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

TONY CHANG dba George's Liquor
700 North Broadway, Los Angeles, CA 90012,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7530

File: 21-303392 Reg: 99045921
Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: October 5, 2000
Los Angeles, CA

ISSUED NOVEMBER 20, 2000

Tony Chang, doing business as George's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 25 days for his clerk selling an alcoholic beverage to a person under the age of 21, 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 Tony Chang, appearing through his counsel, Rick Blake, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 9, 1995. Thereafter, the Department instituted an accusation against appellant charging that, on October 23,

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[1]The decision of the Department, dated October 28, 2000, is set forth in the appendix.

1998, appellant's clerk, Michael Trieu ("the clerk"), sold an alcoholic beverage, beer, to Hiroshi Uehara, who was then 18 years of age. Uehara was working as a decoy for the Los Angeles Police Department (LAPD) at the time.

An administrative hearing was held on September 21, 1999, at which time documentary evidence was received and testimony was presented by Sergio Alvarado, an LAPD officer working with Uehara; Uehara ("the decoy"); and the clerk. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved.

Appellant thereafter filed a timely appeal in which he raises the following issues: (1) the decoy did not display the appearance that could generally be expected of a person under the age of 21 as required by Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)), and (2) the Administrative Law Judge (ALJ) found a violation in this case, not because of the evidence presented, but because of the existence of a prior sale-to-minor violation.

DISCUSSION

I

Appellant contends that use of this decoy violated Rule 141(b)(2) because the decoy looked over 21. He bases his contention on the clerk's testimony that he did not ask for identification because he thought the decoy looked over 21 and because the decoy was able to purchase alcoholic beverages at locations other than appellant's.

The ALJ made a specific finding that this decoy had the appearance which could generally be expected of a person under 21, based on the totality of the evidence. This

is a finding that the Appeals Board is not in a position to second guess, not having had the opportunity that the ALJ did to observe the decoy in person.

The clerk's belief that the decoy looked over 21 was based on his perception of the decoy as big, tall, and muscular [RT 43, 46]. The decoy was about 5' 7½" tall and weighed about 150 pounds at the time of the decoy operation. He was taller than the clerk by about an inch and a half and, judging by the photograph of the two after the sale, he outweighed the clerk by a fair amount. The clerk testified that he considered anyone who was big and strong, at least bigger and taller than he is, to be over 21 [RT 46-47]. His training for selling alcoholic beverages was that he should check the identification of anyone who looked under 21, but if a person looked over 21, he didn't need to [RT 44-45]. Nothing in this testimony indicates that the ALJ erred in disregarding the clerk's assessment of the decoy's age.

Appellant also complains that he was prejudiced in his defense when the ALJ erroneously sustained the Department's objections to the introduction of evidence about how many other locations sold to the decoy that night. The Department objected to introduction of such evidence as hearsay; sustaining this objection was error, appellant argues, because hearsay was "not the proper objection" and because hearsay is admissible in an administrative proceeding if it corroborates other facts that have been elicited. Most importantly, appellant contends, such evidence, while not conclusive, might have helped establish appellant's defense based on the decoy's appearance.

While not specific as to time or number, there was testimony that the decoy had been able to purchase alcoholic beverages at other premises. However, regardless of how many other establishments may have sold to the decoy that night, the ALJ

determined, after observing the decoy on the stand and looking at the photograph taken of him on the night of the sale, that the decoy presented the appearance of a person under 21. Other sales of alcoholic beverages to the decoy do not prove that the decoy looked over 21; they do not even corroborate the clerk's stated belief that the decoy appeared to be over 21, since it is unlikely that very many others would assume, as did the clerk here, that anyone taller and bigger than they were was over 21. We find that appellant has made no showing of any prejudice to his defense from the ALJ sustaining the Department's objection to this evidence.

II

Appellant contends that comments by the ALJ at the end of the hearing make clear that he was "predisposed to his findings and not interested in the evidence presented at the hearing," and that the ALJ "found against the licensee due to the existence of the prior."

The comments referred to, made by the ALJ to appellant, who was present at the hearing, are noted by appellant as beginning on line 28 of page 49 of the hearing transcript and continuing through line 17 on page 50:

> "THE COURT: What troubles me, Mr. Chung, is simply the fact that you already had a prior in '97. If I find this one to be true, that would be the second one. You're familiar with the three-strike law, I take it. ¶ I would have thought that somebody who is interested in keeping their license, and this is part of your livelihood, after the first one would take that as a warning, be very, very careful with their clerks, and set up some kind of a policy to screen sales, to make sure that, you know, as much as humanly possible you avoid sales to minors; because the laws are very, very tough in this area right now. And again, if I find this to be true, this will be the second strike. ¶ I do not know how many lessons you need to learn before you take action to make sure to raise the bar high enough so that your clerks are aware of what's going on and do things that other establishments do." [The ALJ goes on to suggest that appellant take the Department's LEAD training and do something more to protect his license.]

We do not see anything in the ALJ's "lecture" to the appellant that could be construed as the ALJ's "predisposition" to find a violation here simply because appellant had suffered a previous sale-to-minor violation. While the appropriateness of the ALJ's comments may be questioned, he was obviously trying to warn appellant about the dangers inherent in continuing to allow untrained or ill-trained clerks to sell alcoholic beverages and to advise him to take steps to correct the situation while he still could.

The ALJ did, as appellant states, use the prior violation to impose a significant suspension. However, the 25-day suspension is the common penalty imposed in cases of "second strikes," that is, a second sale-to-minor violation within 36 months of a prior one, such as this one. There is absolutely no basis for appellant's contention that the ALJ found a violation in the present case because there had been a violation in the first case. The ALJ found a violation here because appellant conceded that a sale to a minor had occurred and failed to establish a defense to the violation under Rule 141.

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

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[2]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.