The Department failed to prove at the hearing that the beverage purchased was an alcoholic beverage covered by the Alcoholic Beverage Control Act. Its decision is reversed.[5]

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

JOHN B. TSU, MEMBER, did not participate in the hearing or decision of this matter.

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[5] 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.