ISSUED JUNE 29, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION and JOSEPH H. and ROBERTA L. WHITFIELD dba 7-Eleven Store #13661 9251 Carlton Hills Boulevard Santee, CA 92071, Appellants/Licensees,	)	AB-7313
	)	File: 20-215254
	)	Reg: 98043682
	)	Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria
v.	)	
	)	Date and Place of the Appeals Board Hearing: February 3, 2000 Los Angeles, CA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	

The Southland Corporation and Joseph and Roberta L. Whitfield, doing business as 7-Eleven Store #13661 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for appellants' employee selling an alcoholic beverage to a person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of

[1]The decision of the Department, dated December 10, 1998, is set forth in the appendix.

Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant The Southland Corporation and Joseph and Roberta L. Whitfield, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging that, on April 3, 1998, appellants' clerk, Danette Stonebraker ("the clerk"), sold a six-pack of Budweiser beer to Janelle Castrejon ("the decoy"), an 18-year-old decoy working for the San Diego County Sheriff's Department.

An administrative hearing was held on August 19 and October 19, 1998, at which time oral and documentary evidence was received, and testimony was presented by deputy sheriff Andrew E. Dvorak, by the decoy, and by the clerk.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged in the accusation and no defenses had been established.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) The ALJ did not apply the proper standard in evaluating the decoy's apparent age under Rule 141(b)(2); (2) there is no evidence supporting the finding of a July 6, 1995, prior; (3) the Department violated appellants' right to discovery; and (4) the Department violated Government

Code §11512, subdivision (d), when a court reporter was not provided to record the hearing on appellants' Motion to Compel.

DISCUSSION

I

Appellant contends the ALJ improperly limited his consideration of the decoy's appearance to his physical appearance alone.

Rule 141(b)(2) provides:

> "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense; . . ."

In Finding III. 1., the ALJ stated, in pertinent part:

> "Janelle Castrejon (hereinafter the "minor") is a youthful looking female, whose physical appearance is such as to reasonably be considered as being under twenty-one years of age and who would reasonably be asked for identification to verify that she could legally purchase alcoholic beverages."

This raises an all too frequently recurring issue on appeal. In Circle K Stores, Inc. (1999) AB-7080, the Board stated:

> "Nonetheless, while an argument might be made that when the ALJ uses the term "physical appearance," he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what he did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.
>
> "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.
>
> "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]).

The Board's position finds its support in the teachings of the California Supreme Court in Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836] that "the 'accepted ideal is that the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.'"

We believe that this case must be reversed for the same reasons as expressed in the earlier Board reversals, such as Circle K Stores, Inc. (1998) AB-7080, and Circle K Stores, Inc. (1999) AB-7122, where this issue was presented.

II

The ALJ found that appellants had previously paid a fine in lieu of suspension following the filing of an accusation on July 6, 1995, and the finding of a violation. The ALJ also found that the present violation is the licensees' second sale-to-minor violation within a 36-month period, and imposed a 25-day suspension, which is commonly imposed for a "second strike" under Business and Professions Code

25658.1, although he did not explicitly use that section as the basis for the penalty.

Exhibit 2 consists of 1) an "Order Granting Offer in Compromise" in Reg. #95033232, dated November 30, 1995, and 2) an accusation in Reg. #95033232, dated June 22, 1995, alleging a sale-to-minor violation on April 7, 1995. The accusation in the present matter alleges a sale-to-minor violation in Reg. #95033232, giving a date of July 6, 1995.

Appellant contends it was improper to consider the prior violation, since the findings do not set forth the correct date of the violation. Appellant cites a recent Board decision Kyung H. And Seung I. Kim (Sept. 2, 1999) AB-7103) for the proposition that without competent evidence of a prior violation, an enhanced penalty cannot be imposed.

The Board's decision in Kyung H. and Seung I. Kim turned on the fact that the documents purporting to establish the existence and date of a prior strike, relied upon by the Department to support an order of revocation pursuant to Business and Professions Code §25658.1, were not properly authenticated, and, therefore, could not be used to show that the violation in question occurred during the critical 36-month period.

