

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

AB-9775

File: 21-285768; Reg: 18086708

IN DUCK LEE and JOHN S. LEE,
dba M & P Liquor
2200 South Pacific Avenue,
San Pedro, CA 90731,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: August 16, 2019
Sacramento, CA

ISSUED AUGUST 26, 2019

Appearances: *Appellants:* Dean R. Lueders, of ACTlegally, as counsel for In Duck Lee and John S. Lee,

Respondent: Joseph J. Scoleri III, as counsel for the Department of Alcoholic Beverage Control.

OPINION

In Duck Lee and John S. Lee, doing business as M & P Liquor, appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 5 days because their clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

¹The decision of the Department, dated November 21, 2018, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 18, 1993. There is one prior instance of departmental discipline against the license.

On March 28, 2018, the Department filed an accusation against appellants charging that, on November 11, 2017, appellants' clerk, Emanuel Rodriguez (the clerk), sold an alcoholic beverage to 18-year-old Briana Haro (the decoy). Although not noted in the accusation, the decoy was working for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on July 18, 2018, documentary evidence was received and testimony concerning the sale was presented by the decoy; by LAPD Officers Jessica Gutierrez-Gonzalez and Brad Bautista; and by one of the licensees, John S. Lee.

Testimony established that Officer Gutierrez-Gonzalez entered the licensed premises on November 11, 2017, followed a short time later by the decoy. The decoy selected a can of Bud Light beer and took it to the sales counter. The clerk asked to see her identification and the decoy handed her California identification card to him. The ID contained her correct date of birth, showing her to be 18 years of age, and a red stripe indicating "AGE 21 IN 2020." (Exh. 5.) The clerk looked at it briefly, said "it's OK," then completed the sale. The decoy later re-entered the premises with the LAPD officers and made a face-to-face identification of the clerk. The facts of the underlying accusation are not at issue in this appeal.

The administrative law judge submitted his proposed decision on August 24, 2018, sustaining the accusation and recommending a 5-day suspension. Thereafter, on September 12, 2018, counsel for the Department submitted a comments letter to the

Director requesting that the Director hold the proposed decision in the instant matter—because there was a second accusation against the premises, involving the same employee and the same violation—and that the two cases should be considered together.

Notwithstanding the comments letter, the Director did not assent to the recommendation to consider the two cases together, but instead adopted the proposed decision in its entirety on November 13, 2018. A Certificate of Decision was issued on November 21, 2018.

Appellants then filed a timely appeal contending that comments submitted to the Director, prior to the adoption of the proposed decision, violated appellants' due process rights.

DISCUSSION

Appellants contend that the comments submitted to the Director, prior to the adoption of the proposed decision, violated appellants' due process rights. (AOB at pp. 2-5.) Appellants maintain that the information conveyed to the Director—regarding the existence of a second accusation against appellants—had no purpose “except to influence Director Appelsmith during his decision-making process.” (*Id.* at pp. 3-4.)

The Board addressed the impact of the Department's use of the comment procedure at great length in *7-Eleven, Inc./Gupta* (2017) AB-9583, cited by appellants. In that case, the Board concluded the Department's comment procedure constituted an unenforceable underground regulation because the procedure was instituted without going through the formal rulemaking process. However, the Board concluded that the sole comment submitted in that case had no effect on the outcome of the matter. As

such, the Board found that the comment procedure did not materially affect appellants' due process rights in that instance. (See *id.* at pp. 26-29.)

In the instant case, appellants argue that the mere submission of comments to the Director by Department counsel entitles it to claim a due process violation. However, appellants fail to identify how they were harmed by the Director's receipt of this letter when, in fact, the Director adopted the ALJ's proposed decision in its entirety without modification or aggravation. While we acknowledge that counsel's letter — bringing to the Director's attention that a second accusation had been brought against appellants — *could* have been viewed as prejudicial if in fact it had influenced the Director in some way, the facts do not support a conclusion that it was prejudicial in this case.

To cause reversal, an error must be prejudicial and it must appear that a different result would have been probable if such error did not exist. (Code Civ. Proc., § 475; also see *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 104 [87 Cal.Rptr.2d 754] .) The burden is on the appellant to show that the error was sufficiently prejudicial to justify reversal. (*Kyne v Eustice* (1963) 215 Cal.App.2d 627, 635-636 [30 Cal.Rptr 391].) The appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred. (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308 [140 Cal.Rptr.3d 459].)

