ISSUED DECEMBER 29, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KYUNG OK CHUN dba Tag's Liquor 3866 Crenshaw Blvd. Los Angeles, CA 90008, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7287 File: 21-193021 Reg: 98043813 Administrative Law Judge at the Dept. Hearing: Jeffrey Fine Date and Place of the Appeals Board Hearing: November 5, 1999 Los Angeles, CA

Kyung Ok Chun, doing business as Tag's Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his off-sale general license for permitting his clerk to sell 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 violations of Business and Professions Codes §§24200, subdivisions (a) and (b), and 25658, subdivision (a).

Appearances on appeal include appellant Kyung Ok Chun, appearing through his counsel, Andreas Birgel, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

[1]The decision of the Department, dated December 3, 1998, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on October 29, 1986. Thereafter, the Department instituted an accusation against appellant charging the above referenced sale to a minor person.

An administrative hearing was held on September 22, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation occurred, and that appellant had incurred two prior violations of the same type, in 1996 and 1997.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) there is no substantial evidence supporting the conclusion that an alcoholic beverage was sold to the minor; (2) the police did not conform to Rule 141 concerning the face to face requirement and that the decoy is to convey the appearance generally of a person under 21 years; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends there is no substantial evidence supporting the conclusion that an alcoholic beverage was sold to the minor.

The Findings of Fact of the Department on the issue of whether an alcoholic beverage was sold, are in pertinent part, as follows: " ...The minor went to the refrigerated case, took a beer from it ... He [the clerk, possibly] bagged the beer ... The beer itself was not offered in evidence at the hearing ... A police officer stated that the decoy purchased a beer, but he, the officer, could not remember the brand ... On direct

evidence, [the decoy] stated he thought he bought a 40-ounce Miller beer ... On cross examination, he stated he typically purchased a Miller beer because it is a common brand and he did not have to linger at the cooler thinking about which beer to buy ... [the decoy] had participated in three or four minor decoy buys earlier that day[2] ... Both [the decoy] and [the police officer] testified that [the decoy] purchased a beer even if they cannot say with absolute certainty which brand was purchased ....” We are called to muse that the phrase “cannot say with absolute certainty” is absolutely uncertain in its breadth and scope.

Vincent Jakawich, the decoy, testified that “I walked in, walked to the refrigerator where the alcohol was kept. I grabbed, I believe it was a 40-ounce Miller. That was standard what I usually grabbed” [RT 27]. On cross examination, the decoy stated the beverage was Miller [RT 38].

Police officer Robin Surendranath, testified that the decoy went to the cooler, obtained “I believe it was a 40-ounce beer from the cooler” [RT 9], and later testified that “It was a 40-ounce beer. I couldn’t tell the brand ....” [RT 16.]

However, in this case, appellant raises the issue against questionable testimony, which is essentially: of “my best memory” type of speculation. The officer destroyed his notes [RT 14-15], so therefore, it is presumed in preparation of the hearing, the officer and decoy reviewed the police report.

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[2]The police officer testified that there were six to eight “visits” that day, calling into question the accuracy of the decoy’s or officer’s recollection of the testimony. However, the record does state the decoy had been out on three different days, and the decoy remembered two or three visits that day [RT 26, 36].

To know whether the beverage was beer, the decoy and the officer must have either seen the bottle and the wording, or just assumed it was beer.

Therefore, the law sets up standards to keep guessing out of the legal process. Where testimony is offered as to what a party read, such comes within Evidence Code Section 1520-1523, which in pertinent part states: "The content of a writing may be proved by an otherwise admissible original." The Rule applies to words or symbols on any tangible thing. (People v. Bizieff (1991) 226 Cal.App.3d 1689 [277 Cal.Rptr. 678].)

At the time of the hearing, the beverage was producible, in that it was in the Southwest evidence room of the police department [RT 16]. There is no excuse for such poor preparation for the administrative hearing. With the absence of the evidence which could determine without conjecture, that the beverage was alcoholic, the decision need to be reversed.

