ISSUED APRIL 28, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION, CYNTHIA & NEIL E. OGATA dba 7-Eleven Store #2173 5288 E. Francis Avenue Chino, California 91710, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6673 File: 20-267067 Reg: 95034515 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: February 5, 1997 Los Angeles, CA

Cynthia and Neil E. Ogata, doing business as 7-Eleven Store #2173 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their off-sale beer and wine license suspended for 15 days, with 5 days of the suspension stayed for a probationary period of one year, for having sold an alcoholic beverage (beer) 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,

[1]The decision of the Department dated May 9, 1996, is set forth in the appendix.

subdivision (a).

Appearances on appeal include appellants Cynthia and Neil E. Ogata, appearing through their counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 14, 1992. Thereafter, the Department instituted an accusation alleging the sale on June 19, 1995, of an alcoholic beverage (beer) to a minor. An administrative hearing was held on March 14, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction involving the sale.

Subsequent to the hearing, the Department issued its decision which determined that appellants' clerk had sold a six-pack of beer to a 19-year-old minor, and that no defense had been established under Business and Professions Code §25660. Appellant thereafter filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) the Department failed to give consideration to the physical appearance of the minor as a factor in mitigation; and (2) the minor became an agent of the police and subject to rule 141 (4 Cal. Code Regs. §141) ("rule 141").

DISCUSSION

I

Appellants contend that the Department failed to give sufficient consideration, as a factor in mitigation, to the fact that the minor who purchased the alcoholic beverage appeared to be an adult.

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].) We interpret appellants' contention as a claim the penalty was excessive, in that, if the mitigation factor had been appropriately considered, the penalty would have been less.

The minor who purchased the beer, Miguel Arellanes, was asked to do so by another 19-year-old, Luke Fullmer, who, at the time, was participating in a sting operation being conducted by the Chino Police Department. Fullmer's assignment was to solicit adults to purchase beer for him, while disclosing to them that he was a minor. Fullmer mistakenly took Arellanes for an adult. At the time of the incident, Arellanes was 6'3", weighed 240 pounds, was wearing a goatee and a uniform shirt with a name tag, and was carrying a clipboard and keys.

Arellanes entered the store, made a purchase of a soft drink for himself and a six-pack of beer for Fullmer, and left the store, where he was then stopped by Chino police who were sitting in a car nearby. While Arellanes was at the counter

making the purchase, appellants' clerk asked him if he was 21. Arellanes said he was. Without asking for further verification, the clerk made the sale.

The Administrative Law Judge (ALJ), who had the opportunity to view Arellanes, found that, despite his size and goatee, Arellanes was a "youthful looking male," and that it would be reasonable to ask him to verify that he was old enough to legally purchase alcohol.

The ALJ stated in paragraph 5 of Finding III that the testimony of appellants and their clerk, the fact that Fullmer thought Arellanes was over 21, and the factors which tended to make Arellanes look older than his actual age, were considered in the imposition of the penalty. Counsel for the Department had recommended a suspension of 25 days with 10 days of the suspension stayed for a one-year period. The ALJ imposed a 15-day suspension, with 5 days stayed, for a net suspension of 10 days.

Appellants question the statement by the ALJ that he took mitigating factors into consideration as "but a hollow attempt," asserting that he did not take such factors into account. Appellant also argues that since the Department ordinarily imposes a lesser penalty in decoy operations, this penalty is further proof that the ALJ merely paid lip service to the mitigation factor.

Appellants offer nothing of substance to support their contention that the ALJ was less than candid about considering the mitigating factors into account.

The fact that the penalty imposed was significantly and materially[2] different from that sought by the Department indicates there is substance to the ALJ's assertion.

Neither appellants' nor the Department's brief mentions appellants' previous disciplined (with a 20-day suspension) for a sale to a minor. The ALJ, however, did refer to it in his proposed decision. Since a subsequent violation usually results in an increased penalty, the fact that the penalty in this instance was less than what was imposed in the earlier case is proof that mitigating factors were, indeed, considered.

II

Appellant contends that Arellanes, when recruited by Fullmer to purchase beer for him, thereby became an agent for the Chino police, subject to rule 141. Appellant next contends that two of rule 141's provisions were violated:

"(2) 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;"

"(4) A decoy shall answer truthfully any questions about his or her age."

Appellant argues that since Arellanes appeared to Fullmer and to appellants' clerk to be over 21, subparagraph (2) of the rule was violated, and that Arellanes's affirmative response to the clerk's question about his being 21 violated subparagraph (4). Therefore, appellant argues, since Arellanes was, in effect, a

[2] The penalty imposed could be the subject of a petition in offer of compromise. The penalty originally sought by the Department would not qualify under Business and Professions Code §23095.

police decoy, failure to comply with the rule is a defense to the accusation.

The Department argues that rule 141 does not apply, since it did not become effective until February 1, 1996, and the incident in question occurred on June 19, 1995. The Department also contends that Arellanes cannot be considered an agent of the police because he never agreed to be one.[3]

Unless rule 141 is interpreted to apply retroactively to proceedings pending at the time it became effective, it would not apply. Witkin states that a procedural statute, to which rule 141 may be compared, will ordinarily be construed as prospective, unless a legislative intent to make it retroactive is clearly established. (7 Witkin, Summary of California Law, Constitutional Law, §495, p. 686.) There is nothing in rule 141 to suggest that it was intended to apply retroactively.

The law in effect at the time the incident occurred is summarized in Provigo v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561, 569 [28 Cal.Rptr.2d 638]:

> "... [T]he rule is clear that 'ruses, stings, and decoys are permissible stratagems in the enforcement of criminal law, and they become invalid only when badgering or importuning takes place to an extent and degree that is likely to induce an otherwise law-abiding person to commit a crime. ... Although the decoys involved in the present cases were apparently somewhat mature and self-assured in appearance and demeanor, it is uncontradicted that no pressure or overbearing conduct occurred that might suggest an entrapment. ...
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> "... The seller may readily protect itself by requiring sales agents to routinely check identification. ... Indeed, requiring such routine checks would

[3] This question need not be resolved in this case. Even assuming the existence of an agency relationship, appellants' argument fails on the merits.

> appear to involve no greater burden on sales personnel than is already assumed when a prospective purchaser offers to pay by check or credit card."

While appellant's clerk testified on direct examination that he thought the minor was 21 [RT 33], he admitted on cross-examination that, before making the sale, he asked: "How old are you?" [RT 34]. The very fact that the clerk saw fit to ask Arellanes if he was 21 belies any element of unfairness. The clerk entertained enough of a suspicion about the purchaser's age to ask the question; his mere acceptance of an affirmative response without asking for verification was an inadequate response to his own suspicions.

CONCLUSION

The decision of the Department is affirmed.[4]

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

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[4] This final order is filed as provided in 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.