The decisions of the Department should not be defeated by reason of "any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the [reviewing body] shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

(*Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345]. Procedural due process violations, even if proved, are subject to a harmless error analysis.

(*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th 169, 200 [167 Cal.Rptr.3d 24].) In sum, reversal is inappropriate where an appellant has shown no prejudice or material effect on due process.

In the instant case, the penalty imposed by the Director remained unchanged from that recommended by the ALJ, notwithstanding his receipt of the letter. Accordingly, we believe the comments letter must be viewed as harmless error. Appellants have not met their burden to show that they would have received a more favorable result if the Department had not submitted the comments letter to the Director.

ORDER

The decision of the Department is affirmed.²

SUSAN A. BONILLA, CHAIR
MEGAN McGUINNESS, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.

APPENDIX

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

**IN THE MATTER OF THE ACCUSATION
AGAINST:**

IN DUCK LEE, JOHN S. LEE
M & P LIQUOR
2200 S. PACIFIC AVENUE
SAN PEDRO, CA 90731

OFF-SALE GENERAL - LICENSE

Respondent(s)/Licensee(s)
Under the Alcoholic Beverage Control Act

LAKESWOOD DISTRICT OFFICE

File: 21-285768

Reg: 18086708

CERTIFICATE OF DECISION

It is hereby certified that, having reviewed the findings of fact, determination of issues, and recommendation in the attached proposed decision, the Department of Alcoholic Beverage Control adopted said proposed decision as its decision in the case on November 13, 2018. Pursuant to Government Code section 11519, this decision shall become effective 30 days after it is delivered or mailed.

Any party may petition for reconsideration of this decision. Pursuant to Government Code section 11521(a), the Department's power to order reconsideration expires 30 days after the delivery or mailing of this decision, or if an earlier effective date is stated above, upon such earlier effective date of the decision.

Any appeal of this decision must be made in accordance with Business and Professions Code sections 23080-23089. For further information, call the Alcoholic Beverage Control Appeals Board at (916) 445-4005, or mail your written appeal to the Alcoholic Beverage Control Appeals Board, 1325 J Street, Suite 1560, Sacramento, CA 95814.

On or after January 2, 2019, a representative of the Department will contact you to arrange to pick up the license certificate.

Sacramento, California

Dated: November 21, 2018



Matthew D. Botting
General Counsel

RECEIVED

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**Alcoholic Beverage Control
Office of Legal Services**

**BEFORE THE
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
OF THE STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

In Duck Lee & John S. Lee
dba M & P Liquor
2200 S. Pacific Ave.
San Pedro, California 90731

Respondents

} File: 21-285768

} Reg.: 18086708

} License Type: 21

} Word Count: 10,000

} Reporter:

} Tracy Terkeurst

} Kennedy Court Reporters

Off-Sale General License

PROPOSED DECISION

Administrative Law Judge Matthew G. Ainley, Administrative Hearing Office, Department of Alcoholic Beverage Control, heard this matter at Cerritos, California, on July 18, 2018.

Jonathan V. Nguyen, Attorney, represented the Department of Alcoholic Beverage Control.

Dean R. Lueders, attorney-at-law, represented respondents In Duck Lee and John S. Lee. John S. Lee was present.

The Department seeks to discipline the Respondents' license on the grounds that, on or about November 11, 2017, the Respondents, through their agent or employee, sold, furnished, or gave alcoholic beverages to Briana Haro, an individual under the age of 21, in violation of Business and Professions Code section 25658(a).¹ (Exhibit 1.)

Oral evidence, documentary evidence, and evidence by oral stipulation on the record was received at the hearing. The matter was argued and submitted for decision on July 18, 2018.

FINDINGS OF FACT

1. The Department filed the accusation on March 28, 2018.

¹ All statutory references are to the Business and Professions Code unless otherwise noted.

2. The Department issued a type 21, license to the Respondents for the above-described location on August 18, 1993 (the Licensed Premises).

