ISSUED JULY 19, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

RAYMOND DAVID COX dba Ceres Fourth Street Lounge 3014 Fourth Street Ceres, California 95307, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	AB-7181 File: 48-290966 Reg: 97042173 Administrative Law Judge at the Dept. Hearing: George S. Avila Date and Place of the Appeals Board Hearing: May 20, 1999 San Francisco, CA

Raymond David Cox, doing business as Ceres Fourth Street Lounge (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his on-sale general public premises license for 25 days, for his bartender, Linda Warner, having sold an alcoholic beverage to Jennie M. Weston, an 18-year-old minor participating in a decoy program being conducted by the Ceres Police Department, 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).

[1]The decision of the Department, dated June 18, 1998, is set forth in the appendix.

Appearances on appeal include appellant Raymond David Cox, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Peirce.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on February 2, 1994. Thereafter, the Department instituted an accusation against appellant charging the sale to the minor decoy.

An administrative hearing was held on April 7, 1998, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Jennie M. Weston, the minor decoy, and Ronald Collins, the Ceres police officer in charge of the decoy operation. Appellant testified on his own behalf, and presented the testimony of Raymond Brickey, the doorman, and Linda Warner, the bartender.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and ordered appellant's license suspended.

Appellant thereafter filed a timely notice of appeal. In his notice of appeal, and in his appeal brief, both of which to a certain extent seek to reargue the facts presented at the hearing, appellant raises the following issues: (1) there are discrepancies between the testimony of the police officer and the minor with respect to the identification which was displayed, whether the minor ordered and was served beer in a bottle or a glass, and whether a transaction actually took place, since no money changed hands; (2) the Appeals Board should look at the facts; (3) appellant has been punished for requesting a hearing; (4) the minor

declined to answer questions about her age; and (5) the Department's factual determinations are erroneous. Issues (1), (2), and (5) are interrelated, in that they all involve factual determinations, and, therefore, will be addressed together.

DISCUSSION

I

Appellant contends there are factual discrepancies in the testimony of the police officer and that of the minor, concerning the identification which was displayed by the minor, whether the beer was in a bottle or a glass, and whether there was a completed transaction. Appellant asks the Appeals Board to reexamine the facts of the case, and, presumably, make its own determination.

The facts of the case are fairly straightforward. The decoy, Weston, testified that, upon entering the premises, she was asked for identification by Brickey, and produced her valid California driver's license, which contained a red strip indicating she was not yet 21 years of age. After examining the license, Brickey returned it to her and placed a stamp on her hand. Weston then proceeded to the bar, requested a Bud Light beer, displayed her stamped hand to Warner, and was served the beer. Officer Collins, who was observing the transaction, immediately seized the beer and advised the bartender she had just served a minor.

Appellant has sought to retry the case before the Appeals Board. His arguments for the most part simply rest on his disagreement with the outcome of the case, and a different view of the facts than that of the Department. This is seen in the particular points which can be extracted from his written presentation.[2]

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[2] *Appellant begins his brief with a reference to an earlier disciplinary action which appellant believes, in hindsight, he should have contested. Appellant claims to have knowledge that another establishment which was also visited by a decoy at that time was not cited. Whether or*

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[3]

Appellant contends that the decoy displayed false identification, referring to the doorman's claim he was shown a different driver's license than the license presented at the hearing; the doorman, Raymond Brickey, testified that he asked to see the decoy's identification because "she was young, she looked young" [RT 65]. After examining the license presented to him, Brickey thought "[w]ell, this girl is almost 30 years old" [RT 67].

The Administrative Law Judge rejected Brickey's testimony, concluding that the police officer and the minor had no reason to scheme and conspire to fabricate a violation. This was a factual determination on an issue of credibility.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage

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not appellant's information is correct - his description of what supposedly occurred appears to be multi-level hearsay - it is totally irrelevant to the issues in the present appeal.

[3] The California Constitution, Article XX, Section 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Appellant refers to what he describes as a discrepancy between the minor's testimony that she was served beer in a bottle - after she ordered a Bud Light, the bartender "opened the lid" and put it in front of her [RT 14] - and that of the police officer [RT 37] that the beer was drawn from a tap. This "discrepancy" was not explored with either witness, and does nor appear to be critical, especially since there is no claim the beverage served the decoy was not beer. Indeed, Warner even admitted she served Weston a beer [RT 94].

Appellant also argues that there was no completed transaction because the bottle of Bud Light beer the minor ordered was never opened, and no money changed hands. That no money changed hands is immaterial, since the minor was served an alcoholic beverage. Thus, the mere fact the police officer may have intervened before the minor paid for the beer - and the record does not indicate whether the officer did or not - is irrelevant.

