ISSUED JUNE 12, 1998

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

BALBIR S. DHILLON and RANBIR K. DHILLON dba Ernie's Wine & Liquors 915 Soquel Avenue Santa Cruz, California 95062, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-6937 File: 21-316374 Reg: 97038668 Administrative Law Judge at the Dept. Hearing: Michael B. Dorais Date and Place of the Appeals Board Hearing: March 4, 1998 San Francisco, CA

Balbir S. Dhillon and Ranbir K. Dhillon, doing business as Ernie's Wine & Liquors (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, for their clerk having sold an alcoholic beverage (beer) to a 19-year-old minor decoy, 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 appellants Balbir S. Dhillon and Ranbir K. Dhillon, and the Department of Alcoholic Beverage Control, appearing through its

[1]The decision of the Department, dated August 14, 1997, is set forth in the appendix.

counsel, Nicholas R. Loehr.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 28, 1996. Thereafter, the Department instituted an accusation against appellant charging that on November 2, 1996, appellants' clerk sold a six-pack of Budweiser beer, in cans, to a 19-year-old minor who was participating in a decoy operation being conducted by the Santa Cruz Police Department and Sheriff's Office.

An administrative hearing was held on July 10, 1997, at which time oral and documentary evidence was received. At that hearing, deputy sheriff Robert McKinley testified that he witnessed the purchase of the beer by the decoy, Jose Garcia. Garcia also testified, and his testimony was consistent with that of McKinley regarding the sale transaction. Both described how Garcia brought the beer to the counter, was not asked for identification, gave the clerk a $10 bill, got change, and started to leave the store, when McKinley intercepted him, took custody of the beer, the change, and Garcia's identification, and returned to the counter.

McKinley testified that the clerk, who identified himself as Balbir Singh, appeared confused when shown Garcia's identification, and stated in broken English that he did not understand what was going on. At that point, another employee in the store came over, identified himself as a relative of the clerk having the same last name, and explained that the clerk had only recently come to this country and did not understand the law. McKinley testified that, with language assistance from the second employee, he issued a citation to the clerk.

Balbir S. Dhillon testified, and claimed he was the only person working in the store on the night in question, and denied having been issued a citation. He also

claimed to have checked the work schedules of two employees who sometimes worked at the store, and determined that neither had worked that night.

Subsequent to the hearing, the Administrative Law Judge issued his proposed decision, which the Department adopted, determining that the sale had occurred in the manner described by the deputy sheriff and the decoy. The ALJ concluded that appellants' evidence regarding the work schedules was, at best, erroneous and incomplete, and that the deputy sheriff and the minor had both testified the sale was made by a person other than Dhillon.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Department failed to establish the identity of the clerk; (2) the transaction was not a "legal transaction" because the minor never left the premises with the beer; and (3) the penalty should be 10 days rather than 15 because that is what the Department requested.

DISCUSSION

Appellants contend that the Department failed to establish the identity of the clerk. However, they do not explain how this affects the result, since any failure to identify the person who made the sale does not negate the evidence that the sale was made, and made by a person placed in the store in a position where he could conduct such a transaction.

A licensee is vicariously responsible for the unlawful on-premises acts of his employees. Such vicarious responsibility is well settled by case law. (Morell v. Department of Alcoholic Beverage Control (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405, 411]; Harris v. Alcoholic Beverage Control Appeals Board (1962) 197 Cal.App.2d 172 [17 Cal.Rptr. 315, 320]; and Mack v. Department of Alcoholic Beverage Control (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629, 633].)

Appellants also contend that since the minor never left the store, there was no "legal transaction," the implication being that the sale was not consummated. This argument is totally lacking in merit. Garcia paid for the beer, received change from the marked $10 bill, and was on his way out of the store. It was only because deputy sheriff McKinley stepped in for the purpose of enforcing the law that Garcia did not leave the premises. Admittedly, the sale was not "legal," but that is only because of the illegality of the clerk's action in selling an alcoholic beverage to a minor.

Lastly, appellants contest the 15-day suspension, on the ground the Department only requested a 10-day suspension. This contention, too, must fail.

