ISSUED AUGUST 26, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

C.W. BROWER, INC. dba Stop N Save 3460 Oakdale Road Modesto, CA 95355, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6731 File: 21-57388 Reg: 96034957 Administrative Law Judge at the Dept. Hearing: Michael B. Dorais Date and Place of the Appeals Board Hearing: June 4, 1997 Sacramento, CA

C.W. Brower, Inc., doing business as Stop N Save (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which ordered appellant's off-sale general license suspended for ten days for appellant's clerk having sold an alcoholic beverage (a six-pack of beer) to a 17-year-old female minor decoy, 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 September 5, 1996, is set forth in the appendix.

Appearances on appeal include appellant C.W. Brower, Inc., appearing through its counsel, Alexander M. Wolfe; and the Department of Alcoholic Beverage Control, appearing through its counsel, John R. Peirce.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 14, 1977. Thereafter, the Department instituted an accusation on January 16, 1996, alleging that on October 20, 1995, appellant's clerk, Cang Nguyen, sold an alcoholic beverage (a six-pack of Budweiser Light beer) to Katina Martin, a 17-year-old minor participating in a decoy operation being conducted by the Modesto Police Department.

An administrative hearing was held on May 9, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the circumstances of the transaction. Following the conclusion of the hearing, the Administrative Law Judge (ALJ) submitted his proposed decision in which he found that the clerk had made the sale in question without requesting identification from the minor, and in which he rejected appellant's contentions that the Modesto Police Department had engaged in selective and discriminatory enforcement, had failed to comply with Departmental guidelines, and had failed to comply with the visitation goals stated in its grant application for decoy funding. The Department adopted the proposed decision, including the recommended ten-day suspension.

Appellant's petition for reconsideration was denied, and appellant thereafter filed its timely notice of appeal. In its appeal, appellant raises the following issues: (1) the

accusation should be dismissed because the Modesto police did not comply with the Department's 1994 Decoy Program Guidelines (Exhibit R); and (2) the Modesto police engaged in a program of selective and discriminatory enforcement in conducting the decoy program.

DISCUSSION

I

Appellant contends that the Modesto Police Department failed to follow the Department's Guidelines as set forth in a 1994 pamphlet [Exhibit R], and as a result, the accusation should be dismissed. Appellant asserts that the dismissal is warranted because Jay Stroh, Director of the Department, is quoted in the April 1995 issue of the Beverage Industry News [Exhibit I] as stating the Department's intention not to take action against any licensee where the guidelines are not followed.

Appellant contends that the guidelines were not followed in two respects: not all on-sale and off-sale premises were called upon by the decoy operation,[2] and the purchase in question was made during the rush hour. The ALJ determined that the evidence failed to show any prejudice to appellant from the failure of the Modesto police to visit all Modesto licensees, and that any deviation from the Department

[2] Appellant also argued in the administrative hearing that the accusation should be dismissed because the Modesto police had not complied fully with the program objectives set forth in the City's grant application for minor decoy funds. Appellant has not raised this contention in its present appeal.

guidelines was not a significant factor in the sale in question.[3] The ALJ further concluded that Rule 141, (Title 4, Cal. Code Regs., §141) did not apply retroactively, but that even if it did, it was not violated in this case (Determination of Issues V). He correctly noted that prior to the adoption of rule 141 (the rule became operative February 1, 1996) the only binding guidance offered to law enforcement agencies was that set forth in Provigo v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561 [28 Cal.Rptr. 638], which held that a seller was not entrapped by the use of mature-looking minor decoys, since he or she could always ask for identification and thereby protect themselves. The informal Departmental guidelines promulgated prior to the advent of rule 141 were, as the name indicates, simply guidelines. The ALJ also cited, in Determination of Issues IV, that portion of Business and Professions Code §25658 which provides that law enforcement minor decoy programs in effect before the effective date of the prospective regulation shall be authorized if the minor decoy displays to the seller of alcoholic beverages the appearance of a person under the age of 21. In this case the 17-year-old decoy was found to present such an appearance. (Finding of Fact III-1.)

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[3] The ALJ's proposed decision (Determination of Issues V, second paragraph) refers to "either" sale. We think this is simply a slip of the pen, since only one sale was in issue.

Appellant also contends that the accusation must be dismissed because of a statement attributed to its Director that where the guidelines were not followed, the Department would not take action. Appellant relies on Exhibit I, an article from a trade journal in which the Director is quoted to that effect. In effect, appellant is contending that the Department is estopped from proceeding against it even though the fact the violation occurred is undisputed.