Appellant contends that because the police did not issue a citation to either the doorman or the bartender, there could not have been a violation. If there was no citation issued - and the record is unclear whether any citation was issued[4] - that too is irrelevant, since the issuance of a citation is not a condition precedent to a disciplinary charge by the Department.

II

Appellant contends that the decoy was questioned repeatedly about not looking old enough, but would not admit her age. Although inartfully presented, appellant has raised the issue whether there was compliance with Department Rule 141(b)(4) (that a decoy answer truthfully questions about her age).

There is some, but only slight, evidentiary support for appellant's claim. The bartender, Warner, testified that she "asked for [the decoy's] stamp or her ID" [RT 92]. When the decoy responded "Huh," Warner stated: "I need your stamp or your ID" [RT 92]. The decoy then raised her hand, displaying the stamp the doorman, Brickey, had placed on her hand [RT 92].

Brickey's testimony lends no support at all to appellant's claim. He testified [RT 65-66]:

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[4] Because the police officers were undecided as, between the doorman, who stamped the decoy's hand, and the bartender, who served the beer, who should be held responsible, they left the matter to the detectives. Officer Collins was of the belief citations had been issued. (See RT 39, 43).

"A She was standing in the aisle, and I had left the doorway and gone back through the bar to check some other ID's. And as I was checking the ID's there at the bar, she was standing in the aisle. And I turned around to her and asked her if she had an ID. She said yes. I said I'd like to see it.

Q. Let's hold on there. You approached her? You approached her and asked to see her identification?

A. Right.

Q. And she showed you her identification?

A. She handed me an ID."

Brickey testified about his thought processes while he examined what had been given to him, but nowhere in his testimony did he say he asked her any other questions.

The record shows, at most, that both the bartender and the doorman asked the decoy for something, and, in each case, were given what they asked. It can not be said the decoy declined or refused to answer any of their questions, let alone answer untruthfully.

J.J.J

Appellant contends that he has been punished for asking for a hearing in this matter.

An examination of the record reveals that, when the accusation package was served on appellant, it included a proposed stipulation and waiver, which, if accepted by appellant, would have admitted the charge of the accusation, dispensed with the need for a hearing, and a suspension of 15 days would have been imposed. A letter[5] from David M. Seneca, a Department District Administrator, stated that the proposed suspension was intended as a pre-hearing settlement, and expressly cautioned appellant that "it is possible that a different penalty will be ordered as a result of a hearing."

It is not unusual for the Department to order a longer suspension after a hearing than the suspension offered as part of a pre-hearing settlement. Indeed, if appellants had nothing to risk by going to a hearing, where a full exposition of the facts may disclose information previously unknown to the Department, there would be vastly fewer settlements.

The issue of the Department's ability to impose a penalty after a hearing greater than it had offered prior to the hearing was addressed long ago in Kirby v.

[5] A copy of this letter was attached to appellant's notice of appeal.

Alcoholic Beverage Control Appeals Board (1971) 17 Cal.App.3d 255 [94 Cal.Rptr. 514]. Viewing the initial proposal as in the nature of a settlement proposal, the court stated (17 Cal.App. 3d at 260-261):

> "Even in cases strictly criminal, there is a public policy in favor of negotiations for compromise ...; a fortiori there is an equal policy in cases such as this. The department, acting on the basis of written reports, secures a prompt determination, at little administrative cost; the licensee avoids the risks that testimony at a formal hearing may paint him in a worse light than the reports and, also, avoids the costs and delay of a hearing. The licensee who rejects a proffered settlement hopes that the hearing will clear - or at least partially excuse - him and he hopes that even if he is not found innocent, he will be dealt with less harshly than the department proposes. But if the department can never, no matter what a hearing may develop, assess a penalty greater than that proposed in its offer, a licensee has little to lose by rejection. Only the cost of a hearing is risked; he could not otherwise be harmed. In that situation, licensees would be induced to gamble on the chance of prevailing at the trial, while the department would lose much of its inducement to attempt settlement. The law should not permit that kind of tactic by an accused.
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> "It follows that the mere fact - if it be a fact - that the department had once offered a settlement more favorable than the discipline ultimately imposed is not, in and of itself, a ground for setting aside the penalty ultimately adopted."

In the last analysis, the question is whether there is a rational basis in the record for the ALJ's determination of what he believed was an appropriate level of discipline.

Appellant had resolved an earlier sale-to-minor violation, by payment of a fine in lieu of serving a 10-day suspension, in February, 1996. The penalty usually imposed by the Department for a second sale-to-minor violation is 25 days. That was the suspension imposed on appellant.

Under the circumstances, it does not appear that the Department abused its discretion in ordering a customary penalty for a fairly clear-cut violation.

ORDER

The decision of the Department is affirmed.[6]

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

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[6] *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.