3. The Department alleged that the Respondents' license was the subject of discipline in 2000. Specifically, the Department alleged that, in a case bearing reg. #00048944, the Respondents sold alcohol to a minor and incurred a 15-day suspension. The Department did not submit any evidence of such a case. Instead, the Department submitted a prior disciplinary decision bearing reg. #98043264 in which an accusation alleging the sale of alcohol to a minor was dismissed. (Exhibit 2.)

4. Co-licensee John S. Lee testified that the Licensed Premises had one prior violation for selling alcohol to a minor, which he believed was from April 2000. When shown a letter dated August 19, 2014 which purported to be a warning about the sale of alcohol to a minor in 2014 (exhibit 3), Lee testified that he did not recall receiving such a letter. He conceded that, at some point in 2014, a detective told him that he would be receiving a warning. Lee testified that the acknowledgement letter dated August 14, 2014 bore his signature. (Exhibit 4.)

5. Briana Haro was born on August 14, 1999. She served as a minor decoy during an operation conducted by LAPD on November 11, 2017. On that date she was 18 years old.

6. Haro appeared and testified at the hearing. On November 11, 2017, she was 5'11" tall and weighed 150 pounds. She wore green pants and a gray t-shirt, with a flannel shirt tied around her waist. Her hair was long and straight and came down to her elbow. (Exhibits 6-7.) Her appearance at the hearing was the same, except that she weighed 167 pounds and her hair was longer (waist-length).

7. On November 11, 2017, Ofcr. Jessica Gutierrez-Gonzalez entered the Licensed Premises. Haro entered a few moments later. Haro selected a can of Bud Light beer and took it to the counter. The clerk, Emanuel Rodriguez, rang up the beer and asked to see her ID. She handed her California identification card (exhibit 5) to him. Rodriguez looked at it briefly and said, "It's OK." Haro paid for the beer, received some change, then exited.

8. Outside, Haro went to the vehicle where an officer was waiting. She told the officer what happened and handed him the beer.

9. Haro re-entered the Licensed Premise with various officers, including Ofcr. Gutierrez-Gonzalez and Ofcr. Brad Bautista. Ofcr. Bautista contacted Rodriguez and explained the violation to him. One of the officers asked Haro to identify the person who sold her the beer. She pointed to Rodriguez and said that he had. Haro and Rodriguez were on

opposite sides of the sales counter at the time, approximately five feet apart. A photo of the two of them was taken (exhibit 6), after which Rodriguez was cited.

10. When informed of the violation, Rodriguez stated that he had checked Haro's ID. Ofcr. Bautista obtained Haro's ID from her and showed it to Rodriguez. Rodriguez testified that, when he looked at the date of birth on the ID prior to the sale, he believed it read "1989." He also testified that he believed Haro could have been as old as 28 (the age she would have been had she been born in 1989) based on her appearance inside the Licensed Premises.

11. Lee testified about the training he provided to Rodriguez. This included providing Rodriguez with two IMPACT booklets published by the Department. He had Rodriguez sign a form declaring that he had read the booklets. After this incident, he had Rodriguez review the IMPACT booklets again. When selling alcohol, Rodriguez is supposed to ask for ID if the customer looks young.

12. The Licensed Premises previously had an ID checker/scanner, but it did not work properly. Among other things, it did not recognize out-of-state IDs and sometimes read fake IDs as if they were valid. Lee removed the ID checker/scanner and has not replaced it.

13. November 11, 2017 was Haro's first time acting as a decoy. On that date she visited four different locations. The Licensed Premises was the only location which sold an alcoholic beverage to her. He had been a cadet with LAPD for approximately seven years before this incident. She first learned of the decoy program through her role as a cadet.

14. Haro appeared her age—18—at the time of the decoy operation. Based on her overall appearance, i.e., her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance and conduct in the Licensed Premises on November 11, 2017, Haro displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to Rodriguez.

15. Except as set forth in this decision, all other allegations in the accusation and all other contentions of the parties lack merit.

CONCLUSIONS OF LAW

1. Article XX, section 22 of the California Constitution and section 24200(a) provide that a license to sell alcoholic beverages may be suspended or revoked if continuation of the license would be contrary to public welfare or morals.

