

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

AB-8876

File: 21-282837 Reg: 07065859

PANNA and VASANT KALE, dba One Stop Mini Mart
4300 Green River Road #115, Corona, CA 92880,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: December 3, 2009
Los Angeles, CA

ISSUED MARCH 11, 2010

Panna and Vasant Kale, doing business as One Stop Mini Mart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their off-sale general license, stayed execution of the order of revocation for 180 days to permit the sale or transfer of the license to parties acceptable to the Department, and ordered a suspension for 30 days and indefinitely thereafter until transfer or revocation, for their clerk, Wanda Salazar, having sold a 24-ounce can of Bud Light beer, an alcoholic beverage, to David Glassick, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a). The violation was appellants' third within a 36-month period.

Appearances on appeal include appellants Panna and Vasant Kale, appearing through their counsel, Ralph B. Saltsman and Ryan M. Kroll, and the Department of

¹The decision of the Department, dated April 15, 2008, is set forth in the appendix.

Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 30, 1998. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on February 2, 2007.

An administrative hearing was held on February 21, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by David Glassick, the decoy, and Martin Vega, a Corona police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and that appellants had been disciplined previously for sale-to-minor violations on March 5, 2004, and August 4, 2005.

Appellants filed a timely notice of appeal in which they raise the following issues: (1) Rule 141(b)(4) was violated and (2) the Department abused its discretion with respect to penalty.

DISCUSSION

I

Rule 141(b)(4) (4 Cal. Code Regs., §141, subd. (b)(4)) states: "A decoy shall answer truthfully any questions about his or her age."

Finding of Fact 7 of the proposed decision states the following:

The clerk, Wanda Salazar, asked Glassick for identification. Glassick produced his California driver's license. (See Exhibit 2). Salazar looked at the license and said "Born in 1987. You should smile more in your pictures." Salazar then handed the license back to Glassick. Salazar did not ask any questions of Glassick

Appellant argues that the clerk's statement was the equivalent of a question that

imposed upon the decoy an affirmative duty to clarify his age for the clerk.² The Department argues that the clerk's comment was simply a recitation of the information listed on the decoy's driver's license, and that the clerk's actions indicated only that she had correctly read the information on the license. Since Salazar did not testify, it is not known what her intent was.

Appellant cites the Board's decision in *Equilon* (2002) AB-7845, a case in which the clerk was shown a driver's license which showed the decoy to be under 21. When the clerk looked at the license, he stated "[b]orn in 1981. You check out okay." The Board ruled that a decoy must respond when a clerk's comment "is a verbalization of the seller's thought processes" indicating some uncertainty on the part of the clerk concerning the decoy's age.

Appellant also cites the Board's decision in *Lucky Stores Inc. Delaware* (1999) AB-7227, where the clerk either said "1978. You are just 21," or "1978. You are 21." The Board reversed the decision of the Department, stating "there can be a very fine line between a remark that is a mere statement and a remark that is really a question," and that "where a clerk's remark about age is such that an honest clarification from the decoy may prevent a sale from occurring, the decoy has an obligation to offer such clarification."

We do not believe the line is so fine in this case. Had the clerk said nothing more than "born in '87," or even "okay, you were born in '87," the issue would be close. But in this case, the clerk went on to offer the decoy advice - to smile more in his

² Appellant's brief quotes the clerk as having said "Okay, you were born in '87. You should smile more in your pictures." The finding in the proposed decision omits the word "Okay," even though both witnesses acknowledged that the clerk used that word.

pictures- a remark flirtatious in nature, hardly calculated to elicit a response.

Like so many of the cases involving Rule 141, the specific facts of the case control the result. In this case the administrative law judge (ALJ) viewed the entire content of the clerk's remark in the context in which it was made, and made a factual determination that there was no question posed to the decoy.

We are not inclined to second guess him in this case.

II

Appellants contend the penalty constitutes an abuse of discretion, because it does not credit various steps appellants took to prevent future violations, including the posting of additional signs to discourage attempts by minors to purchase alcohol, the use of a card scanner to verify a purchaser's age, and letters and testimony concerning the training provided the clerk who made the sale and the caution and diligence she exhibited in her work.

The ALJ concluded that appellants' efforts at mitigation were too little and too late - "these types of things should have been done after the 2004 violation."

Appellants argue that Department Rule 144 (4 Cal. Code Regs. §144) requires the Department to consider acts of mitigation whether occurring before or after the violation. This may well be true. This does not, however, prohibit an ALJ from weighing the timeliness and apparent sincerity of steps taken by licensees against the likelihood of their effectiveness in the future, considering the licensees' past record.

The Department clearly had the power to revoke appellants' license outright (see Bus. & Prof. Code, § 25658.1), and has done so, with the Board's approval, in a number of cases. Department counsel recommended in this case that the license be revoked outright. The ALJ chose, instead to stay the order of revocation to permit the

sale or transfer of the license, thus allowing appellants six months to recoup some of the value of the license. The 30-day and indefinite suspension pending transfer or revocation reflected the ALJ's apparent desire to prevent further violations during the stay period. We cannot say that the penalty is a "palpable abuse" (see *Rice v. Alcoholic Beverage Control Appeals Bd.* (1979) 89 Cal.App.3d 30, 39 [152 Cal.Rptr. 285]) given appellants' track record.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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.

5. Appellants