ISSUED DECEMBER 21, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS

BOARD OF THE STATE OF CALIFORNIA

LUCKY STORES, INC. dba Sav-On-Drugs 7915 Florence Avenue Downey, CA 90240, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7210 File: 21-330724 Reg: 98042907 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: 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 Control[1] which suspended its license for 15 days, with all 15 days stayed, for appellant's clerk having sold beer to a minor decoy, 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 July 30, 1998, is set forth in the appendix.

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, Thanh-Le Nguyen.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 12, 1981. Thereafter, the Department instituted an accusation against appellant charging that, on December 17, 1997, appellant's clerk, Mayra Martinez, sold a six-pack of Rolling Rock Premium Beer to Justin Prentice, an 18-year-old decoy working with the Downey Police Department.

An administrative hearing was held on June 22, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the clerk, Martinez; the decoy, Prentice; Downey police officer Jeff Griffen; and the store manager, Robert Shimazu.

The testimony of all witnesses was consistent in describing the events as stated in the Department decision (Findings IV and V):

> "When the clerk scanned the six-pack of Rolling Rock beer on the computer, the computer displayed the words 'item not found.' She noticed the words 'mountain spring' on the cans of beer and believed that the six-pack contained soft drinks. (The words on the can were 'It comes from the mountain springs to you.') She asked the decoy the price of the six-pack. The decoy replied that it was $2.99. The clerk then rang up the six-pack as 'pop (carbonated)' and sold it to the decoy for $2.99 plus tax. When the clerk sold the six-pack of Rolling Rock beer to the decoy, she made a good faith mistake in believing that the six-pack contained soft drinks. . . . ¶ Not knowing that she was selling beer to the decoy, the clerk did not ask the decoy regarding his age or ask to see his identification."

Subsequent to the hearing, the Department issued its decision which determined that cause for suspension of the license had been established because the clerk sold alcoholic beverages to a person under the age of 21 in contravention of Business and Professions Code §25658, subdivision (a) .

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) The decoy sale was unfair and violated Rule 141(a), and (2) the Department may not base a license suspension on strict liability.

DISCUSSION

I

Appellant contends that this decoy operation was unfair and therefore violated Rule 141(a) because the decoy picked an "obscure" brand of beer which the clerk mistook for soda or mineral water. Although the decoy should have been aware the clerk did not realize the six-pack was beer, he did nothing to let the clerk know of her mistake.

Appellant analogizes to the appeal of Southland and Dandona (1999) AB-7099, where the Board held that the decoy had a duty to respond to the clerk's obvious misreading of the decoy's age on her ID. That case is clearly distinguishable, however, since Rule 141(b)(4) specifically requires that a decoy answer truthfully any questions about his or her age. There is no similar provision requiring decoys to provide other information to clerks.

If the clerk had looked more closely at the cans, she would have seen that they contained beer. As Department counsel pointed out in closing argument at the

administrative hearing [RT 44]:

> "99.9 percent of the cases that come before you involving sales to minors, I don't think involve people who go up to the counter saying that his employee's thinking 'Gee, I want to sell beer to this 18-year-old kid.' They all are a mistake of some kind or another. Failing to check I.D., looking at an I.D. and misreading it, these are all mistakes, but they're not a defense to the accusation.
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> "The fact is we do understand what happened here. We have some sympathy for Ms. Martinez. But just to rely on the computer alone and not to look closely at what she was selling, I think had she looked closely at it, she could have seen it said 'premium beer' in the big blue and white circle. We can't rely on machines. We have to look at the people in front of us. She said she wouldn't sell cigarettes to this kid because he looks so young. She needs to be [more] vigilant. It was a mistake, but a mistake is not a defense. We think our recommended penalty [15 days with all stayed] considers that mistake and is suggested because of it."

Ultimately, the licensee and its agents have to be responsible to prevent "mistakes" that result in the sale of alcoholic beverages to minors. The decoy in this instance may not have been aware that the clerk did not know that the cans contained beer. Even if he had, it is far from clear that he owed any duty to say anything to the clerk. These circumstances are not so unfair as to violate Rule 141.

II

Appellant argues that finding a violation in this instance amounts to holding the licensee to a standard of strict liability. Citing the case of Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779], it argues that licensees may not be held strictly liable for violations; the Department must show there is "good cause" for disciplining the license.

The case of Laube v. Stroh, supra, rejected the analysis and decision in McFaddin San Diego 1130, Inc. v. Stroh (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8], which held that a licensee "permitted" drug sales when the licensee failed to take reasonable steps to prevent the sales, even though the licensee had no reason to believe such activity took place on the premises, "and regardless of the nature of the establishment or its clientele." (Laube v. Stroh, supra, 2 Cal.App.4th at 366.) Laube dealt with surreptitious drug transactions between patrons and an undercover agent--a type of patron activity concerning which the licensee had no indication and therefore no actual or constructive knowledge--in "'an upscale type hotel, bar and restaurant operation that was described by the Chief of Police as "'clean' and 'orderly'." (Laube v. Stroh, supra, 2 Cal.App.4th at 367.)

In rejecting the notion of strict liability for licensees, the Laube court stated:

> "A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once the licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to 'permit' by a failure to take preventive action."

This appeal is clearly distinguishable from Laube, supra. The appellant here is not being subjected to strict liability as was the licensee in Laube. Appellant is not being disciplined for activity of which it had no knowledge and which it could not reasonably anticipate would take place in its premises. The sale of an alcoholic

beverage to a person under 21 is a "reasonably possible unlawful activity" for any seller of alcoholic beverages; therefore, any licensee has a duty to be diligent in preventing a sale. The clerk here made a mistake which resulted in a violation. The mistake, however, was one that was reasonably preventable by a more careful inspection of the product. To find the clerk made a mistake is not equivalent to finding the clerk blameless.

ORDER

The decision of the Department is affirmed.[2]

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

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[2]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.