ISSUED NOVEMBER 2, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

TBD ENT., INC. dba Schoonerville 7279 Foothill Boulevard Tujunga, CA 91042, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7253 File: 41-324700 Reg: 98043232 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: September 2, 1999 Los Angeles, CA

TBD Ent., Inc., doing business as Schoonerville (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale beer and wine public premises license for 10 days for its bartender having sold an alcoholic beverage (beer) to a minor participating in a decoy operation conducted by the Los Angeles Police Department.

[1]The decision of the Department, dated October 22, 1998, is set forth in the appendix.

Appearances on appeal include appellant TBD Ent., Inc., appearing through its counsel, Joshua Kaplan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on December 9, 1996. Thereafter, the Department instituted an accusation against appellant charging that appellant's bartender, Denise Allreid, sold a beer to Jill Morgan, the decoy, who, at the time, was 19 years of age.

At an administrative hearing, Jill Morgan and Stephen Moore, a Los Angeles police officer, presented testimony with regard to the sale forming the basis for the accusation. Leo Michael Lesh, manager of the premises, testified on behalf of appellant.[2]

Morgan testified that she entered the bar alone, sat at the bar, and ordered a Bud Light [RT 10], which the bartender, later identified as Allreid, served in a glass. Morgan did not see the beer poured, and did not know whether it came from a tap, bottle, or can [RT 15]. Morgan was not asked her age or for identification [RT 11]. After paying for the beer, Morgan waited for the officers to come in. When they did, she pointed to Allreid as the person who sold her the beer [RT 11]. Morgan then went outside, but was later brought back in and asked a second time to point

[2] Our summary of the facts includes those we think particularly relevant to the issues presented in this appeal, and does not purport to present all the testimony and evidence.

out who sold to her, which she did [RT 12]. Morgan also testified that Exhibit 2 consisted of two photos taken of her before the decoy operation began that evening [RT 13].

On cross-examination, Morgan confirmed that she had not seen the bartender pour the beer, and had no personal knowledge of the contents of the glass [RT 16]. She denied wearing any jewelry other than the necklace which appears on the Exhibit 2 photos, and denied wearing any makeup. Morgan said she visited a total of 27 establishments that evening, eight of which sold her an alcoholic beverage.

Officer Moore testified that he entered the premises three or four minutes after Morgan, and stood by while his fellow officer, Ginger Harrison, advised the bartender she had sold an alcoholic beverage to a minor [RT 29]. Moore was present when Morgan identified Allreid as the person who made the sale. Moore said he also observed a schooner with amber-colored liquid inside it, which Morgan identified as the beer she was served [RT 30]. Moore took a sample from the schooner, smelled it, and described the smell as that of an alcoholic beverage like beer [RT 31]. After he advised Allreid of her constitutional rights, Allreid admitted she had sold an alcoholic beverage to Morgan, and said she did not normally work behind the bar area, was busy, and "got a little lackadaisical" [RT 31].

On cross-examination, Moore testified that he did not recall Morgan having made a second identification of Allreid [RT 35], and admitted a photograph had been taken of Morgan and Allreid together, but could not account for its

whereabouts [RT 33]. Moore also admitted that he had never before smelled non-alcoholic beer, so would not be able to differentiate non-alcoholic beer from alcoholic beer on the basis of smell alone [RT 34].

Leo Lesh, appellant's manager, testified that Allreid was terminated eight or nine days after the incident because she "just wasn't up to performance. Things weren't done properly" [RT 40]. Allreid had only worked there "about 10, 13 days," and was not a bartender [RT 40-41]. Lesh also testified that the bar sells non-alcoholic beer, has a training program for its employees, and that Allreid violated appellant's policy that every purchaser of an alcoholic beverage must be asked for identification [RT 42]. Allreid's violation of that policy was the principal reason she was terminated [RT 43].

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, finding that the sale took place as alleged, and finding that appellant's defenses lacked merit. The Department adopted the proposed decision, and this timely appeal followed.

Appellant now contends (1) the decision is not supported by the findings and the findings are not supported by the evidence; (2) the Department's use of an administrative law judge appointed in accordance with Business and Professions Code §24210 denied it due process; and (3) the penalty is so excessive as to amount to cruel and unusual punishment.

I

Appellant's contention that the decision is not supported by the findings and the findings not supported by the evidence is made up of a series of unrelated points, ranging from an attack on the finding that there was a sale of an alcoholic beverage, to a claim the minor did not present the appearance of a person under the age of 21, to claims the Department violated its guidelines for decoy operations, entrapped appellant, and failed to preserve critical evidence.

Appellant's scattershot attack on the finding and decision lacks merit.

Appellant's principal contention, that the beverage which was served to the decoy was not alcoholic, is defeated by a well-established legal presumption that the patron was served the drink requested (see, e.g., Griswold v. Department of Alcoholic beverage Control (1956) 141 Cal.App.2d 807 [297 P.2d 762, 764], and by the admission of Allreid that the beverage served to Morgan was beer.

Appellant's claim that the Department violated its guidelines is also unpersuasive. Contrary to appellant's claims, Morgan was the proper age for a decoy [RT 9], and was found to present the requisite appearance (Finding of Fact III-1).[3] The licensees were notified that decoy operations were being conducted [RT 36]. The claim that the transaction occurred during appellant's "rush hour" is supported only by Lesh's statement that the premises were "busy" [RT 40],

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[3] Although this Board is not entitled to make independent findings of fact, our examination of Exhibit 2 helps us to appreciate the ALJ's findings that Morgan presented an appearance which could reasonably be considered as that of a person under the age of 21, and that she presented that appearance on the night in question.

without any amplification. There is no specific evidence to suggest Allreid's attention may have diverted from her responsibility to ask for identification before selling an alcoholic beverage.

The entrapment claim deserves little mention. The record contains nothing to suggest the existence of any conduct on the part of the police which could be said even to remotely resemble entrapment.

The test for an entrapment defense is whether the conduct of the public agent was such that a normally law-abiding person would be induced to commit the prohibited act. Official conduct that does no more than offer an opportunity to act unlawfully is permissible. (People v. Barraza (1979) 23 Cal.3d 675 [153 Cal.Rptr. 459].)

II

Appellant contends the proceeding suffers from a constitutional infirmity, based upon the fact the ALJ was appointed by the Department, pursuant to Business and Professions Code §24210.

Appellant's contention equates to an attack on the constitutionality of §24210. The Appeals Board, as with other administrative agencies of the State, lacks the power to declare an act of the Legislature unconstitutional. (California Constitution, article 3, §3.5.)

Therefore, in accordance with its usual practice, the Board declines to address this issue.

III

Appellant contends the penalty is so excessive as to amount to cruel and unusual punishment.

The penalty, a mere 10-day suspension for serving an alcoholic beverage to a minor, can hardly be considered cruel and unusual punishment. It is, in fact, a relatively lenient penalty for this type of offense, and well within the Department's discretion.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

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