

ISSUED DECEMBER 18, 1996

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

THRIFTY OIL COMPANY	)	AB-6591
dba Thrifty)	
633 Birmingham	)	File: 20-86603
Encinitas, CA 92007,	)	Reg: 95032828
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
DEPARTMENT OF ALCOHOLIC)	
BEVERAGE CONTROL,	)	Date and Place of the
Respondent.	)	Appeals Board Hearing:
	)	August 7, 1996
	)	Los Angeles, CA
_____)	

Thrifty Oil Company, doing business as Thrifty (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellant's off-sale beer and wine license for 15 days, with ten days stayed for a probationary period of one year, for appellant's 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 Thrifty Oil Company, appearing through

¹The decision of the Department dated October 19, 1995, is set forth in the appendix.

its counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 9, 1980.

Thereafter, the Department instituted an accusation against appellant on May 10, 1995. An administrative hearing was held on August 30, 1995, at which time oral and documentary evidence was received. At that hearing, testimony was received that appellant's clerk sold an alcoholic beverage (beer) to an 18-year-old who was acting as a police decoy at the time.

Subsequent to the hearing, the Department issued its decision which determined that appellant's off-sale beer and wine license should be suspended for 15 days, with 10 days stayed for a probationary period of one year. Appellant thereafter filed a timely notice of appeal.

In its appeal, appellant raises the following issues: (1) Business and Professions Code §24210 allowing the use of the Department's administrative law judge (ALJ) was an unconstitutional deprivation of appellant's due process rights, (2) the police officer did not follow the Department's decoy guidelines, (3) the crucial findings were not supported by substantial evidence, and (4) the penalty was excessive.

DISCUSSION

I

Appellant contends that Business and Professions Code §24210 allowing the use of the Department's "in house" Administrative Law Judge (ALJ) was an

unconstitutional deprivation of appellant's due process rights.

The California Constitution, Article III, §3.5, prohibits a state agency from declaring any statute unconstitutional. We therefore decline to review this contention.

II

Appellant contends that the police failed to follow the Department's guidelines. The Department over time has offered guidelines to police officers in the decoy program. These are mere guidelines and this and any other appellate tribunal must look for due process considerations and not the mere adherence to "suggested practices."

Appellant's citation to the case of Provigo Corporation v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561 [28 Cal.Rptr. 638], concerning the demand for adherence to guidelines to insure fairness to licensees, is not relevant. The Department's prescribed guidelines apparently issued in accordance with the Provigo decision, went into effect as of February 1, 1996, and failure to follow those guidelines may be a defense. However, such is not the case in this matter.

III

Appellant contends that the crucial findings were not supported by substantial evidence, arguing that exhibits 3 and 4 were improperly admitted into evidence, and there was no evidence the cans of purported beer contained alcohol.

Finding VI states that the ALJ did not consider the two exhibits, 3 and 4. A review of the entire record shows that the sale to the minor was shown by substantial evidence. The minor entered the premises, went to the cooler, and obtained a six pack of Bud Light (Budweiser beer) and after payment, took the beer to the police officer [RT

14-16, 41-43]. Exhibit 3 was a photograph of the six pack of Bud Light. Exhibit 4 was the transcript of the criminal proceedings against the selling clerk. Both exhibits, 3 and 4, are irrelevant to the present matter and the ALJ in finding VI stated he did not take these exhibits into consideration. A reading of the whole record supports the ALJ's statement in finding VI.

IV

Appellant contends that the penalty was 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 [34 1 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].)

The Department had the following factors to consider: (1) on March 26, 1992, in a prior matter, appellant's license was suspended due to a sale to a minor with appellant accepting a fine in lieu of a 10-day suspension, (2) the Department's Instructions, Interpretations and Procedures manual at page L227.1 recommends a 15-day suspension for service to a minor (10 days for decoy matters), (3) the Department in the present matter recommended to the ALJ that a fitting penalty would be a 20-day suspension with ten days stayed (considering the prior 1992 violation), and (4) the Department's decision ordered a 15-day suspension with 10 days stayed, essentially a suspension of five days (a penalty less than the prior 1992 matter).

Considering such factors, such dilemma as to the appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

CONCLUSION

The decision of the Department is affirmed.²

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

²This final order is filed as provided by Business and Professions Code §23088, and shall become effective 30 days following the date of this filing of the final order as provided by §23090.7 of said statute for the purposes of any review pursuant to §23090 of said statute.