ISSUED APRIL 18, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ZEROM TESFAYOHANES dba El Zorro Market and Liquor 4225-31 S. Main Street Los Angeles, CA 90037, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7321 File: 21-267143 Reg: 98042643 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: January 20, 2000 Los Angeles, CA

Zerom Tesfayohanes, doing business as El Zorro Market & Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for his 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, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

[1]The decision of the Department, dated December 17, 1998, is set forth in the appendix.

Appearances on appeal include appellant Zerom Tesfayohanes, appearing through his 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 on March 6, 1992. Thereafter, the Department instituted an accusation against appellant charging that, on September 19, 1997, appellant's clerk, Raul Maurillo Gandora ("the clerk") sold a bottle of Budweiser beer to Luis Tapia ("the decoy"), who was then 19 years of age and working as a decoy for the Los Angeles Police Department (LAPD).

An administrative hearing was held on October 14, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the sale by LAPD officers Jesse Zuniga and Joel Estrada; the decoy; the clerk; Alvaro Carrasco, another of appellant's clerks working at the time of the sale; and Zerom Tesfayohanes, the appellant.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as charged, that no defenses had been established, and that this was the third such violation at appellant's premises within a 36-month period.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) the decision is not supported by the findings, and the findings are not supported by substantial evidence in the record; (2) the Department is estopped from imposing a penalty; (3) Business and Professions Code §24210 is unconstitutional; and (4) the penalty is excessive.

DISCUSSION

I

Appellant contends that the decision is not supported by its findings and its findings are not supported by substantial evidence in this record, because the Department violated Rule 141 and its decoy guidelines, resulting in evidentiary deficiencies, entrapment, and the due process violation of outrageous police conduct.

Appellant alleges that the decoy guidelines were violated[2] in that no evidence was presented of a notice given to licensees before the decoy operation began or of maintenance of a photograph of the decoy; the operation was during rush hour; the "buy" money was not produced; the beverage purchased was not produced or analyzed; and the decoy did not have the appearance of someone under the age of 21.

The California Supreme Court, in Provigo Corp. v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561 [28 Cal.Rptr.2d 638], held that the Department's decoy guidelines are suggestions for police departments to follow, and failure to follow them does not provide a defense to a charge of sale to a minor. Any failure on the part of the LAPD to follow the Department guidelines in the present case, therefore, did not constitute outrageous police conduct or entrapment.

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[2] Appellant consistently refers to violations by the Department; it should be noted, however, that it was the LAPD and its officers which conducted the decoy operation.

Failure to retain evidence may, in certain instances, result in the exclusion of reference to that evidence. (People v. Hitch (1974) 12 Cal.3d 641 [117 Cal.Rptr. 9]; see also People v. Nation (1980) 26 Cal.3d 169 [161 Cal.Rptr. 299].) However, the cases cited are criminal proceedings, and the rationale of those cases has never been held applicable to administrative hearings. (See Government Code §11513, subdivision (c); Woodland Hills Onion AB-4791 (June 26, 1981).)

Both the decoy and officer Zuniga testified that the decoy purchased a bottle labeled as Budweiser beer. Even though there was no analysis of the beverage in the bottle, there was no evidence that the beverage was other than beer, and it is presumed that a container labeled "beer" contains beer. Appellant's contention there was no evidence the beverage was beer is erroneous; on the contrary, there was no evidence the beverage was not beer.

As to appellant's contentions that Rule 141(b)(2) (the decoy to display the appearance of a person under 21) and (b)(5) (the decoy to make a face-to-face identification of the seller) were violated, he has provided no argument nor pointed to any specific evidence that would indicate that such violations occurred.

Appellant's contentions regarding alleged violations of the Department's decoy guidelines and Rule 141 are rejected.

II

Appellant contends the Department must be estopped to revoke this license because of appellant's good faith belief that his signing of a stipulation and waiver with regard to a prior sale-to-minor violation (Reg. # 97040688) on March 5, 1998, had completely and finally resolved all Department disciplinary matters pending

against him, including the charge in the instant accusation, which had been issued but not received by appellant on March 5, 1998.

The ALJ specifically addressed this issue in his proposed decision. Finding VI.B. states:

> "As the Department's counsel noted, there is nothing in the March 5 Stipulation and Waiver that indicates that the present case would also be included. Also, a penalty of a 25-day suspension of [appellant's] license for a 'second strike' violation and a 'third strike' violation of Business and Professions Code Section 25658(a) would be unbelievably lenient. Furthermore, there is no evidence to suggest, much less show, that the Department did anything to lead [appellant] to conclude that he was settling both cases. In other words, if [appellant] came to such a conclusion, he did so due to mistake of his making. And, there is no reason that [appellant] should be able to take advantage of his own mistake."

We agree with the ALJ's conclusion on this issue. In addition, we note that appellant did not object to having to defend against this accusation, which presumably he would have done if it had been, or he believed it had been, already settled.

III

Appellant contends that, because Business and Professions Code §24210 allows the Department to employ its own administrative law judges to hear cases in which the Department has issued the accusation, conducted the investigation, and prosecuted the case, the statute unconstitutionally denies a licensee due process and equal protection.

This Board is prohibited by article 3, §3.5, of the California Constitution from declaring a statue unconstitutional or unenforceable because of unconstitutionality unless an appellate court has held the statute unconstitutional or unenforceable.

We know of no court which has held this statute unconstitutional, and we decline to consider this question.

IV

Appellant contends the penalty of revocation, or any suspension at all, is unfair, unreasonable, and cruel and unusual punishment in light of the official misconduct in this case and the evidence of appellant's substantial efforts to preclude such violations.

Since we have found no official misconduct, this contention fails automatically. This was the third violation for sales to minors within nine months. There is nothing cruel, unusual, or excessive about the penalty in this matter.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]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.