Exhibit 2 was admitted into evidence without objection, and the copies of both the order and the accusation are properly certified. Appellants state that the registration number on the accusation is handwritten and that it does not bear a "file stamp date," but do not explain the significance of these facts. As long as the

documents are properly certified and clearly indicate their relationship by the registration number (regardless of whether it is typed or handwritten), we see no reason to disregard them.

Appellants argue that the July 6, 1995, date used in the finding only appears as part of appellants' disciplinary history in the accusation filed in the present matter, but "has no factual basis whatsoever in the administrative record or in any of the testimony." (App. Opening Br. at 7.)

The ALJ took the date July 6, 1995, from the accusation in the present matter, and referred to it erroneously in his finding as the date the prior accusation was filed. This does not mean, however, that there was no competent evidence establishing the date of the prior violation. The accusation in Exhibit 2 establishes the date of the prior violation as April 7, 1995.

Appellant does not dispute the existence of the prior sale-to-minor violation, and appellants' counsel during the administrative hearing, implicitly acknowledged that the date of the prior violation was April 7, 1995, when he pointed out to the ALJ that the violation in the present matter "was four days shy of not being a second strike case at all . . . [RT 84]." The present violation occurred on April 3, 1998; four more days would be April 7, 1998, and 36 months before that date would be April 7, 1995.

Although the ALJ used the wrong date in referring to the prior violation, that does not mean that the Department used a nonexistent prior as the basis for the 25-day suspension. Competent evidence established that there was a prior sale-to-

minor violation on April 7, 1995, and the Department properly considered that prior in imposing the penalty. There was no abuse of discretion.

III

Appellants claim they were prejudiced in their ability to defend against the accusation by the Department's refusal and failure to provide them discovery with respect to the identities of other licensees alleged to have sold, through employees, representatives or agents, alcoholic beverages to the decoy involved in this case, during the 30 days preceding and following the sale in this case.

This is but one of a number of cases which this Board has heard and decided in recent months. (See, e.g., The Circle K Corporation (Jan. 2000) AB-7031a; The Southland Corporation and Mouannes (Jan. 2000) AB-7077a; Circle K Stores, Inc. (Jan. 2000) AB-7091a; Prestige Stations, Inc. (Jan. 2000) AB-7248; The Southland Corporation and Pooni (Jan. 2000) AB-7264.)

In these cases, and many others, the Board reviewed the discovery provisions of the Civil Discovery Act (Code of Civ. Proc., §§2016-2036) and the Administrative Procedure Act (Gov. Code §§11507.5-11507.7). The Board determined that the appellants were limited to the discovery provided in Government Code §11506.6, but that "witnesses" in subdivision (a) of that section was not restricted to percipient witnesses. We concluded that:

> "We believe that a reasonable interpretation of the term "witnesses" in §11507.6 would entitle appellant to the names and addresses of the other licensees, if any, who sold to the same decoy as in this case, in the course of the same decoy operation conducted during the same work shift as in this case. This limitation will help keep the number of intervening variables at a

> minimum and prevent a "fishing expedition" while ensuring fairness to the parties in preparing their cases."

We believe the "discovery issue" in the present appeal must be disposed of in accordance with the cases listed above.

IV

Appellant also contends that the decision of the ALJ to conduct the hearing on its discovery motion without a court reporter present also constituted error, citing Government Code §11512, subdivision (d), which provides, in pertinent part, that "the proceedings at the hearing shall be reported by a stenographic reporter." The Department contends that this reference is only to the evidentiary hearing, and not to a hearing on a motion where no evidence is taken.

This issue has also been decided in the cases mentioned in II, above. The Board held in those cases that a court reporter was not required for the hearing on the discovery motion. We have not been persuaded to change our mind.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration in light of the comments herein with respect to Rule 141(b)(2), for compliance with appellant's discovery request as limited by this opinion, and for such other and further proceedings as are appropriate and necessary.[2]

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[2] 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.

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

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.