ISSUED MAY 3, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ABU ALI TAYYIB dba The Blue Bird Market 450 South Main Street Los Angeles, California 90013, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7093 File: 20-068164 Reg: 97040451 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: April 1, 1999 Los Angeles, CA

Abu Ali Tayyib, doing business as The Blue Bird Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his off-sale beer and wine license for his clerk having sold a can of Miller Lite beer to a 19-year-old decoy working with the Los Angeles Police Department, this being found 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 March 19, 1998, is set forth in the appendix.

Appearances on appeal include appellant Abu Ali Tayyib, appearing through his counsel, Lawrence M. Adelman, 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 30, 1975. Thereafter, the Department instituted an accusation against appellant charging the sale, by appellant's clerk, of an alcoholic beverage to a minor.

An administrative hearing was held on November 7, 1997 and February 3, 1998, at which time oral and documentary evidence was received. At the November hearing, Dan Hudson, the Los Angeles police officer in charge of the decoy operation, and who witnessed the sale, and Jaime Zaso, the decoy, testified regarding the circumstances of the sale. The hearing was then continued to permit appellant the opportunity to retain counsel and present a defense.[2]

At the February hearing, Mohammed Rahman, the clerk, denied selling to the decoy, claiming that the decoy left the store after being asked for his identification. A few minutes later, according to Rahman, an older man entered, requested one 16-ounce Magnum and one 16-ounce Miller Lite, and paid for each separately.

Appellant also testified, agreeing with Rahman regarding the selling price of the Miller Lite, and describing the store policy of requiring identification from all customers.

Subsequent to the hearing, the Department issued its decision which determined that the transaction had occurred as alleged, and ordered appellant's license revoked. The decision included a specific finding that the clerk's testimony denying the sale was

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[2] *The Administrative Law Judge (ALJ) advised appellant that it was in his interest to retain counsel, inasmuch as this was a "third strike" case, and the Department was seeking to revoke his license.*

not credible.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the finding that the clerk sold beer to the decoy is not supported by substantial evidence; (2) the finding that Rahman was the clerk who sold beer to the decoy is not supported by substantial evidence; (3) the decoy did not display the appearance of a person under 21 years of age, and did not produce identification when asked to do so; (4) the Department improperly denied appellant the opportunity to transfer his license; and (5) appellant was denied his right to be tried before an impartial hearing officer. Since issues 1 and 2 are necessarily related, they will be discussed together.

DISCUSSION

I

Appellant contends that there was no substantial evidence to support the findings that appellant's clerk made a sale to the decoy, or that Rahman was the clerk involved in the transaction. Both of these contentions are frivolous.

Appellant concedes, apparently for purposes of argument, the testimony of both the police officer and the decoy that the decoy requested a beer, gave a $20 bill to the clerk, and was given change. But, he contends, there is neither evidence nor a finding that the clerk "rang up" the sale. Consequently, according to appellant, there is no evidence that a sale actually occurred.

The notion that there can not be, nor has been, a completed sale, even though a price is quoted, money changes hands, the seller surrenders possession of the item in question by delivering it to the buyer, and the buyer then leaves the store with the item, is one that completely escapes us. There is no need to cite any statutory or case law

setting forth the law of sales when we know from our own everyday experience that this is essentially how all retail sales are conducted.

It is not exactly clear what appellant means by his reference to a "ringing up" of a sale. We might speculate that he is referring to the clerk's deposit of the sale proceeds into the cash register, accompanied by a ringing of the bell on the register. If so, we see nothing of legal significance to this insofar as whether there was a completed sale to the minor in this case.

Appellant also contends that there is no substantial evidence to support the finding that Rahman was the clerk who made the sale. Appellant argues that neither the police officer nor the decoy had a clear and unobstructed view of Rahman, because of his location behind a steel mesh screen. Further, appellant argues, since Rahman was not present when the police officer and the decoy testified, and, conversely, they were not present when he testified, there was no "in-court" identification of Rahman as the seller.

Appellant's argument that the police officer never had a clear and unobstructed view of the clerk is refuted by the police officer's testimony [I RT 12] that, after the sale:

> "I went to the individual that I had observed sell the liquor to the minor and identified myself as a police officer, and told him I had observed him sell alcohol to a 19-year-old male."

Then, continued the officer, after the decoy was brought back into the store,

> "[h]e came up to where I was speaking to the defendant, and pointed to him and stated that that was the individual that had sold him the alcohol."

It should be noted that, if this were the only evidence in the record regarding the identity of the clerk who made the sale, we would have to agree with appellant that the Department had not proved Rahman was the clerk in question. Neither the police

officer nor the decoy referred to the clerk by name in their testimony. However, there is other evidence from which it can only be concluded that Rahman was, in fact, the clerk on question.

That other evidence is Rahman's own testimony that he was the clerk arrested on the day in question, that he was shown the minor to whom he allegedly sold the beer, that he claimed to have refused to sell to the minor when the minor did not produce identification, and that the minor was brought back in the store to identify him. Further, Rahman testified [II RT 5] he was the clerk on duty that day; the other employee on duty that day was in the restroom, and did not see what happened [II RT 10]. Rahman also described [II RT 9] how he was handcuffed and taken to the police station, testimony that implicates him as the clerk cited by the police officer in the officer's testimony.

