**ISSUED OCTOBER 19, 2000**

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

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| NAVY TANG and HENRY TRAN<br>dba Ralph's Drive In Liquor<br>2128-30 West Century Boulevard<br>Los Angeles, CA 90047,<br>Appellants/Licensees,<br><br>v.<br><br>DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,<br>Respondent. | ) | AB-7454<br><br>File: 21-323701<br>Reg: 99045610<br><br>Administrative Law Judge<br>at the Dept. Hearing:<br>John P. McCarthy<br><br>Date and Place of the<br>Appeals Board Hearing:<br>August 3, 2000<br>Los Angeles, CA |

Navy Tang and Henry Tran, doing business as Ralph's Drive In Liquor (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 Navy Tang and Henry Tran,

[1]The decision of the Department, dated July 15, 1999, is set forth in the appendix.

appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 17, 1996. On February 8, 1999, the Department instituted an accusation against them charging that their agent or employee, Choi Ka Tsui, sold or furnished an alcoholic beverage (beer) to Nefratery Hernandez, a person then 16 years of age. Hernandez was a decoy working with the Los Angeles County Sheriff's Department.

An administrative hearing was held on April 29, 1999, at which time oral and documentary evidence was received. Testimony was presented by Hernandez ("the decoy"); by Tsui ("the clerk"), who made the sale; by Bobby Wyche ("Wyche"), the deputy sheriff who accompanied the decoy; and by Troy Lynn Robinson ("Robinson"), a store patron. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) Rule 141(b)(5) was violated; (2) Departmental Guidelines were violated; and (3) the penalty constitutes an abuse of discretion.

DISCUSSION

I

Appellants contend that Rule 141(b)(5) was violated. This rule requires that, where a violation of Business and Professions Code §25658, subdivision (a), is

predicated upon a sale to a minor decoy, the decoy must, prior to the issuance of any citation, make a face-to-face identification of the seller of the alcoholic beverage.

Finding of Fact III-D of the Department's decision describes the identification which took place after the deputy and the decoy returned to the store after the sale:

> "Shortly afterward, Hernandez and Deputy Wyche reentered respondents' store. The two walked up to where clerk Choi was working. They did not get in a line, if there was one, but walked up and stood next to the person who was being served. Once there, decoy Hernandez told deputy Wyche that Choi is the one who sold her the beer. As she did so, she pointed at Choi with her left hand and Choi was looking in her direction from just across the counter."

Appellants contend the identification process was flawed because the identification was made while the clerk was attending to another customer, and before deputy Wyche had identified himself as a law enforcement officer. Thus, appellant contends, the clerk had no reason to think he was being identified in connection with a sale to a minor, and remained unaware any identification had occurred.

Appellants' factual summary, although accurate, is not complete. Appellants are correct that deputy Wyche did not disclose his identity as a law enforcement officer to Tsui until after the decoy had identified Tsui. However, the suggestion that Tsui was unaware he was being singled out as the seller ignores deputy Wyche's testimony and that of the decoy that Tsui was looking at the decoy when the decoy pointed him out and orally stated to Deputy Wyche that Tsui was the seller.

We do not believe the fact that the identification of the seller occurred before the police officer had identified himself corrupted the identification process. Tsui had to know he was being singled out for some reason. Then, deputy Wyche explained who he was and what Tsui had done. The decoy had, only moments or even seconds earlier, pointed to Tsui and uttered words to the effect "He's the one." Together with the deputy's retrieval of the money used to make the purchase, of which Tsui must have been aware, the combination of circumstances gave Tsui all he could reasonably expect in the way of knowing he had been accused and by whom.

The ALJ was not required to accept Tsui's claim that he was not aware he was being identified.

II

Appellants contend the decoy operation violated Departmental guidelines because it was conducted during rush hour.

Appellants cite the Board's decision in Saif Assaedi (1999) AB-7144, asserting the Board there ruled that it would be unfair for a law enforcement agency to engage in a decoy operation during a true rush hour circumstance.

Assaedi does contain broad language which suggests there may be circumstances when a violation of one of the Department's guidelines may be such as to render a particular decoy operation unfair when measured against Rule 141. We believe, however, that such an instance will be rare, because the guidelines are merely that, and are not written with sufficient precision to warrant their application as if they were rules of law.

The guideline at issue, which discourages the conduct of decoy operations during rush hour, is an example of imprecision. "Rush hour" is a term ordinarily used in connection with freeway traffic, and associated with commuters traveling to and from their workplace and residence. As applied to individual premises, the term has no practical meaning, and is of little use as a guideline.

The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy.

We believes it is asking too much of law enforcement to require it to know in advance the time of day or evening that, for any particular establishment, would fairly be considered "rush hour."

It is conceivable that in a situation which involved an unusual level of patron activity that truly interjected itself into a decoy operation to such an extent that a seller was legitimately distracted or confused, and the law enforcement officials sought to take advantage of such distraction or confusion, relief would be appropriate. This was not such a situation.

There was no showing here that any law enforcement official acted improperly or unfairly in the course of the decoy operation. All the record fairly shows is that the operation took place at a time when a second clerk was away from his register and several customers were at the open register, in line to make purchases. There was no unfairness.

III

The Administrative Law Judge accepted the recommendation of Department counsel that the violation be considered aggravated because, in the ALJ's words, "of the tender age of the minor decoy."

Appellants take issue with the ALJ's comment that appellants, while arguing that the accusation should be dismissed for failure to comply with Rule 141 or the Department guidelines, "failed wholly to address the penalty question." They interpret his comment as a statement that no evidence was offered concerning the penalty, in spite of his having precluded them from offering evidence of the decoy's apparent age (an opinion of a store patron present on the evening in question).

We read the record differently, and interpret the ALJ's comment as no more than a statement that appellants' counsel did not argue the propriety of aggravating the penalty, and not a reference to any failure to offer evidence of the decoy's appearance.

The ALJ observed the 16-year-old decoy while she testified, and concluded, among other things, that "she looked and acted her age. "

It is well settled that the Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].)

We are unwilling to say that it was an abuse of discretion to consider a sale of an alcoholic beverage to a 16-year-old who looked and acted her age an aggravated violation.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2] 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.