The ALJ explained his departure from the Department's recommendation in the following manner (Finding VIII)::

"Counsel for the Department recommended a ten (10) day suspension.

"This recommendation is consistent with that usually recommended in cases of illegal sales to minors where a decoy is involved. In non-decoy cases, the recommendation is usually a fifteen (15) day suspension.

"Effective July 1, 1997, Government Code Section 11425.50(d) [sic - (e)] provides that a penalty may not be based upon a guideline or other standard falling short of a formal regulation. No regulation exists which supports the Department's penalty recommendation.

"Causing additional concern is the unequal application of the law. The Department's long standing distinction in standard penalty for the same type of wrongful act draws into question the issue of unequal application of the law. Moreover, a lesser penalty in decoy cases is problematic because it suggests somehow a violator is less culpable because the purchaser was a police agent. No such distinction should be drawn unless it is proved that a decoy stepped over the lines governing against entrapment. In such a case, the action should be dismissed.

"In light of these considerations it is appropriate that absent evidence of mitigation or aggravation, that a single standard penalty be applied in decoy and non-decoy cases.

"Due to the serious nature of the violation, the stronger penalty is more appropriate if one or the other of the two current standard penalties is to become the norm.

"Given the large number of sales made to minors in decoy operations, and given the serious adverse social consequences of underage drinking, it appears that the Department should consider creating a stiffer standard penalty in such cases to significantly reduce the number of illegal sales of alcoholic beverages to minors."

Government Code §11425.40, subdivision (e) (cited as subdivision (d) by the ALJ) reads, in full text, as follows:

"A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule subject to Chapter 3.5 (commencing with Section 11340) unless it has been adopted as a regulation pursuant to Chapter 3.5 (commencing with Section 11340)."

The Law Revision Commission notes to this subdivision explain its objective:

"Subdivision (e) is consistent with the rulemaking provisions of the Administrative Procedure Act. Section 11340.5 ('underground regulations'). A penalty based on a precedent decision does not violate subdivision (e). Section 11425.60 (precedent decisions). If a penalty is based upon an 'underground rule' - one not

> adopted as a regulation as required by the rulemaking provisions of the Administrative Procedure Act - a reviewing court should exercise discretion in deciding the appropriate remedy. Generally the court should remand to the agency to set a new penalty without reliance on the underground rule but without setting aside the balance of the decision. Remand would not be appropriate in the event that the penalty is, in light of the evidence, the *only* reasonable application of duly adopted law. Or a court might decide the appropriate penalty itself without giving the normal deference to agency discretionary judgments. See Armistead v. State Personnel Bd., 22 Cal.3d 198, 583 P.2d 744, 149 Cal.Rptr. 1 (1978)."[2]

[25 Cal.L.Rev.Comm. Reports 55 (1995].

The gist of the ALJ's general criticism is the Department's reliance on standard penalties, or ranges of standard penalties, which may be known only to the Department and those practitioners whose experience in litigating with the Department has exposed them to the Department's thinking.

The ALJ's specific criticism, that the Department should not differentiate between sale-to-minor and sale-to-minor decoy cases in the penalty to be imposed, reflects his personal view, with which, despite its adoption of the proposed decision without change, the Department may or may not fully agree.

Be that as it may, we are unable to say the ALJ's determination that a 15-day suspension is an appropriate penalty for the violation in this case was error. It is clear that he gave considerable thought to what would be a reasonable and fair penalty, and did not act arbitrarily or capriciously. The Appeals Board has said on numerous occasions that it will not disturb the Department's penalty orders in the absence of an

---

[2] In the cited case, the California Supreme Court held that a section of the personnel board's transactions manual was invalid because it had not been adopted in accordance with the Administrative Procedure Act. The Court reversed the trial court's dismissal of a petition for writ of mandate filed by an employee seeking to set aside a resignation of his civil service position he had withdrawn before it was to become effective or was acted upon by the board.

abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) There is no reason to disturb the penalty in this case.

CONCLUSION

The decision of the Department is affirmed.[3]

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

[3]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 decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate 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.