ISSUED JANUARY 17, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION, LIDA KOMPANIAN and MOHAMMAD KOMPANIAN dba 7-Eleven 315 Saratoga Avenue Santa Clara, CA 95050, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7328 File: 20-278060 Reg: 98043415 Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja Date and Place of the Appeals Board Hearing: September 21, 2000 San Francisco, CA

The Southland Corporation, Lida Kompanian and Mohammed Kompanian, doing business as 7-Eleven (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days, with 10 days thereof stayed, conditioned upon a one-year period of discipline-free operation, for their clerk having sold an alcoholic beverage (a six-pack of Budweiser beer) to a minor, being contrary to the universal and generic public welfare and morals

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

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

Appearances on appeal include appellant The Southland Corporation, appearing through its counsel, James R. Parrinello; Lida and Mohammed Kompanian, representing themselves; and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 20, 1992. Thereafter, the Department instituted an accusation charging that, on March 6, 1998, appellants, acting through their clerk, sold an alcoholic beverage to a minor.

An administrative hearing was held on August 20, 1998, at which time oral and documentary evidence was received. At that hearing, testimony in support of the charge of the accusation was presented by Santa Clara police officers Mark Shimada and Brian Lane, and by Daniel Escobar, the minor, who was acting as a decoy for the Santa Clara Police Department. Shingara Singh, appellants' clerk, testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and imposed the order of suspension from which this timely appeal has been taken.

In their appeal, appellants raise the following issues: Southland contends that the decision of the Administrative Law Judge (ALJ) is based entirely on inadmissible hearsay statements, consisting of a police report and a statement of a

sales clerk; without the report and the clerk's statement, Southland contends, the finding of a violation fails for lack of substantial evidence. Lida and Mohammad Kompanian, the franchisees/operators of the store, contend the clerk lacked the intention to sell to a minor, and did so mistakenly.

DISCUSSION

I

Appellant Southland contends that the ALJ committed error in admitting into evidence a written report prepared by the police officer some six hours after the sale in question. The report quotes appellants' clerk as having admitted pressing the wrong button on a scanning device provided by Southland to its licensees for the purpose of reading the information encoded in the magnetic strip on the back of the California driver's license. As a result of that mistake, the device signaled, erroneously, that the sale was permissible. Southland further contends that the officer's testimony that the clerk told him he had pushed the wrong button when he scanned the driver's license also should not have been permitted.

The ALJ ruled the report admissible pursuant to Evidence Code §1280, the public employee exception to the hearsay rule, and the clerk's statement admissible pursuant to Evidence Code §1224. Southland contends that the report fails to meet the requirements of §1280 that it be prepared at or near the time of the event and under such circumstances as to indicate its trustworthiness. Southland argues that the officer's ability to recall the events would have been adversely affected by intervening events during that six-hour period. Southland, citing Markley v. Beagle, 66 Cal.2d 951, 959 [59 Cal.Rptr. 809], further contends that the clerk's statement

is not admissible under Evidence Code §1224.

We think the police officer's report was admissible under Evidence Code §1280, but only because of the fact that its hearsay content (the clerk's explanation for the failure of the machine to detect the minority age of the purchaser - the wrong button was pushed) tended to supplement the officer's direct testimony on the same subject.

We are not persuaded that the lapse of six hours would have rendered the report untrustworthy. The relative uniqueness of the event itself suggests that it would have easily been retained by one trained to observe and recall matters relating to the performance of one's duties. There was no evidence of any similar problems with card-reading devices at any of the other locations visited by the officer that night that might have generated confusion as to what he had seen and heard and what the clerk might have said about the device.

As the Department argues, the issue is more one of credibility, and the ALJ, who heard both the officer and appellant's clerk testify, believed the officer's testimony.

In any event, even if the report is excluded from the record, the undeniable fact is that an alcoholic beverage was sold to a minor. Whether the clerk operated the card reading device incorrectly, or the device failed to operate correctly, the sale would be unlawful. The suggestion that the driver's license caused the erroneous read-out, in the absence of any evidence that the "scuffing" altered its coded information, is too speculative to warrant consideration.

II

The franchisee appellants suggest the sale "probably occurred due to the pressure of the crowd, problem with the I.D., problem with the machine, or pushing both buttons," and was not intentional.

Based upon our review of the record, we are inclined to agree the clerk was simply guilty of carelessness, and an excessive reliance upon a device that, it is now apparent, is not fail-safe. Be that as it may, there was an unlawful sale to a minor.

III

The Department concedes that the Administrative Law Judge erred in his evaluation of the decoy's appearance as related to the requirements of Rule 141(b)(2), noting that the Department's decision antedated Board decisions regarding those requirements, and requests that the matter be remanded to the Department.[2]

The Board has routinely reversed and remanded cases such as this to the Department for such further consideration as may be appropriate, and, we think, should do so here as well.

ORDER

The decision of the Department is affirmed as to all issues except that involving Rule 141(b)(2), and the case remanded to the Department for such further proceedings as may be appropriate in light of the Department's concession

[2] This concession is set forth in the Department's letter reply brief dated July 11, 2000.

involving the decoy's appearance.[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 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 final 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.