

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

FORTUNE COMMERCIAL	)	AB-7143
CORPORATION	)	
dba Seafood City	)	File: 21-323823
1340 Third Avenue	)	Reg: 97041702
Chula Vista, CA 91910,	)	
Appellant/Licensee,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	John P. McCarthy
	)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	April 1, 1999
Respondent.	)	Los Angeles, CA
	)	

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Fortune Commercial corporation, doing business as Seafood City (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its license for 20 days for appellant's clerk selling beer, an alcoholic beverage, to a person then 17 years of age, such sale 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).

Appearances on appeal include appellant Fortune Commercial corporation, appearing through its counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

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<sup>1</sup>The decision of the Department, dated May 14, 1998, is set forth in the appendix.

Appellant's off-sale general license was issued on April 7, 1997. Thereafter, the Department instituted an accusation against appellant charging that, on September 12, 1997, appellant's employee, Emilyn Medina, sold a six-pack of beer to Sarah Eisenberg, who was then 17 years old and a decoy working under the supervision of officers of the Chula Vista Police Department

An administrative hearing was held on March 25, 1998, at which time documentary evidence was received and testimony was presented by Ben Chassen (Chassen), a Chula Vista police officer; Sarah Eisenberg (Eisenberg), the 17-year-old purchaser of the beer; and Emilyn Medina (Medina), the clerk who sold the beer to Eisenberg.

Chassen testified that he observed the transaction from outside the premises, where he was waiting in his car, while another officer observed from inside the store [RT 8-10]. He instructed Eisenberg about the decoy operation using a pamphlet and video supplied by the Department [RT 16-17]. After Eisenberg left the store with the beer, she and Chassen went into the store where Eisenberg identified the clerk who had sold to her [RT 10-12].

Eisenberg testified that she entered the store, picked up a six-pack of beer, and took it to one of the registers that was open, where two people were in line ahead of her [RT 20-23]. When her turn came, the clerk asked for her identification and Eisenberg gave the clerk her California driver's license [RT 23-25]. The clerk looked at the driver's license for a few seconds, said "okay" and Eisenberg paid for the beer [RT 26-27]. Eisenberg took the beer outside, gave it to the police officers there, re-entered the store with the officers and identified Medina as the clerk who had sold to her [RT 27-28]. At

the administrative hearing, Eisenberg was dressed similarly to the way she was dressed when she bought the beer [RT 29, 32-34].

Medina thought Eisenberg looked at least three years older than Medina, who was 17 at the time [RT 39, 41, 45]. Medina also testified that she had been told to ask for identification when anyone wanted to buy liquor, but she had not been told why identification was important, and she was unsure about how old one had to be to legally purchase alcoholic beverages [RT 40-41, 47-48]. She said that it had been her experience that everyone who showed her an I.D. when she asked for one had been over 21, so she expected to see that Eisenberg was over 21 [RT 42-43]. Since this incident, Medina said, she had received further training about alcoholic beverage sales [RT 48-49].

Subsequent to the hearing, the Department issued its decision which determined that the sale had been made as alleged in the accusation.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Rule 141(b)(2) was violated, and (2) the penalty constitutes an abuse of discretion.

## DISCUSSION

### I

Appellant contends that Rule 141(b)(2) (4 Cal.Code Regs., § 141, subd. (b)(2)) was violated because the Department used criteria different from the criteria stated in the Rule. The Rule requires that the decoy “display the appearance which could generally be expected of a person under 21 years of age.” The ALJ, however, found that “her appearance both at the hearing and at the time of the transaction in question

was that of a person well under the age of 21 years, such that a reasonably prudent licensee would request her age or identification before selling her an alcoholic beverage.” (Finding III.A.) The Rule, appellant argues, requires a comparison of the decoy to the population of those under 21, not the determination of what a reasonably prudent licensee would do upon seeing the decoy. The only comparison made was with the clerk, Medina, who was almost exactly the same age as the decoy, and the ALJ found that the decoy appeared more mature, both physically and in her manner, than the clerk.

The ALJ included a detailed description of the decoy as she appeared at the hearing, finding that she appeared the same as she had as a decoy, and that she appeared “well under the age of 21 years.” The fact that the clerk thought the decoy looked older than she (the clerk) was, does not mean that the decoy looked over 21.

The clerk said she thought the decoy looked three years older than she (the clerk) was. Since the clerk was 17, this would mean the decoy appeared to her to be 20 years old, so that actually confirms the conclusion that the decoy presented the appearance of a person under the age of 21.

## II

Appellant contends the penalty constitutes an abuse of the Department's discretion. The Department recommended, at the hearing, a penalty of 15 days' suspension, which was said to be “standard.” The proposed decision of the ALJ, which was adopted by the Department, imposes a 20-day penalty.

Appellant argues that the ALJ, improperly increased the penalty believing that a violation of Business and Professions Code §25663<sup>2</sup> (which was not charged by the Department) had occurred.

The first paragraph of Finding V. of the Department's decision states:

“Clerk Emilyn Medina's date of birth is October 7, 1979, making her just one day younger than decoy Eisenberg. It was not established that Medina was 'under the continuous supervision of a person 21 years of age or older,' but no violation of California Business and Professions Code Section 25663 was alleged.”

The second paragraph of Finding VII. states:

“In determining an appropriate sanction in this matter, the fact that seller Medina was only 17 years of age and had not been trained in the lawful sales of alcoholic beverages were considered as elements in aggravation.”

Counsel for the Department argues that the clerk being only 17 was properly considered by the ALJ as an aggravating factor because the licensee cannot assume that a 17-year-old will know as much as an adult. Under the Department's rationalization, it could also be argued that a clerk with an IQ a few points below average should be an aggravating factor, or someone without a high school diploma. The mere fact that the clerk was 17 is not a legitimate aggravating factor.

The ALJ also cited the clerk's lack of training as an aggravating factor. The clerk said she was informed to ask for I.D. when anyone wanted to purchase alcoholic beverages [RT 40-41, 47-48], so she apparently got some training. However, she also testified that, at the time, she wasn't too sure about how old one had to be to legally purchase alcoholic beverages and why she was to look at an I.D. when an alcoholic

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<sup>2</sup> *This section prohibits off-sale licensees from employing anyone under 18 to sell alcoholic beverages, unless the person under 18 "is under the continuous supervision of a person 21 years or age or older."*

beverage was being purchased [RT 47-48]. No one testified as to the training that appellant's employees usually receive regarding alcoholic beverage sales.

While there may have been room for additional training of this clerk (and additional training did occur after this violation), it is not appropriate to use the lack of training as a factor in aggravation. Inadequate employee training may have made this violation more likely to occur, but it cannot be said that any failure to adequately train made this violation more egregious.

The Department does not address the ALJ's pointed reference to a possible violation of §25663. The ALJ's obvious belief that such a violation had occurred but had not been charged, lends credence to appellant's charge that the ALJ aggravated the penalty for that unalleged violation. This would be extremely improper, since appellant would have not have had an opportunity to prepare and present a defense regarding that question.

Finding that neither of the stated grounds for aggravation were proper, the penalty must be reversed.

#### ORDER

The decision of the Department is affirmed, but the penalty is reversed and remanded to the Department for reconsideration.<sup>3</sup>

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

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<sup>3</sup>*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.*

APPEALS BOARD