All of this is enough to satisfy the most inquiring mind that Rahman, and no one else, was the clerk who made the sale in question. Therefore, the absence of any in-court identification is immaterial.

II

Appellant contends that there was no compliance with Rule 141(b)(2), in that the decoy did not present the appearance which could be generally expected of a person under 21 years of age.

Rule 141(b)(2) is one of the minimum standards governing decoy operations. It requires that 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."

Focusing upon the minor decoy's description of his appearance on the day of the incident, appellant argues:

> "A 170 pound male, 5'6" tall, wearing a long-sleeve shirt, blue jeans and brown boots, does not have the appearance of which would generally be expected of a person under 21 years of age. His girth alone, would not place him within the category of someone that would generally be under 21 years of age. Further, the fact that he was wearing boots at the time of the sale indicates that his height would have appeared to be taller than 5"6" when he was present in the Market. Far from being a mere teenager, Decoy Zaso was only 5 months away from his 20th birthday. Clearly his use as a decoy was unreasonable under the circumstances. Since Rule 141 requires that the decoy be under the age of 20 years, Decoy Zaso was 'pushing the envelope' of age."

Once again, the record refutes appellant's argument that the decoy's appearance was not in compliance with Rule 141(b)(2).

Rahman, the clerk, was asked about the decoy's appearance when he testified at the hearing [II RT 9]:

Q. How old did he look to you? How old did you think he was?

A. That guy?

Q. Yeah, the minor.

A. He looks like 19 or 20 like that."

Appellant's testimony that it was store policy for his clerk to ask for identification from all customers, regardless of their apparent age, may be commendable, but does not help appellant in this case.

The clerk, by his own testimony, demonstrated his belief that the minor presented the appearance of a person under the age of 21. That, as much as anything might, shows that it was not unfair to use Zaso as a decoy.

Thus, appellant's attempt to depict Zaso as older, based upon the way he was dressed, must fail.

III

Appellant contends the Department acted improperly when it ordered an outright revocation of appellant's license, rather than stay its order and permit appellant to sell the license.

Appellant argues that the Department lacked good cause to revoke outright, and that the public welfare is no less protected by permitting appellant the opportunity to transfer.

The Appeals Board, on countless occasions, has acknowledged the discretion vested in the Department with respect to penalty:

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].) The Board will, however, review the issue of penalty when raised by an appellant. Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].) In doing so, the Board is always mindful that the issue is one of discretion, and unless the record demonstrates an abuse of discretion, the order of the Department will stand.

This was a "third strike"[3] case. Under Business and Professions Code §25658.1, the Department has been granted the authority to revoke a license where there are three sales to minors within a 36-month period. This was such a case. In fact, appellant had an additional sale to minor violation in 1993. Although this last violation was not relevant with respect to the Department's power under §25658.1,it is one the

[3] *The Appeals Board has observed that Business and Professions Code §25658.1 is commonly referred to in briefs and arguments to the Board as "the three strikes law."*

Department could have considered in determining whether revocation was an appropriate sanction.

The Department is not obligated to stay a revocation otherwise appropriate simply to give a licensee an opportunity to sell his license or his business to another. The Legislature made it clear in §25658.1 that the Department was to have the discretion to revoke a license after three violations in a 36-month time period. Appellant is correct that the statute did not make revocation mandatory, but incorrect in his belief that the Department must show more than the requisite three violations in a 36-month span. Proof of the three violations provides the Department with the good cause appellant claims is absent.

IV

Appellants appearing before the Board have routinely challenged the Department's employment of the administrative law judges, pursuant to the authorization given the Department in Business and Professions Code §24210, by questioning the constitutionality of §24210. In such cases, the Board has routinely stated that, since article 3, §3.5 of the California Constitution denies an administrative agency the power to declare an act of the Legislature unconstitutional, it must decline to consider the issue.

In this case, appellant has obliquely raised the issue of the constitutionality of §24210. He relies on a recent decision of the Fourth District Court of Appeal in Haas v. County of San Bernardino (1999) 1999 Daily Journal D.A.R. 1242, in which the court set aside the county's revocation of Haas's massage license on the grounds the county's unilateral selection, retention and payment of the hearing officer violated

Haas's due process rights to a fair hearing conducted by an impartial hearing officer. Appellant argues that this case compels reversal because the administrative law judge was employed by the Department

Appellant's argument is an indirect attack on Business and Professions Code §24210, since that statute is the basis for the Department's employment of its administrative law judges. If there is a violation of due process resulting from such appointment, it would follow, under appellant's theory of the law, that §24210 is unconstitutional.

But, as explained above, the California Constitution expressly denied an agency such as the Appeals Board the power to declare an act of the Legislature unconstitutional. Consequently, without an expression on the merits of appellant's argument, the Board must decline to consider the issue.[4]

ORDER

The decision of the Department is affirmed.[5]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL

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[4] It is worth noting that the court carefully limited its ruling to the facts of the case before it, in which, among other things, the hearing officer was unilaterally selected, retained and paid by the county, and the attorney who retained the hearing officer also participated in the hearing.

[5] 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.