Ordinarily, four elements must be present in order to apply the doctrine of equitable estoppel: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct be acted upon, or so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. (City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 489 [91 Cal.Rptr. 23]; Driscoll v. City of Los Angeles (1967) 67 Cal.2d 297, 305 [61 Cal.Rptr. 661, 666].)

The law is clear that a governmental entity (here, of course, the Department of Alcoholic Beverage Control) can be subject to the law of estoppel.

> " It is settled that '[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it.' ... Correlative to this general rule, however, is the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy adopted for the benefit of the public. ... " (Citations omitted).

(City of Long Beach v. Mansell, supra, 3 Cal.3d at 493; see also Driscoll v. City of Los Angeles, supra, 67 Cal.2d at 305.) As stated in Chaplis v. City of Monterey (1979) 97

Cal.App.3d 249, 259, "estoppels against the government are rare and to be invoked only in extraordinary circumstances."

The issue, then, is whether on the facts of this record appellant has demonstrated that this is one of those rare cases.

The record is silent as to the background of the article in which Mr. Stroh is quoted, and we have no way of knowing whether the quote is accurate, complete or in context. For purposes of discussion, however, we have assumed that it is. However, we think that any reasonable interpretation of Mr. Stroh's remark, as attributed to him, would be that only a licensee prejudiced by a deviation from the guidelines would escape discipline, and that no general amnesty would flow from a flawed decoy operation which did not prejudice the licensee.

Randy Anderson, operations manager of appellant, testified that he "uncovered" the article, and, and in an effort to head off the accusation, confronted John Patterson, the District Administrator of the Department, with it, but Patterson avoided commenting on the article other than with the cryptic remark "this is as close as you are going to get" [RT 86-88]. There is nothing in the record to suggest that any other employee of appellant was aware of the existence of the article, and obviously there is no contention that any employee relied on the article at the time the sale was made to the minor. This, in itself, is enough to justify a rejection of the estoppel claim.

The cases cited above make it clear that an extraordinary showing must be made if the consequence of the estoppel would be to nullify an important government

program. The discouragement and prevention of the sale of alcoholic beverages to minors is one of the paramount features of California's alcoholic beverage control program, and the minor decoy program is a fundamental part thereof.

It is impossible to find any prejudice flowing from a rejection of the estoppel claim. Appellant's clerk clearly did not rely on Mr. Stroh's comment. To hold, on the facts presented here, that the Department should be barred from pursuing a sale to a minor would permit a highly technical argument, void of any equitable content, to thwart an important and essential method of law enforcement.

All of the above discussion is premised on the assumption that the transaction was affected by a deviation from the guidelines. First, although the transaction took place shortly after 5:00 p.m., a time which may very well represent "rush hour" on an urban freeway, it is not at all clear whether that was rush hour at appellant's store. The ALJ made no findings on this issue, but our own examination of the surveillance camera photographs indicates an absence of any crowd problem when the transaction took place. At the hearing before this Board, counsel stated there were gasoline pumps outside the premises, but there was no evidence at the administrative hearing that the attention of store personnel was diverted to serving fuel customers.

Second, we have great difficulty finding any connection between the failure of the Modesto police to call on all licensees in the city and the fact that appellant's clerk made the sale which led to the accusation. Appellant complains that there were more visits to its stores than to stores of the larger grocery and drug chains. Our review of

the record indicates that while the frequency of visits may very well have been skewed toward the smaller, convenience-type stores, we cannot reject the testimony of the police officers, consistent with such testimony in many of the other cases which have come to this Board involving purchases of alcoholic beverages by minors, that such stores are more frequently targeted by those minors, and, therefore, may warrant greater scrutiny. As a practical matter, it would be virtually impossible for police in most cities to include every licensed establishment in a decoy program, unless they did so over an extremely prolonged period of time. It is understandable that their energies were focused on the areas most deserving of attention.

II

Appellant claims it is the victim of selective and discriminatory prosecution. It bases its claim on the contention that the Modesto police focused the minor decoy operation against small business licensees, licensees who were owned by or employed members of minority groups, and against appellant itself, whose six stores, it contends, were visited a total of 14 times during 1995, resulting in the single violation charged. Appellant points out, in contrast, the fact that there were few or no visits to larger, chain stores.

Our earlier remarks are equally applicable here. Officer Broumas denied targeting the smaller convenience markets or stores employing foreign-born people [RT 43-44,50, 61], and explained that some stores were visited more than once because they had been the object of anonymous complaints. She acknowledged that most of the

violations occurred at the small, convenience-type stores. As she explained in response to questions from the ALJ: "... I just drove around town and randomly picked liquor stores, or I'd get anonymous tips. A lot of the detectives have teenage children, and they'd hear through the rumor mill." [RT 59].

