ISSUED NOVEMBER 21, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

MARTIN D. TOM dba Food 24 Hour Convenience Market 500 Clement Street San Francisco, CA 94118, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7572 File: 21-223426 Reg: 99045981 Administrative Law Judge at the Dept. Hearing: Robert R. Coffman Date and Place of the Appeals Board Hearing: September 21, 2000 San Francisco, CA

Martin D. Tom, doing business as Food 24 Hour Convenience Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his off-sale general license for 25 days for his clerk selling an alcoholic beverage to a person under the age of 21 years, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and Business and Professions Code §24200, subdivisions (a) and (b), arising from a violation of Business and Professions Code

[1]The decision of the Department, dated January 6, 2000, is set forth in the appendix.

§25658, subdivision (a).

Appearances on appeal include appellant Martin D. Tom, appearing through his counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on October 17, 1988. Thereafter, the Department instituted an accusation against appellant charging that a sale of an alcoholic beverage had been made to a person under the age of 21 years (minor). An administrative hearing was held on September 3 and November 17, 1999, at which time oral and documentary evidence was received.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred. Appellant thereafter filed a timely notice of appeal.

In his appeal, appellant raises the following issues: (1) the Department did not meet its burden concerning its Rule 141(b)(5), concerning a face to face identification of the seller; (2) the evidence offered as to a prior violation is based on inadmissible hearsay evidence; and (3) the penalty is excessive.

DISCUSSION

I

Appellant contends the Department did not meet its burden concerning its Rule 141(b)(5),[2] concerning a face to face identification of the seller. The Rule

[2]4 California Code of Regulations §141(b)(5).

states in pertinent part:

> "... the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages to make a face to face identification of the alleged seller of the alcoholic beverages."

The Appeals Board in Chun (1999) AB-7287, stated:

> "The phrase 'face to face' means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller."

The ALJ in his findings stated:

> "The decoy testified he identified the clerk. The police officer who testified in this matter was present at the time of the identification. She observed the face to face identification ...."

Lynda Zmak, San Francisco police officer, testified that a face to face identification of the seller was made [RT 6, 11, 13, 82].

Counsel for appellant and the Administrative Law Judge (ALJ), in viewing the premises' surveillance video, made many observations as to what was progressing on the video [RT 47-53, 76-82].

The tape is not very helpful in assessing whether there was a face to face identification made. The comments of the ALJ attest to the problem of seeing a video from an angle which is not necessarily helpful, especially without sound. The ALJ made a determination that the face to face was properly made, from the testimony of the police officer and his own view of the tape. We concur.

II

Appellant contends the evidence offered as to a prior violation is based on

inadmissible hearsay evidence. Exhibit 7 consists of seven documents (1) a cover letter by Department counsel; (2) an accusation; (3) a stipulation and waiver form signed by appellant; (4) a decision by the Department; (5) an order allowing for the payment of a fine; (6) a police report concerning the sale; and (7) a certification dated and signed by the legal analyst for the Department.

The exhibit does not have the same defects as raised in the cases of Loresco (2000) AB-7310, and Kim (1999) AB-7103, the defects being the inability to know the documents belong to the individual case.

Exhibit 7 appears to us to come within the terms of Evidence Code §1530 as an official writing, properly attested to as demanded by Evidence Code §1531, and raises the presumption as found in Evidence Code §1453. Evidence Code §1271 does not appear to be applicable.

Government Code §11513, subdivision (c), states that technical rules do not necessarily apply, if reasonable persons would normally rely on such evidence. We determine that Exhibit 7 is such reasonable evidence, supported by the admission of appellant that he suffered a prior violation [RT 64-67, 71-72].

Appellant argues that the Department must show compliance to Rule 141 in the prior cases which are then final. This would demand the Department re-litigate every prior case, causing a near-complete breakdown of the administrative process, needlessly, as in these cases, it is by a stipulation and waiver which the appellant had signed, making the argument of appellant in this case, one of doubtful plausibility. Appellant has not cited any law which would demand such, and we

know of none to support appellant's cause.

III

Appellant contends that the penalty is excessive. 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].)

Appellant's contention was based upon his belief that the Board would reverse the matter concerning the prior violations. Such is not the case. The penalty appears reasonable.

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.