ISSUED NOVEMBER 21, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CHONG RHEE and JAY RHEE dba Lake Food Center 1585 Madison Street Oakland, CA 94612, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7513 File: 21-100733 Reg: 99046354 Administrative Law Judge at the Dept. Hearing: Arnold Greenberg Date and Place of the Appeals Board Hearing: September 21, 2000 San Francisco, CA

Chong Rhee and Jay Rhee, doing business as Lake Food Center (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale general license for 25 days with 10 days stayed during a two year probationary period, for appellants' 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

[1]The decision of the Department, dated September 23, 1999, is set forth in the appendix.

violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants Chong Rhee and Jay Rhee, appearing through their counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

Appellants' current license was issued on May 31, 1988, but with licensing since 1980 with a beer and wine license. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a person under the age of 21 years (minor). An administrative hearing was held on July 14, 1999, at which time oral and documentary evidence was received.

Subsequently, on September 23, 1999, the Department issued its decision which determined that the violation had occurred. Appellants thereafter filed a timely notice of appeal.

In their appeal, appellants raise the following issues: (1) the Department used the wrong standard in evaluating the minor's appearance, (2) the decoy operation occurred during rush hours, (3) the prior violation alleged was based on inadmissable evidence and was hearsay, and (4) the penalty is excessive.

DISCUSSION

I

Appellants contend the Department used the wrong standard in evaluating the minor's appearance. The decision states in pertinent part:

> "... That physical appearance [of the minor] was such as to be reasonably considered to be under the age of 21 years."

The Department in its arguments, concedes the matter should be remanded for further proceedings to impose a proper standard, apparently based upon the many cases which determined the limitation of appearance to "physical" criteria too limiting and improper.[2]

II

Appellants contend the decoy operation occurred during rush hours. Appellants argue that Rule 141 requires the decoy operation to be conducted in a fashion that promotes fairness. Appellants correctly argue that the training material provided by the Department advises that "rush hours" are to be avoided for decoy operations. The decoy operation took place at 6 p.m., testified by the clerk as a rush hour – from 5 to 8 p.m. [RT 50-51, 54, 60].

However, the record also shows that there was one customer at the counter when the minor went to the sales counter to consummate the sale, but when the clerk advised the minor the six-pack was one bottle short, and the minor went and obtained another bottle, there were no customers in line. When the minor returned to the store with the police officer, there were four people in line [RT 11, 14, 16, 23, 24-25, 31]. But when the officer interrupted the clerk to inform him of the illegal sale, there was only one customer in line [RT 44].

Even assuming the operation was conducted during what was considered the busiest time for the store, there was no evidence that the premises was so busy at the time as to create an unfair situation. There were several customers in the store

[2]Circle K Stores, Inc. (1999) AB-7122; Circle K Stores, Inc. (1999) AB-7112; Circle K. Stores, Inc. (1999) AB-7108; and Circle K Stores, Inc. (1999) AB-7080.

at different times, but there is no evidence that the clerk was overwhelmed or distracted by an inordinate number of customers demanding his attention.

Additionally, the clerk was not too busy to inform the minor that her six-pack was one bottle short, and waited without another customer coming up to the counter for the minor to return with the sixth bottle.

Without specific evidence of unfairness in this particular instance, general statements about the store's busiest time do not convert this into an operation conducted unfairly during the store's "rush hour."

III

Appellants contend the prior violation alleged was based on inadmissable evidence, being hearsay. Exhibit 2 consists of five documents: (1) an accusation with the proper file and registration numbers affixed, and a date when filed with the headquarters office of the Department, which filed date being the date which appears on the present case's accusation, under previous record of violations; (2) a stipulation and waiver form properly showing the file and registration numbers as shown on the accusation, apparently signed by one of the co-appellants, consenting to imposition of a sanction; (3) a decision also showing the file and registration numbers shown on the accusation, which sets forth the penalty for the violation; and (4) two certifications properly dated and signed by counsel 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, hence rendering them inapplicable to the issues in this matter.

Exhibit 2 appears 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. The objection by the Department is not well taken, that there was no timely objection, which is not the case. Government Code §11513, subdivision (d), sets forth the rules of objection, calling for raising the objection timely, defined as before submission or on reconsideration, which according to the record, was properly made by the filing by appellants of their Petition for Reconsideration and Hearsay Objection to Evidence of Priors.

Government Code §11513 states in subdivision (c) state that technical rules do not necessarily apply, if reasonable persons would normally rely on such evidence. We determine that Exhibit 2 is such reasonable evidence, supported by the admission of co-appellant Jay Rhee that appellants suffered a prior violation which was substantiated by counsel for appellants [RT 74].

Appellants also contend that the Department must show compliance to Rule 141 in prior cases which are final. This would demand the Department re-litigate every prior case, such as the cases listed in footnote 3,[3] which use prior cases to enhance the penalty. This would cause a near-total break-down of the administrative process. Appellants have cited no case which would demand such, and we know of none to support appellants.

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[3]Circle K Stores, Inc. (1999) AB-7122; Circle K Stores, Inc. (1999) AB-7112; Circle K. Stores, Inc. (1999) AB-7108; and Circle K Stores, Inc. (1999) AB-7080.

IV

Appellants contend 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].)

The penalty appears to be a very minimal penalty (25/10), where most second violation cases warrant a 25-day suspension. The appropriateness of the penalty must be left to the discretion of the Department. The Department having exercised its discretion reasonably, the Appeals Board will not disturb the penalty.

ORDER

The decision of the Department is affirmed in all particulars, except that the issue of conformity to 4 California Code of Regulations §141(b)(2) concerning the appearance of the minor, is reversed.[4]

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

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[4]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.