2. Section 24200(b) provides that a licensee's violation, or causing or permitting of a violation, of any penal provision of California law prohibiting or regulating the sale of alcoholic beverages is also a basis for the suspension or revocation of the license.
3. Section 25658(a) provides that every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor.
4. Cause for suspension or revocation of the Respondents' license exists under Article XX, section 22 of the California State Constitution, and sections 24200(a) and (b) on the basis that, on November 11, 2017, the Respondents' clerk, Emanuel Rodriguez, inside the Licensed Premises, sold an alcoholic beverage to Briana Haro, a person under the age of 21, in violation of Business and Professions Code section 25658(a). (Findings of Fact ¶¶ 5-14.)
5. The Respondents argued that the decoy operation at the Licensed Premises failed to comply with rules 141(b)(2)² and, therefore, the accusation should be dismissed pursuant to rule 141(c). With respect to rule 141(b)(2), the Respondents argued that Haro's physical appearance and demeanor was that of a person over the age of 21 based on Rodriguez's testimony. This argument is rejected. As noted above, Haro's appearance was consistent with her actual age, 18, and, therefore, she displayed the appearance which could generally be expected of a person under 21 years of age. She did not appear to be old enough to pass for a 28-year-old. (Finding of Fact ¶ 14.)

PENALTY

The Department requested that the Respondents' license be suspended for a period of 25 days, arguing that an aggravated penalty was appropriate based on the 2000 sale-to-minor violation and the lack of safeguards since the incident in 2014. The Respondents argued that their 24 years of operation with only one violation 17 years ago warranted a mitigated penalty. Accordingly, the Respondents recommended a 10-day suspension, all stayed.

The Department's reliance on a purported violation in 2014 is misguided. On August 14, 2014, the Department sent something to the Respondents for signature. Exactly what accompanied this letter is unclear since the Department did not maintain the attachment. (Exhibit 4.) During closing arguments, the Department argued that the attachment was the August 19, 2014 warning letter. (Exhibit 3.) This argument makes no sense—the warning letter was dated five days **after** the acknowledgement was sent. The legal

² All rules referred to herein are contained in title 4 of the California Code of Regulations unless otherwise noted.

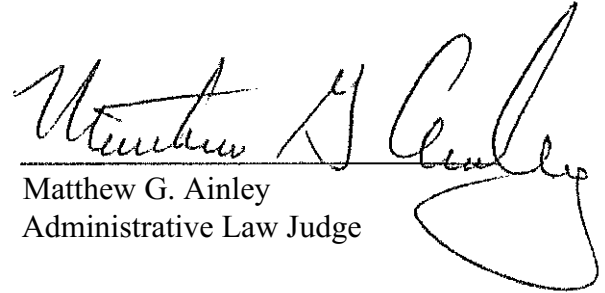
presumption that a letter sent by U. S. mail has been received is a rebuttable presumption. In the present case, Lee testified that he received something in 2014, which he signed and sent back. He could not recall what it was, but identified his signature on the August 14, 2017 acknowledgement. Finally, he did not recall seeing the August 19, 2017 letter. Based on this evidence, Lee received the August 14, 2014 acknowledgement with its unknown attachment, but he did not receive the August 19, 2014 letter (i.e., the Respondents presented evidence sufficient to rebut the presumption). Since the Department did not maintain the attachment, it is impossible to determine what, if any, information it was intended to impart.

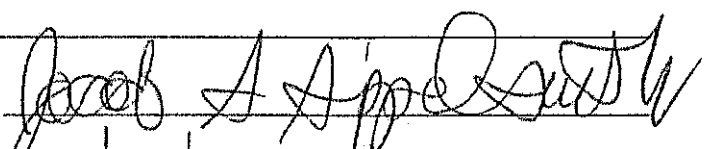
The Department emphasized that the Respondents did not have a formal training process for its employees. Yet the Respondents' informal process clearly was effective—only one violation in 25 years and no violations for the past 17 years speaks volumes. The standard recommended penalty under rule 144 for a sale-to-minor violation is a 15-day suspension. In this case, 17 years of discipline-free operation warrants some mitigation. The penalty recommended herein complies with rule 144.

ORDER

The Respondents' off-sale general license is hereby suspended for a period of 5 days.

Dated: August 24, 2018


Matthew G. Ainley
Administrative Law Judge

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<input type="checkbox"/> Non-Adopt: _____
By: 
Date: <u>11/13/18</u>