

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

LUCKY STORES, INC. DELAWARE	)	AB-7314
dba Lucky Store #044)	
272 East Santa Clara Street	)	File: 21-51598
San Jose, CA 95113,	)	Reg: 98044213
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Jeevan S. Ahuja
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	November 18, 1999
	)	San Francisco, CA

Lucky Stores, Inc. Delaware, doing business as Lucky Store #044
(appellant), appeals from a decision of the Department of Alcoholic Beverage
Control¹ which suspended its license for 5 days for appellant's employee 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,

¹The decision of the Department, dated December 10, 1998, is set forth in
the appendix.

article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Lucky Stores, Inc. Delaware, appearing through its counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Murphy.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 16, 1991. Thereafter, the Department instituted an accusation against appellant charging that, on May 28, 1998, appellant's clerk, Rudolph Terrones ("the clerk"), sold a six-pack of Budweiser beer to Michele Chavez ("the decoy"), a 19-year-old decoy working with the San Jose Police Department.

An administrative hearing was held on October 16, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction in issue.

Subsequent to the hearing, the Department issued its decision which determined that the violation alleged had occurred.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the fairness requirement of Rule 141 (4 Cal.Code Regs. §141) was violated; (2) the Department failed to prove that the decoy made a face-to-face identification of the seller as required by Rule 141(b)(5); (3) the clerk relied upon a bona fide ID in making the sale and therefore the defense under Business and Professions Code §25660 was established; and (4) §25658,

subdivision (e), does not permit a decoy to make an indirect purchase from the clerk.

DISCUSSION

In response to appellant's five contentions, the Department filed a brief which states in its entirety:

After reviewing the record in this matter and in light of the court of Appeal's decision in the case of *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board*,¹ the Department does not contest or oppose the appeal filed by Lucky Stores, Inc. in this matter.

¹ 67 Cal.App. 4th 575, 79 Cal.Rptr. 2d 126 (1998).

With regard to the face-to-face identification by the decoy (the "Acapulco issue"), she only went to the door and pointed to the clerk. It appears that she did not even go inside, and that she may have been quite a distance away when she pointed him out. The face-to-face identification does not appear to have been made, and the Department concedes this.

Even without the "Acapulco issue," the unusual situation in this decoy operation gives credence to appellant's argument that this decoy transaction was unfair. The clerk in this case asked for the decoy's ID, and she said she had none. The clerk then said he could not sell the six-pack of Budweiser to her. A stranger, Alejandro Solano, who had been in front of the decoy in line and had been flirting with her, said he would buy it for her. She gave him \$10, although the clerk said he did not see her do that. The clerk, thinking the decoy and Solano were boyfriend and girlfriend, carded Solano, whose ID said he was 26, and sold him the beer. The decoy and Solano left the store together.

The ALJ rejected appellant's arguments regarding reliance on Solano's bona fide ID, the failure of the statute to authorize the use of decoys for a transaction like this, and the unfairness of the situation as reasons for dismissal of the accusation. Instead, he used the "uncertainties" of the situation to mitigate the penalty. The Department has apparently reconsidered the appropriateness of mere mitigation in this matter, and now does not contest the requested reversal. We are in full accord with the Department's position.

ORDER

The decision of the Department is reversed.²

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.