

ISSUED DECEMBER 21, 1999

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

LUCKY STORES, INC. dba	)	AB-7208
Sav-On-Drugs)	
19424 Soledad Canyon Rd.	)	File: 21-295836
Santa Clarita, CA 91351,	)	Reg: 98043048
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Sonny Lo
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	September 2, 1999
	)	Los Angeles, CA

Lucky Stores, Inc., doing business as Sav-On-Drugs (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for appellant's clerk having sold an alcoholic beverage to a 19-year-old police 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 appellant Lucky Stores, Inc., appearing through its counsel, Richard Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

¹The decision of the Department, dated July 30, 1998, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 1, 1994. Thereafter, the Department instituted an accusation against appellant charging that on December 12, 1997, appellant's clerk, Jamie Smith, sold a six-pack of Bud Lite beer to Amy Blankenship, who was 19 years old at the time and working as a decoy for the Los Angeles Sheriff's Department.

An administrative hearing was held on July 6, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the decoy (Blankenship); by Thomas Drake, a Los Angeles County deputy sheriff assigned to the decoy operation with Blankenship; and by appellant's clerk (Smith).

Blankenship testified that she entered the premises, picked up a six-pack of Bud Lite beer, took it to the checkout counter, and gave it to the female clerk, who rang up the sale and asked to see Blankenship's identification [RT 11-12]. She showed the clerk her California ID card, paid for the beer, received change, and left the store with the beer, where sheriff's deputies were waiting for her [RT 13-15]. Blankenship then went back inside the premises with the deputies and she identified Smith as the clerk who sold her the beer [RT 15].

Drake testified to the same sequence of events [RT 20-23]. In response to a question from the Administrative Law Judge (ALJ), Drake stated that the clerk looked at the decoy's ID for five or ten seconds and entered numbers on a keypad while looking at the ID [RT 24].

Smith testified that she thought Blankenship looked young, so she asked to see her ID and looked at the date of birth shown on it [RT 26-27]. The cash register computer asks for a birth date when alcoholic beverages are scanned, so Smith entered on the cash register keypad the date of birth she thought she saw on the ID, 09/13/70. The computer accepted the date, calculated the decoy's age as over 21, and permitted the transaction to be completed, which Smith did [RT 27-29]. Smith testified she was aware that ID's had red stripes indicating when the holder turned 21, but she "just didn't see it" [RT 30].

Subsequent to the hearing, the Department issued its decision which determined that Smith had sold alcoholic beverage to a minor and rejected appellant's request for mitigation of penalty because "had the clerk merely looked at the identification card carefully, she would have known, without doing any calculation, that the decoy was under 21 years old." (Finding IV.)

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the sale violated Rule 141(a) (4 Cal.Code Regs., § 141, subd. (a)) because the date of birth on the ID was obscured, and (2) the good faith mistake of the clerk which led to the illegal sale should have caused mitigation of the penalty.

DISCUSSION

I

Appellant contends the sale here violated the mandate of Rule 141(a) that decoy operations be conducted “in a fashion that promotes fairness” because the date of birth on the decoy's ID was partially obscured by the DMV hologram, causing the clerk to misread the birth date of 09/13/78 as 09/13/70.

To say that the decoy operation was conducted unfairly because the decoy used her valid California ID that carries the standard DMV hologram stretches credulity. The date of birth, while it may have been somewhat difficult to read because of the hologram, was not impossible to read. If a DMV-issued ID with holograms is held in certain positions, it can be difficult to read; however, by slightly turning the card, the holograms disappear and the information on the card is no longer obscured. Had the clerk spent a moment more and made sure she could read the information clearly, she would have known and used the correct date of birth.

In addition, the ID bore a red stripe that had “AGE 21 IN 1999” printed on it in white letters. Had the clerk looked at the red stripe, she would have known that the decoy was not yet 21.

Appellant argues that the Department “cannot have it both ways” with regard to the red stripe. That is, in another Lucky Stores appeal, AB-7028 (1999), the decoy's ID did not have a red stripe and the licensee argued that it was unfair to use an ID without the stripe since the clerks were trained to look for it. The Department argued, and the Appeals Board agreed, that “All the clerk had to do was look at the date of birth” Appellant now argues that the Department is taking contradictory positions, one time saying the date of birth is what should be looked at, another time saying it is the red

stripe. The appellant sees these seeming contradictions as “intended by the Department to ignore the fairness requirement of Rule 141(a).” (App. Br. at 4.) There is no unfairness in this. Both the date of birth and the red stripe are there to alert licensees to a purchaser's age. The licensee or the licensee's employee takes a risk when he or she chooses to disregard one of these and makes a mistake about the other one.

While the new point-of-sale devices, such as the cash register that recognizes an alcoholic beverage and requires the purchaser's age, should help prevent sales to minors, they also may lull licensees and their employees into believing that they do not have to be as careful when checking ID's, since they rely on the computer to stop them if they make a mistake. As this case makes evident, however, the computer is only as accurate as the data that is entered.

II

Appellant contends that, if the clerk's good faith mistake does not fully excuse the violation in this case, it ought to at least be considered as a mitigating factor, resulting in a penalty less than the “standard” 25-day penalty for a second sale to minor.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Although the clerk was found to have made a “good faith” mistake, the mistake resulted from not looking carefully enough at the ID. This is not the type of mistake that calls for mitigation.

The penalty is not a light one, but is in line with the usual penalty for second sale-to-minor violations. It cannot be said that this penalty exceeds the Department's discretion.

ORDER

The decision of the Department is affirmed.²

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

²This 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.