

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-8174

File: 20-236471 Reg: 03054713

LISA A. GANNON and JOHN T. GANNON, JR. dba Black Oak Arco AM/PM
1201 Ysable, Paso Robles, CA 93446,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED JULY 30, 2004

Lisa A. Gannon and John T. Gannon, Jr., doing business as Black Oak Arco AM/PM (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk having sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Lisa A. Gannon and John T. Gannon, Jr., appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 4, 1989.

¹The decision of the Department, dated July 24, 2003, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellants charging that their employee, Dale Moran Williams (the clerk), sold beer to Bethany Thomas, a person then 19 years of age. Although not noted in the accusation, Thomas was acting as a decoy for the Paso Robles Police Department.

An administrative hearing was held on June 19, 2003, at which time oral and documentary evidence was received. At that hearing, testimony concerning the transaction was presented by Terry Lee Johnson, a Paso Robles police officer, and by Thomas (the decoy). Appellant John T. Gannon, Jr., testified about training provided appellants' employees, and about his research and selection of scanning devices used to verify identification provided by patrons.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and that appellants had failed to establish any affirmative defense under Rule 141 (Title 4, Cal. Code Regs., §141.)

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the decision violates the fairness requirement of Rule 141(a); and (2) the imposition of a 25-day suspension was an abuse of discretion because made pursuant to an underground regulation.

DISCUSSION

I

Appellants argue that the decoy operation violated the fairness requirement of Rule 141(a) because it was not terminated after the clerk had unsuccessfully attempted to utilize a mechanical scanning device to determine the age of the decoy. Appellants also suggest that their efforts following the transaction, i.e., terminating the employment of the clerk, and seeking a more reliable scanning device, should have been considered

as mitigation factors.

Paso Robles police officer Terry Johnson witnessed the transaction and later spoke to the clerk. Johnson observed the clerk pass the decoy's driver's license through a "machine," hesitate for a few seconds, looking down, return the license to the decoy and go forward with the sale. The clerk told the officer that the device had not given him a response, and, when he looked at the license, he did not focus on the decoy's age. The officer permitted the clerk to pass the license through the scanning device a second time, when, according to the clerk, the device worked properly.

The clerk's admission to the officer that the scanning device had not given him a response is itself reason why the device's claimed failure should not constitute mitigation. The clerk held in his hand all he needed to avoid a sale to a minor, but failed to utilize the information the license provided him. This situation is little different from the case where a clerk who does not have a scanning device fails to examine the identification tendered by a decoy.

Not do we think it unfair for the decoy operation to have continued. Nothing the decoy did can be said to have been unfair.

II

Appellants contend that the penalty was imposed pursuant to an underground regulation, i.e., the Department's penalty guidelines. Appellants contend that the 25-day suspension is the Department's standard penalty in the case of a second violation of section 25658, subdivision (a), within a 36-month period.

Department counsel recommended a 25-day suspension, and made no reference to the Department's penalty guidelines.

Nor did the administrative law judge (ALJ) refer to guidelines. He did note that

this was appellants' second violation within a 36-month period, and rejected appellants' claims that the failure of the scanning device resulted in an unfair decoy operation or should be considered a mitigating factor.

We cannot say with any degree of certainty that the suspension was determined by the Department's guidelines. They were not cited to the ALJ, and he made no note of them in his decision. It is common for a second violation to be met with an enhanced penalty, and we are not in a position to assume that the mere fact that the penalty imposed happens to be the same as that contained in the Department's guidelines is proof that the ALJ was controlled by those guidelines.

ORDER

The decision of the Department is affirmed.²

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.