ISSUED SEPTEMBER 2, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

KYUNG H. and SEUNG I. KIM dba Santa Ana Shell 8275 East Santa Ana Canyon Road Anaheim, CA 92808, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7103 File: 20-301796 Reg: 97041544 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: July 1, 1999 Los Angeles, CA

Kyung H. and Seung I. Kim, doing business as Santa Ana Shell (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for appellants' employee selling beer to an 18-year-old police decoy, their third sale-to-minor violation within 36 months, 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 Kyung H. and Seung I. Kim, appearing through their counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon Logan.

[1] *The decision of the Department, dated April 9, 1998, is set forth in the appendix.*

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 7, 1995. Thereafter, the Department instituted an accusation against appellants charging that, on June 27, 1997, appellants' clerk, Jorge Atrisco, sold a six-pack of beer to Michael Hedgpeth, who was then 18 years of age and acting as a decoy for the Anaheim Police Department.

An administrative hearing was held on February 27, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Anaheim police officer Mike Nichols; the decoy, Hedgpeth; Brian Alexander, a person present at the time of the sale to Hedgpeth; Juan C. Munoz, the person who gave Atrisco his training with regard to the sale of alcoholic beverages; and Seung I. Kim, one of the appellants.

Nichols testified that he went into the store before the decoy did and observed Hedgpeth get a six-pack of Coors beer, take it to the register, show his identification to Atrisco, pay for the beer, and take it outside to another investigator who was waiting there [RT 14-16]. Hedgpeth then went back into the store, showed the clerk his driver's license, and pointed out the clerk as the one who sold to him [RT 16-17].

Hedgpeth testified to the same sequence of events [RT 24-26]. He also testified that his appearance on the day of the hearing was substantially the same as it was on the day of the decoy operation: he was 6'2" or 6'3" tall and weighed about 160 pounds [RT 26-27]. His hair was a little shorter on June 27, 1998, than it was at the time of the hearing [RT 27].

Brian Alexander testified that he was a regular customer at appellant's store and was there when Hedgpeth bought the beer [RT 35-36]. He recalled that the store was busy during the time Hedgpeth was there [RT 38, 43]. He said that Hedgpeth was asked for, and showed, his identification and that the clerk, Jorge Atrisco, looked at the identification, consulted a calendar on the counter, and sold the six-pack to Hedgpeth [RT 39-40]. Alexander also testified that he thought Hedgpeth looked under the age of 21 [RT 43].

Juan C. Munoz testified that he received training from the Department regarding the sale of alcoholic beverages and, in turn, trained Jorge Atrisco [RT 46-47]. Seung I. Kim testified that he was not told when he signed stipulations and waivers to resolve two prior sale-to-minor accusations that a third sale-to-minor violation might cause his license to be revoked [RT 63].

Subsequent to the hearing, the Department issued its decision which determined that the sale of an alcoholic beverage to a minor was made as alleged in the accusation, that this was appellants' third violation of that kind occurring within a 36-month period, and that appellants' license should be revoked pursuant to Business and Professions Code §25658.1, subdivision (b).

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) there was not competent evidence of the dates of the prior violations; (2) the ALJ did not address the defense made under Rule 141(b)(2); and the Department arbitrarily revoked this license, thereby failing to properly exercise its discretion.

DISCUSSION

I

Appellants contend there was not competent evidence of the dates of the prior violations, so those violations cannot be considered in determining whether appellant has had three sale-to-minor violations in 36 months, thus coming within the purview of Business and Professions Code §25658.1, subdivision (b).

Evidence of the dates of the prior accusations is in the accusations for those violations. The Department submitted copies of the accusations and the decisions in the prior cases, but the copies of the accusations were not properly certified. Two copies of each accusation were submitted: one was complete with the registration number and filing date, but the certification by Rheba Chastain of Department headquarters was not dated; the other was properly certified by Phyllis Crippen, Santa Ana district administrator, but it had no registration number or filing date.

These documents were admitted over the objection of appellants' counsel, and the accusations in question apparently formed the basis for the ALJ's statement in Finding I-A that “Both of the . . . violations occurred in 1995.”

