

ISSUED MARCH 11, 1997

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

MOKHLES ATHANASIOUS and	)	AB-6690
NAGIBA ATHANASIOUS,)	
dba Paul's Liquor Mart	)	File: 21-222866
4172 Norse Way	)	Reg.: 96034982
Long Beach, CA 90808,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Sonny Lo
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	January 8, 1997
	)	Los Angeles, CA
)	
)	

Mokhles Athanasious and Nagiba Athanasious, doing business as Paul's Liquor Mart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended appellants' off-sale general license for 20 days, with 10 days of the suspension stayed for a probationary period of one year, for having sold alcoholic beverages (a six-pack of 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, subdivision (a).

¹ The decision of the Department, dated June 27, 1996, is set forth in the appendix.

Appearances on appeal include appellants Mokhles Athanasious and Nagiba Athanasious, appearing through their counsel, Joshua Kaplan; and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued in September 1988. Thereafter, the Department instituted an accusation alleging that on August 18, 1995, appellant Mokhles Athanasious sold a six-pack of Budweiser beer to a minor participating in a decoy operation, without asking for identification or proof of age, in violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on June 11, 1995, at which time oral and documentary evidence was received. At that hearing, testimony was presented that established that alcoholic beverages, namely beer, were sold to the 19-year-old female police decoy, and the transaction was witnessed by a Long Beach police officer.

Subsequent to the hearing, the Department issued its decision which determined that appellants had violated Business and Professions Code §25658, subdivision (a), and ordered appellants' license suspended for 20 days, with 10 days of the suspension stayed for a probationary period of one year. Appellants filed a timely notice of appeal.

In their appeal, appellants raise four issues: (1) appellants were entrapped and denied due process because of the failure of the Long Beach Police Department to follow the guidelines issued by the Department of Alcoholic Beverage Control; (2) the decision and the findings are not supported by substantial evidence, in that the

evidence shows that the Long Beach Police Department did not comply with the guidelines issued by the Department; (3) appellants were denied due process and equal protection by reason of the unconstitutionality of Business and Professions Code §24210; and (4) the penalty was excessive.

DISCUSSION

I

Appellants contend that they were victims of entrapment, in that appellant Mikhles Athanasious was duped into making a sale to a mature-appearing minor engaged in a decoy operation not conducted in accord with the Department's guidelines. Athanasious testified that while he ordinarily did not work during the time period when the transaction took place, he was in the store to pick up some snacks, en route to the airport where he and his family were going on a trip [RT 28-30].

"And this was a lady came, this one. And in fact, seems to me she looked at this time about 27 at least. She have her hair up, her shoulder, she have red ... lipstick. And her hair was way up on her shoulder. And I don't know, maybe I rushing because I have to leave fast to catch the plane, maybe her looks, something, I don't know, it's never -- no way I make this mistake."

The test for an entrapment defense is whether the conduct of the public agent was such that a normally law-abiding person would be induced to commit the prohibited act. Official conduct that does no more than offer an opportunity to act unlawfully is permissible. (People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459].) While it may be true that the Department's guidelines were not rigidly followed, there is nothing in the record to suggest that the evils described in Barraza were

present. There is no evidence of "overbearing conduct such as badgering, cajoling, importuning, or other affirmative acts likely to induce a normally law-abiding person to commit the crime." (23 Cal.3d, supra, at 689-690). The decoy testified that she simply placed the beer and the money on the counter, and said nothing. This was not contradicted. Appellant Athanasious's testimony is equally consistent with that of a person who allowed extraneous things - his desire to get to the airport - to interfere with his business judgment.

It is true that the Long Beach police did not adhere to the guidelines in certain respects. However, appellants are not in a position to claim they were prejudiced as a result. The guidelines alleged not to have been followed were:

(a) The appellants claim they were not told that decoy operations were being conducted. This claim, by itself, would seem to be unpersuasive, since appellants have a continual duty to be alert with respect to sales to minors.

(b) The decoy wore makeup, and was not photographed. The decoy admitted that she wore makeup, describing her appearance as the same as when testifying. The ALJ was in a position to see whether she had been so made up as to appear older than 21.

(c) The beverages in question were not retained. However, there was clear testimony from all three witnesses that the product sold was beer.

(d) The "buy money" was not retained. Again, this omission is simply a matter of evidence, and there was no dispute the transaction took place.

(e) The appearance of the decoy was that of someone well under 21. This objection was effectively put to rest in Provigo v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561, 569 [28 Cal.Rptr.2d 638], where the Court approved the use of decoys who were “somewhat mature and self-assured,” but the evidence was uncontradicted that no pressure or overbearing conduct occurred that might suggest entrapment:

“Because the seller cannot avoid liability by relying solely on the appearance of the buyer, it is not unfairly trapped by the use of mature-looking decoys. Such a practice would not arise to the level of ‘overbearing conduct’ needed to constitute entrapment under Barraza. Here, the decoys simply bought beer and wine, without attempting to pressure or encourage the sales in any way.

The same is true here. Although appellants contend in their brief that the decoy intentionally distracted the clerk, there is simply no evidence in the record that supports their contention.

II

Appellants contend that the failure of the Long Beach police to adhere to the guidelines also resulted in a failure of proof. They argue that the failure to preserve the alcoholic beverages which were purchased violates the rule established in People v. Hitch (1974) 12 Cal.3d 641 [117 Cal.Rptr. 9], and that the Department produced no evidence showing the beverage sold to the decoy contained more than ½ of 1% alcohol by volume. However, Hitch has not been held to apply to administrative proceedings such as this, and, in any event, there is no dispute that the product sold was an alcoholic beverage, namely beer. Both police officer Dial [RT 9] and the decoy

[RT 20-21] testified that the decoy bought a six-pack of Budweiser beer, and even appellant Athanasious conceded she purchased beer [RT 37].

III

Appellants contend that they were denied due process of law and equal protection under the law because the administrative hearing was conducted by an administrative law judge appointed by the director of the Department of Alcoholic Beverage Control. They contend that Business and Professions Code §24210, pursuant to which such appointment was made, is unconstitutional.

The Appeals Board is prohibited by the California Constitution, article III, §3.5, from refusing to enforce a statute unless an appellate court has held the statute unconstitutional, or itself declaring a statute unconstitutional. No appellate court has held Business and Professions Code invalid. Consequently, we decline to address this issue.

IV

The Department suspended appellants' license for 20 days, with 10 days of the suspension stayed. Appellants contend the suspension was excessive, essentially because, in their view, it was the end product of an unfair proceeding.

Since it is our view that appellants' other contentions lack merit, it follows that we think this argument is also without merit. Appellants' brief contains much hyperbole, but little substance on this issue.

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].)

The Department had the following factors to consider: (1) The proof of the violation was overwhelming; and (2) this was appellants' second sale-to-minor violation in a relatively short span of time. In early 1994, appellant paid a fine in lieu of a suspension. Considering such factors, the decision 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

² 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.