ISSUED MARCH 30, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

GMRI, INC. dba The Olive Garden 5526 Philadelphia Street Chino, CA 91710, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7336 File: 47-243016 Reg: 98043001 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: February 3, 2000 Los Angeles, CA

GMRI, INC., doing business as The Olive Garden (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for its waitress, Elizabeth Ann Caster, having sold or furnished an alcoholic beverage (a bottle of Budweiser beer) to Kevin R. Mensen, a minor, who was acting as a decoy for the Chino Police Department, 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).

Appearances on appeal include appellant GMRI, INC., appearing through its

[1]The decision of the Department, dated December 31, 1998, is set forth in the appendix.

counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on April 26, 1991. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on November 9, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Kevin R. Mensen, the minor decoy, and Jeffry Allison, a Chino police officer, in support of the charge in the accusation, and by Elizabeth Ann Caster, the waitress, Scott Michael Murad, appellant's manager, and Odette Suzanne Fisher, appellant's general manager at the time of the violation, since retired.[2]

Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale had occurred as alleged, and imposed a 25-day suspension. The suspension reflected the Administrative Law Judge's consideration of a previous sale to a minor.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant makes the following contentions: (1) There was no compliance with Rule 141(b)(2); (2) there was no compliance with Rule 141(b)(5); and (3) the findings do not support consideration of a previous disciplinary proceeding.

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[2] Carol Ruiz, a second decoy, accompanied Mensen into the restaurant. She did not testify at the hearing.

DISCUSSION

I

This is another of the decisions in which the focus of the Department upon the appearance of the minor has been limited to his physical appearance. Although the word "physical" was not used in the decision, the only characteristic addressed was the decoy's "youthful looking face," and that as a seeming apology for the use of a decoy over six feet tall. As the Board has observed on other occasions, a youthful looking face is not inconsistent with an age or appearance greater than 21.

We think this case is sufficiently similar to many which we have decided, involving similar language and findings with respect to the appearance of the decoy, as to warrant the same result. (See, e.g., Circle K Stores, Inc. (1998) AB-7080, and Circle K Stores, Inc. (1999) AB-7122.

II

Appellant contends that there was no compliance with Rule 141(b)(5). That rule provides:

> "Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable effort to reenter the licensed premises and have the minor decoy who purchased alcoholic beverages to make a face to face identification of the alleged seller of the alcoholic beverages."

Pursuant to Rule 141(c), the failure to make the requisite identification is a defense to the action. And, as this Board knows, the rule must be complied with strictly. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126].)

The Administrative Law Judge (ALJ) made an explicit finding that, while standing in close proximity to the waitress, the minor identified her as the person who served him the beer. Acknowledging that the evidence was in conflict, the ALJ stated that, after evaluating the credibility of the witnesses pursuant to the factors set forth in Evidence Code §780, greater weight was given to the consistent testimony of the police officer and the minor than to the witnesses who testified on behalf of appellant.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Nonetheless, appellant asserts that the Appeals Board should disregard these well settled principles because, it argues, the minor's testimony was inconsistent, in part because of the number of premises visited on the night in question, and the police officer's testimony is suspect because he made no reference to the identification

process in his written report. Additionally, appellant points to the testimony of the waitress to the effect that the minor did not identify her as the seller, and the testimony of other employees that they did not see any identification take place.

In this case, the testimony was in conflict, in large part because of the adoption of the term "side room" as a term of reference, and the use of that term in the interrogation of witnesses, without an explanation to the witnesses of precisely what was intended. The ALJ made an express determination on the issue of credibility, no doubt a determination made more difficult because of the ambiguous use of the term "side room."

The decoy, who was the first witness, testified that he was taken to a back or side room where a police officer had taken the waitress, and was asked to identify her, which he did. He testified that the three police officers, himself, the waitress, and Carol Ruiz, the minor decoy who had accompanied him into the restaurant, were all present at the time [RT 14]. When cross-examined, he recalled that the manager was also present [RT 16].[3] Officer Allison, and the waitress were facing each other, about four feet apart [RT 21]. The waitress was also facing toward him [RT 23].

