

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

AB-7763

File: 21-278833 Reg: 00049236

ELLIS Y. and MYUNG J. CHA dba ABC Liquor
4029 West Chapman Avenue, Orange, CA 92868,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

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

ISSUED DECEMBER 11, 2001

Ellis Y. and Myung J. Cha, doing business as ABC Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for ten days for their clerk, John Borbely, having sold an alcoholic beverage (a six-pack of Budweiser beer) to Amanda Martinez, a nineteen-year-old police decoy, 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 Ellis Y. and Myung J. Cha, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Kim.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated January 11, 2001, is set forth in the appendix.

Appellants' off-sale general license was issued on February 24, 1993.

Thereafter, the Department instituted an accusation charging an unlawful sale of an alcoholic beverage to Amanda Martinez ("the decoy") by John Borbely ("the clerk") on May 10, 2000.

An administrative hearing was held on November 7, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the decoy, the clerk, and Detective David Nichols, a police officer for the City of Orange.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the suspension from which this timely appeal has been taken.

Appellants raise the following issues: (1) there was no compliance with Rule 141(b)(5), in that the face-to-face identification was a sham; (2) there was no compliance with Rule 141(b)(2), because the Administrative Law Judge (ALJ) relied on the register of the decoy's voice even though the decoy did not speak to the clerk.

DISCUSSION

I

Appellants assert that "the purported face-to-face identification of the sales clerk ... was a sham and must not be upheld." They quote the ALJ and Detective Nichols as stating that it was impossible to determine from the photograph of the identification whether the decoy was attempting to identify the clerk or another, female, clerk.

Further, they claim that Nichols' statement that he heard the decoy say "that's him" is refuted by the testimony of the decoy and the clerk that the decoy said nothing when making the identification.

The Department, in response, asserts that all three witnesses testified that the decoy identified the male clerk who sold her the beer.

We have reviewed the record, aided by the references in the Department's brief to the relevant testimony, and are satisfied that the face-to-face identification was in full compliance with Rule 141(b)(5) and with the decision in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126].

The decoy testified that, when asked by Detective Nichols who sold her the beer, she pointed to the male clerk, who was standing on the other side of the counter [RT 20]. Nichols testified that she pointed "with her index finger" to the male clerk [RT 43]. The clerk also testified that the decoy pointed him out and identified him.

We agree with the Department that there was no doubt about who was being identified as the seller. Any possible ambiguity that might be present in the photo which was taken as the identification process took place is eliminated by the testimony of the three witnesses.

II

Appellants contend that "the overwhelming weight of the evidence ... indicates that, both physically and through demeanor, [the decoy] displayed the appearance of an individual over the age of 21." They base their assessment of her demeanor on the

fact that she had been a police cadet for one year (working as a file clerk), had worked on a previous decoy operation, and one other establishment sold an alcoholic beverage to her on the night in question. They contend that the ALJ erred by relying upon the decoy's "high pitched" voice, which gave a "girlish" quality to her appearance, even though the decoy testified that she said nothing to the clerk.

If the decision suggested that the decoy's high-pitched voice was a significant factor in the ALJ's assessment of whether her appearance was that which could generally be expected to be displayed by a person under the age of 21, this case could present a more difficult question than it does.

However, it is obvious from the ALJ's written observations that the decoy's voice played little if any role in his assessment. Instead, the ALJ expressly relied upon the decoy's overall appearance, which included, among other things, her physical appearance, her dress, poise, demeanor, maturity and mannerisms shown at the hearing, as well as her appearance in Exhibits 3 and 4, the photographs taken before the commencement of the decoy operation and that taken as she identified the clerk who sold her the beer.

This Board has said many times that it is not the trier of fact, and is extremely reluctant to substitute its view as to the apparent age of a decoy for that of the ALJ, who saw and heard the decoy while he or she testified. This is simply another case where that is true.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
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.