ISSUED DECEMBER 31, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD-

OF THE STATE OF CALIFORNIA-

THE SOUTHLAND CORPORATION and ABDO B. MOUANNES dba 7-Eleven Store #2011-13615 2850 Thunder Drive Oceanside, California 92056, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6985 File: 20-312358 Reg: 97040317 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: December 2, 1998 Sacramento, CA

The Southland Corporation and Abdo B. Mouannes, doing business as 7-Eleven Store #2011-13615 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Kenneth Tyson, having sold a six-pack of Budweiser beer, in cans, to Linda Isakson, a 19-year-old minor participating in a decoy operation being conducted by the Oceanside Police Department, being contrary to the universal and generic public

[1]The decision of the Department, dated November 13, 1997, is set forth in the appendix.

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 The Southland Corporation and Abdo B. Mouannes, appearing through his counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 12, 1995. Thereafter, the Department instituted an accusation against appellants charging that on October 12, 1996, their clerk, Kenneth J. Tyson, sold an alcoholic beverage, beer, to Linda Isakson, who was then 19 years of age, in violation of Business and Professions Code §24200, subdivisions (a) and (b).

An administrative hearing was held on October 6, 1997. Isakson, the decoy, and Michael Wood, the supervising police officer, testified regarding the circumstances of the transaction. Appellant Mouannes described the training provided to his employees, including Tyson, and testified Tyson was fired as a result of his action.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged in the accusation, and ordered appellants' license suspended for 15 days.

Appellant thereafter filed a timely notice of appeal.

Appellant's counsel has raised the following issues on appellant's behalf:

(1) the decision was improperly based upon evidence which lacked foundation, and is not credible or reliable; (2) the decoy operation did not comply with the provisions of Rule 141(b)(2), regarding the appearance of the decoy; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends that the evidence upon which the decision was based lacks foundation and is neither credible nor reliable, largely, appellant argues, because the City of Oceanside police officers who testified relied on their general custom and practice in some of their testimony, rather than what occurred with respect to the transaction at issue.

Although appellant's brief contains a lengthy discussion of the requirement in administrative proceedings that evidence of the sort upon which responsible persons are accustomed to rely in the conduct of serious affairs, it is seriously deficient in illustrating, other than in a general and unhelpful way, the testimony which is allegedly deficient.

In any event, the testimony of the decoy and the two police officers is amply sufficient to sustain the findings and decision regarding the illegal sale.

The decoy clearly identified the clerk who made the sale [RT 14]:

"Q. When you went back inside, did you identify the clerk that sold you the actual --

A. Yes.

Q. How did you do that?

A. I pointed to him and said 'That was the gentleman who sold it to me."

Officer Wood acknowledged he did not observe the transaction, but he retrieved a six-pack of Budweiser beer from the decoy immediately upon her leaving the store [RT 22]. The decoy had earlier testified that she did not specifically recall the brand of beer she had purchased, but it was a six-pack, and she turned it over to Officer Wood upon leaving the store [RT 14-15].

Officer Poorman not only observed the transaction from a vantage point outside the store, but listened to it by means of a hidden transmitter worn by the decoy. While it is true that his testimony appears to rest, in part, upon his usual practice in decoy operations, it is corroborated by the decoy's express testimony that she made the requisite identification.

There is really no bona fide dispute about the transaction. Appellant's challenge to the evidence lacks merit.

II

Appellant contends that Rule 141(b)(2) was violated. That rule provides:

> "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."

Appellant contends that the Administrative Law Judge's (ALJ's) use of the term "normal" instead of the language of the rule "appearance which could generally be expected" injects a new standard into the rule. We disagree. The ALJ's findings (Finding III-A) and determinations (Determination A) make it clear that he relied

upon evidence presented at the hearing, including his own ability to view the decoy when she testified.

While it is true that the ALJ gave little consideration to appellant's claim that the decoy appeared too old, because the clerk thought she appeared close enough to warrant asking her for identification, it is clear that this was after he had reviewed the evidence of the decoy's appearance as she was testifying and as she appeared on the date in question, and had made his finding based upon that evidence. The fact that the clerk blamed his mistake on confusion as to the age at which tobacco may be purchased, rather than alcohol, also undermines the argument that the decoy appeared "old."

III

Appellant contends that the ALJ improperly relied on conjecture in finding aggravation.

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 15-day suspension is the customary penalty for a first violation, absent factors of aggravation or mitigation.

The decision expressly finds matters that would support mitigation of a

standard penalty (Determination II-B, second paragraph):

> "In slight mitigation is the thorough training program in place and the apparent good intentions of both respondents concerning their responsibilities and the importance of keeping alcohol out of the hands of minors. The proof of education and training programs, however, is their effectiveness. While there is little more a licensee can do than is done by these respondents, they are liable for the unlawful sales made by their clerks."

However, appellant was afforded no leniency in spite of these mitigating factors, because the ALJ also found aggravation. The ALJ's reasoning (Determination II-B, first paragraph) was as follows:

> "While [the clerk] claimed confusion to the detectives on the scene, it is just as likely that he knew what he was doing. In a circumstance where a clerk asks for identification, is shown one making the presenter under the age of 21 and sells an alcoholic beverage anyway, his conduct is most suspect. That behavior will fool any observer into believing that the clerk is properly performing his duties and the only two who know to the contrary are the clerk and the purchaser. Only when the purchaser is a decoy does the plan fail."

This Board is troubled by the view that evidence showing no more than that a clerk asked for identification, was shown identification which showed the purchaser was under 21, but made the sale anyway, demonstrates an aggravating factor.

Our concern is that, with nothing more than supposition, the ALJ has transformed what could simply have been the mistake of a confused or careless clerk into a "plan" to effect an illegal sale. While it is certainly conceivable a clerk could engage in such a subterfuge, we do not think the mere fact that a sale occurred supports an inference that it was part of a "plan" and, consequently, an aggravated violation.

We believe that the combination of an overly cynical assessment of the clerk's mistake and an insufficient acknowledgment of the mitigation efforts displayed by the licensees - "there is little more a licensee can do than is done by these respondents" -worked to deny appellants the benefit of a possible reduction in penalty.

ORDER

The Department's findings and determinations with regard to the commission of a violation are affirmed. The case is remanded to the Department for reconsideration of the penalty in light of our comments herein.[2-]

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

JOHN B. TSU, MEMBER, did not participate in the hearing or decision in this matter.

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[2] 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.