Officer Allison, who testified next, insisted that the identification process had taken place. Allison described the room where this took place as a portion of the restaurant which was closed at the time, north of the bar area.[4] Another officer, Perez,

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[3] The decoy pointed to Odette Fisher, who was present in the hearing room, as the manager to whom he was referring.

[4] Appellant's counsel adopted the term "side room" for this area [RT 41]. This occurred after the decoy said he had been taken to a side room [RT 14]. When Caster later testified, she was asked whether there was a side room - she

had brought the waitress to the area, and Allison called the decoy over to identify her. According to Allison, Mensen "positively" identified Caster as the seller [RT 38]. Although Caster was, in his opinion, in a position to hear the conversation, she did not respond or make any comments.

Allison had no explanation why there was no reference to the identification process in the report he prepared on the evening in question, other than that he simply omitted it.

Caster, the waitress, testified that after the transaction, she was taken to her car to get her identification, and then returned to the room where the service took place. She was taken to a table "just a few feet" from the table where the service took place [RT 58], where she was photographed. According to her, Mensen was still at the table where he was served. When asked if Mensen had identified her, she responded "Not that I remember, no" [RT 60].

The ALJ chose to accept the testimony of the Department witnesses, and this Board is not in a position to substitute its view of the record for his. The ALJ saw and heard the witnesses, and was in a position better to understand the nuances in the testimony regarding what occurred when the waitress was cited than this Board could possibly be.

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said there was - and whether she had been taken there - she said no - but she was not told whether the "side room" counsel was referring to was the side room she had in mind [RT 60]. When Scott Murad testified, he was also asked if there was a side room, and whether he went there, but, again, no attempt was made to explain to Murad that the term "side room" had been adopted to refer to a closed area near the bar [71]. The general manager, Odette Fisher, to complicate matters, testified there was no side room [RT 78].

For these reasons, the contention that there was no compliance with Rule 141(b)(5) must be rejected.

III

The ALJ found that appellant had previously paid a fine in lieu of suspension following the filing of an accusation on December 18, 1995, and the finding of a violation. The suspension, 25 days, indicates that the ALJ took this into account in imposing the penalty, since the penalty for a first sale-to-minor violation is ordinarily 15 days.

Appellant contends it was improper to consider the prior violation, since the findings do not set forth its date. Appellant cites a recent Board decision (Kyung H. And Seung I. Kim (September 2, 1999) AB-7103) for the proposition that the findings must identify the date of the violation.

The Board's decision in Keung 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.

In this case, there is no §25658.1 issue, at least at present. That issue would arise if and when the Department asserts the violation as one of three warranting revocation. The Department's ability to impose an enhanced penalty for a prior violation is not conditioned upon the violation being a "strike" under §25658.1. Whether

the violation in question may be considered a strike was not the issue. The issue was whether there was a previous violation that was not so remote as to warrant treating it as a prior exercise of discipline justifying the imposition of a penalty more severe than the one which would ordinarily be imposed.

Exhibit 2 consist of copies of the decision on the prior violation, dated February 8, 1996, and the underlying accusation, which is dated December 7, 1995, and alleges an unlawful sale to a minor on October 21, 1995. It appears from the record that, while appellant's counsel was objecting to the authenticity of the copy of the accusation, because the registration number on it was hand-written, rather than stamped,[5] he did not object to the decision itself.

We are satisfied that the Department established a valid basis for the imposition of a greater than normal penalty.

[5] As the Department points out in its brief, a file-stamped copy of the accusation was submitted to the ALJ for inclusion in the record, thus obviating appellant's objection.

ORDER

The decision of the Department is reversed for the reasons stated in part I, supra.[6]

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

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[6] 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.