Appellants cite a number of cases for the proposition that a certification must be signed and dated to be valid. The Department has presented no argument or citations disputing this. The Department's brief asserts, at page 4;

> “Copies of the accusations in Exhibits 3 & 4 alone are certified properly by the Department, but assuming there was a problem with the missing date of [sic] signature, section 1280 [of the Evidence Code] would not render the accusations admitted improperly.”

Evidence Code §1280 provides:

> “Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
> (a) The writing was made by and within the scope of duty of a public employee;
> (b) The writing was made at or near the time of the act, condition, or event; and

(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

This exception to the hearsay rule is not applicable, because the question is not whether the accusation is a writing covered by §1280,[2] but whether a *copy* of the accusation, lacking proper certification, may be used as evidence of the dates of prior violations. This question involves the "best evidence rule," which says that the best evidence of the content of a writing is the original writing. When the original is not available, secondary evidence, such as a copy of the original writing, may be used if it carries the assurance that it is an accurate copy. Copies of "public writings," such as Department accusations, may be used as secondary evidence if properly certified to be accurate copies. Proper certification involves a written statement by the legitimate custodian of the writing that the copy is a true and correct copy of an official document, the custodian's signature, the date the certification was signed, and the place where it was signed.

In this case, only one copy of each accusation is relevant: that with the filing date and the Reg. number. The certification of this copy was signed "Rheba Chastain, OSSI / Hearing & Legal." The place is provided in the certification itself, which says that the document is from Department headquarters in Sacramento. There is no date, however,

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[2] *Even if this were the question, the accusations would not meet the requirements of § 1280. First, the writing must be made as a record of an act, condition, or event. The case law discussing this section deals with writings such as arrest reports, accident reports, coroner records, flood control reports, meeting minutes, and postal records. An accusation is not a record of an event or act as these are; it merely identifies an action that the Department alleges is a violation of some law or regulation.*

Secondly, even if the accusations were the type of writings covered by § 1280, they were not made near the time of the act, which would presumably be the violation. In one case the violation was alleged to have occurred on May 13, 1995, and the writing was dated July 24, 1995, two and a half months later. In the other case, the date of the violation was July 14, 1995, while the writing isn't dated until November 28, 1995.

nor is there any indication that Rheba Chastain is the legitimate custodian of the writing.

The accusations were not properly certified and were not competent evidence of the dates of the prior violations. Since there was no other evidence of the dates of the prior violations, the Department erred in applying Business and Professions Code §25658.1, subdivision (b), and revoking the license on the basis of "three strikes."

II

Appellants contend the ALJ did not address the defense made under Rule 141(b)(2), which requires that a decoy "shall display the appearance which could generally be expected of a person under 21 years of age . . . ." The decoy in this case was about 6'2" tall and weighed about 140 pounds at the time of the decoy operation [RT 27,28].

The ALJ said nothing in the decision about the appearance of the decoy. In a number of prior cases, the Board has reversed decisions of the Department because it was not clear from the decisions that the ALJ's had considered more than simply the physical aspects of appearance in determining that decoys looked under 21. In Circle K Stores, Inc., AB-7080 (4/14/99), the Board said:

> "It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.
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> "Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department's concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as

> a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).”

In the present case, we don't know what the ALJ determined about the decoy's appearance, except by inference. The ALJ revoked the license, so we can infer that he thought the decoy looked under 21. In light of this Board's previous cases involving this issue, an inference is not sufficient. The Board has stated that the ALJ must make a finding “delineating enough of these aspects of appearance to indicate that [the ALJ is] focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.” (Circle K Stores, Inc., supra.) With no finding at all regarding the decoy's appearance, we cannot simply assume that the ALJ properly focused on the whole person of the decoy, and not just his physical appearance, in assessing whether he conveyed the appearance of a person under the age of 21 years. In spite of our concern about the problem of selling alcohol to minors, we feel compelled to reverse this decision of the Department for failing to meet the mandatory requirements of Rule 141.

III

In light of our conclusions on the first two issues in this appeal, it is not necessary to address appellants' additional contention that the Department failed to properly exercise its discretion when it ordered revocation.

ORDER

The decision of the Department is reversed.[3]

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

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[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 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.