ISSUED MARCH 31, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

FOURTH AVENUE RESTAURANT, INC. dba Sammy's California Woodfired Pizza 770 Fourth Avenue San Diego, CA 92101, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7135 File: 41-293920 Reg: 97040990 Administrative Law Judge at the Dept. Hearing: Rudolfo Echeverria Date and Place of the Appeals Board Hearing: February 3, 1999 Los Angeles, CA

Fourth Avenue Restaurant, Inc., doing business as Sammy's California Woodfired Pizza (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 40 days, with 5 days thereof stayed for a probationary period of one year, for appellant's bartender selling an alcoholic beverage (beer) to a 19-year-old police 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 April 30, 1998, is set forth in the appendix.

Appearances on appeal include appellant Fourth Avenue Restaurant, Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine eating place license was issued on September 14, 1994. Thereafter, the Department instituted an accusation against appellant charging that on July 18, 1997, appellant's bartender, Rocco Alexander (Alexander), sold a Miller Genuine Draft beer to Darren J. Haugum (Haugum), who was then 19 years old and acting as a decoy for the San Diego Police Department.

An administrative hearing was held on March 18, 1998, at which testimony was presented by Haugum and by San Diego Police Department detective Mark A. Carlson concerning the events at appellant's premises on July 18, 1997. Thomas H. Penn, vice president of appellant, testified regarding appellant's training program for its alcoholic beverage servers.

Subsequent to the hearing, the Department issued its decision which determined that Alexander had sold the beer to the decoy as charged in the accusation.

Appellant thereafter filed a timely notice of appeal. In its 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 that the Department contravened Rule 141 (4 Cal. Code Regs., §141, subd. (b)(2)) and its own guidelines for decoy operations; Business and Professions Code §24210, which

allows the Department to use its own administrative law judges to conduct hearings on accusations the Department issues, is a gross denial of due process and equal protection under the California and United States Constitutions; and the penalty is excessive.

DISCUSSION

I

Appellant contends the decision and findings are not supported by substantial evidence because the record is "replete with gross misconduct by the Department" and reveals that "appellant did almost everything possible to avoid any sale of alcohol to any minor." (App. Br. at 8.)

Appellant contends that violation of the Department guidelines for decoy operations and of Rule 141 constitute either "outrageous police conduct" or entrapment, or both. The guideline violations recited by appellant are: no notice to licensees prior to inception of the decoy operation; no photo of the decoy was kept to preserve a record of the decoy's appearance on the date in question; the decoy was wearing jewelry; the "buy" money was not retained; and the beverage purchased was not retained, produced at the hearing, or analyzed for alcohol content. Appellant also contends that Rule 141(b)(2) was violated in that the decoy did not have the appearance of someone under the age of 21.

Although appellant refers to the *Department* violating its own guidelines, it was the San Diego Police Department conducting this decoy operation. Although the Department does provide information and training to police departments regarding

decoy operations, there is no evidence that the Department was directly involved in this decoy operation.

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 San Diego police to follow the Department guidelines in the present case, therefore, did not constitute outrageous police conduct or entrapment.

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 the officer testified that the decoy was served an open bottle labeled as Miller Genuine Draft 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.

The 19-year-old decoy involved here, at the time of the sale, was approximately 6'1" tall and weighed about 185 pounds. Although this decoy was rather large, the Administrative Law Judge (ALJ) specifically found him to look under 21 years of age. (Finding III.1.) The Appeals Board is bound by the Department's findings of fact, even if

a contrary finding might be equally or even more reasonable, as long as the findings are supported by substantial evidence (Harris v. Alcoholic Beverage Control Appeals Board (1963) 212 Cal.App.2d 106 [28 Cal.Rptr. 74,78]), and must accept all reasonable inferences which support the Department's findings (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]). The ALJ observed the decoy in person at the hearing and was in a much better position than is this Board to evaluate the appearance of the decoy. We have no reason to second-guess the ALJ's determination in this instance.

Appellant's contentions regarding the decoy guidelines and regulation are rejected.

II

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 done so. Therefore, we may not decide this issue.

III

Appellant contends the penalty imposed (40-day suspension with 5 days stayed and 1-year probation), 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 this Board has found no official misconduct in this decoy operation, this contention must fail.

This was appellant's third sale to a minor within three years.[2] Under these circumstances, it is hard to see a 35-day suspension as "cruel and unusual" or even unfair.

ORDER

The decision of the Department is affirmed.[3]

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

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[2] The first violation was before the operative date of Business and Professions Code §25658.1, the so-called "three strikes" statute, so it does not count as a strike. If the first violation had occurred a few months later, after the statute became effective, the Department could have recommended revocation.

[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.