Appellant relies on a list of the licensees visited by Modesto police. But, as the ALJ concluded, in the course of finding an absence of discriminatory enforcement, the list demonstrates that "many licensees with premises and businesses similar in size and scope to [appellant], as well as larger enterprises, were visited as part of the Modesto decoy program." (See Finding of Fact III-4.)

Appellant argues that Balayut v. Superior Court (1996) 12 Cal.4th 826 [50 Cal.Rptr.2d 101], is controlling.

Balayut involved the question whether a defendant claiming discriminatory prosecution must show that the police or the prosecutor targeted the group of which the defendant is a member for arrest or prosecution with a specific intent to punish those defendants for membership in that group. The defendants in Balayut were charged with violations of Penal Code §647, subdivision (a) (engaging in lewd and dissolute conduct), and sought dismissal of the charges on the ground the Mountain View police were engaged in a pattern of discriminatory arrest and prosecution of homosexuals, thereby denying them equal protection of the law. The Court held that it was unnecessary for the defendants to show a specific intent to punish the defendant for membership in a particular class.

The police conduct in Balayut, the trial court found, was part of a decoy operation focused solely on persons who had a proclivity to engage in homosexual conduct. Other than the fact that the case involved a decoy program, there is no similarity between the facts in that case and those involved in the case before the Board.

In explaining what constituted discriminatory prosecution, the Court also explained what is not:

> "Unequal treatment which results simply from laxity of enforcement or which reflects a non-arbitrary basis for selective enforcement of a statute does not deny equal protection and is not constitutionally prohibited discriminatory enforcement. ...
>
> In Murgia[4] this court explained the showing necessary to establish discriminatory prosecution: '[I]n order to establish a claim of discriminatory enforcement a defendant must demonstrate that he has been deliberately singled out for prosecution on the basis of some invidious criterion. Because the particular defendant, unlike similarly situated individuals, suffers prosecution simply as the subject of invidious discrimination, such defendant is very much the victim of the discriminatory enforcement practice. Under these circumstances, discriminatory prosecution becomes a compelling ground for dismissal of the criminal charge, since the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.' ...
>
> There must be discrimination and that discrimination must be intentional and unjustified and thus 'invidious' because it is unrelated to legitimate law enforcement objectives ... ."

Balayut v. Superior Court, supra, 12 Cal.4th at 832-833.

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[4] Murgia v. Municipal Court (1975) 15 Cal.3d 286 [124 Cal.Rptr. 204].

People v. Battin (1978) 77 Cal.App.3d 635, 666 [143 Cal.Rptr.731], summarized the burden on a party making such a claim:

> "Discriminatory prosecution constitutes adequate grounds for reversing a conviction ... when the defendant proves: '(1) that he has been deliberately singled out for prosecution on the basis of some invidious criterion;' and (2) that 'the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities.' ... The discrimination must be 'intentional and purposeful.' ... Further, defendant must carry the burden of proof that he has been deliberately singled out in order to overcome the presumption that '[prosecutorial] dut[ies have] been properly, and constitutionally exercised.'" (Citations omitted.)

Appellant attempted to meet that burden by contending that a review of the arrest reports and other exhibits shows, in most cases, either that where arrests were made the person arrested was a member of a minority group, or that where a licensee was visited in the course of the decoy program, it was a small convenience store owned or operated by members of a minority group.[5]

The ALJ's rejection of appellant's contention that the Modesto police were engaged in discriminatory prosecution is a legal conclusion which this Board has jurisdiction to review. However, we think the decision to reject that defense was

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[5] Exhibit K is a list of the businesses visited in the course of the Modesto police minor decoy program in 1995. Exhibit M was described [RT 101] as a list of large supermarkets within the jurisdiction of the Modesto police department. Appellant also cites a separate filing, after the record was closed, consisting of a compilation of arrest reports by Modesto police. Appellant's request that the ALJ take judicial notice of these reports was rejected. We have reviewed these reports, which, in most instances, identify the person arrested. Some of the names listed suggest membership in a minority group, other names do not. Thus, we are unable to see any pattern of discrimination simply from a review of the names on the lists.

sound. It was clear that the purpose of the minor decoy program was a legitimate law enforcement objective - to discourage and prevent sales to minors. The police were, according to officer Broumas, visiting stores either on a random basis or in response to complaints. Neither method is consistent with a plan to target members of a protected group.

Last, it should be noted that appellant is a corporation owned entirely or almost entirely by persons who are not in the class allegedly targeted. That fact belies appellant's claim of discriminatory prosecution.

CONCLUSION

The decision of the Department is affirmed.[6]

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

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[6] This final decision is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this decision as provided by §23090.7 of said Code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.