II

Appellant contends the police did not conform to Rule 141 concerning the face to face requirement, and that the decoy is to convey the appearance generally of a person under 21 years.

Face to Face Identification Issue

California Code of Regulations, title 4, §141(b)(5) states:

> "Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages to make a face to face identification of the alleged seller of the alcoholic beverages."

The decoy testified that after the sale, he returned to the store in the company of the officer who had been in the store with him [RT 33]. Contrary to the decoy's

recollection, the police officer testified he did not reenter the store with the decoy [RT 9]. Further, the decoy testified he did not approach the clerk, but pointed the clerk out to the officers who did enter with him [RT 33, 43-44]. While the findings do not make mention of a face to face identification, the findings do state that the decoy entered the premises with "another" officer and pointed out the clerk who sold the beverage.

The findings do not suggest a face to face identification, but only allude to a pointing out of the seller from somewhere within the premises.

The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

A different officer, or officers (who did not testify), took the decoy back into the premises. What makes this scenario open to suspicion, is the decoy's testimony as to what happened after he left the premises: "Then I just waited because the officers went into the store and did their thing. I had to come back in [to the premises] and take a photo, me and the gentleman who sold me the 40–ounce." [RT 32-33.]

Then, later, testifying: "I didn't approach the clerk at all. I let the other detectives do that. I was supposed to sit back" [RT 43]. To a question that the police approached the clerk and accused the clerk as to the sale, and telling the clerk he was to be cited, the decoy affirmed and said: "First they asked me to point out the clerk." [RT 43.]. With such speculative testimony, the decision needs to be reversed.

Appearance of the decoy issue

California Code of Regulations, title 4, §141(b)(2) states:

> "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."

The findings state as follows:

> "He [the decoy] had not shaved since that morning and consequently had a little shadow. [The decoy] looks his age and even if one might think he is older than 19, a prudent seller would ask for identification. In this case, the clerk asked him for his identification."

We point out that this is not the law or conformity to the Rule, resting a purported search for truth upon the question of whether the clerk saw an identification. Such resistence to the rules of the Department further gives the impression that the rush to judgment is the chief concern in this case, and not the process of a free and fair decision making process.

The Administrative Law Judge failed to make a finding that the decoy's appearance conformed to the rule of the Department, but merely pontificated that others may think the decoy older than 19 years, and then added the irrelevant statement that a "prudent seller would ask for identification," mixing fact, conjecture, and defenses.

The record is full of questions and tell-tell signs of questionable adherence to a fair appearance of a person clearly under the age of 21 years. For instance, the decoy shaved that morning of the hearing, yet had an observable "5 o'clock" shadow [RT 44]. To this testimony the decoy stated: "By 5:00 o'clock it [the face] looks like I haven't shaved for about three days [RT 44-45]. We observe that the hearing was scheduled for 9:30 a.m. This would most likely have allowed a two to three hour period, after the decoy shaved that morning, creating in this two to three hour period, a "5 o'clock

shadow" as testified to. Passing to the day of the violation, the decoy testified that he did not shave again before entering the premises [RT 45], testifying that he had not shaved since that morning [RT 44]. With the operation at the premises at 5:40 p.m, and the shift that day between 10 a.m. and 6:30 p.m., the facial stubble according to the decoy [RT 44-45] would most likely be extremely noticeable: "Looks like I haven't shaved for about three days" [RT 8, 14, 44]. The use of this decoy with his appearance as set forth in the record, shows fairness was not the goal in this operation at this premises.

The use of this decoy who according to the record would have a pronounced growth on his face negates any hint of fairness. The decision needs to be reversed.

III

Appellant contends the penalty is excessive. 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].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Based upon the above discussion, discussion of penalty is irrelevant.

ORDER

The decision of the Department is reversed.[3]

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

[3]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.