ISSUED MAY 25, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION and GUSHARAN P. NAT dba 7-Eleven Food Store 1451 South La Cienaga Boulevard Los Angeles, CA 90035, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7391 File: 20-214691 Reg: 98044886 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: March 2, 2000 Los Angeles, CA

The Southland Corporation and Gusharan P. Nat, doing business as 7-Eleven Food Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk having sold an alcoholic beverage to a minor, 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 The Southland Corporation and Gusharan P. Nat, appearing through their counsel, Ralph Barat Saltsman and Stephen

[1]The decision of the Department, dated April 1, 1999, is set forth in the appendix.

Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellant charging an unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on February 4, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles police officer Donald Blue and by Leslie Salinas, the minor, who at the time of the transaction was acting as a minor decoy for the Los Angeles Police Department. Appellants did not present any witnesses.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation, and ordered a 25-day suspension.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Administrative Law Judge (ALJ) used an erroneous legal standard in his finding and determination regarding Rule 141(b)(2); (2) there was no face to face identification as required by Rule 141(b)(5); (3) the evidence does not support the charge of the accusation that wine coolers were sold; (4) the Department ordered an enhanced penalty despite its failure to prove that Southland was a party in the previous proceeding; and (5) the Department denied appellants their right to discovery and to a court reporter at the hearing on their motion to compel discovery.

DISCUSSION

I

Appellant contends that the ALJ applied an erroneous standard in determining that the decoy's appearance satisfied the requirement of Rule 141(b)(2) that she "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." Appellant argues (App.Br., at page 7) that the rule requires a general comparison between this decoy and what "would" generally be expected of a person under 21 years of age, and, thus, violates the rule.

The Department argues that the rule does not require that the decision set forth facts regarding the decoy's age - presumably meaning her apparent age. To that extent, the Department is correct. However, in the Board's decisions, the Board has stressed the desirability of more detailed findings in order better to illustrate the reasoning behind the decision. Although the absence of such detail may not per se invalidate a decision, it can make the Board's job more difficult.

The Department also argues that the test is whether the finding is supported by the whole record, which, it states, consists of the minor's driver's license, the decoy fact sheet with two photos, and the photograph of the decoy standing next to the seller.[2] The problem, however, is not with the evidence. We know that the ALJ always is able to view the decoy when he or she testifies. Our concern is, that after having done so,

[2] The Department's reference to "the decoy fact sheet with photos" mistakenly treats the entire document as having been admitted into evidence. In fact, only the photo portion was admitted. (See RT 59.)

the ALJ applies the correct legal standard when he evaluates the decoy's appearance against the requirement of Rule 141(b)(2). That is why, in many other decisions, the Board has reversed decisions because, in the Board's view, they had applied an erroneous standard.

The proposed decision in the case under review was written by ALJ Echeverria, the author of most of the Rule 141(b)(2) decisions the Board has reversed because of his emphasis on the physical appearance of the decoy. This decision does not suffer from that flaw.

The decision states:

> "Leslie Salinas is a youthful looking female, whose 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."

Appellants' substitution of the word "would" in place of the word which is used in the rule, "could," in describing the standard against which the decoy's appearance is measured, has the effect of stiffening the requirement of the rule; it could be said in this instance that appellants are guilty of rewriting the rule.

We believe the language of the decision sufficiently parallels the language of the rule as to comport with its demand. The additional language regarding the likelihood of a request for identification is mere surplusage which does not detract from the finding.

II

Appellants contend there was no compliance with Rule 141(b)(5)'s requirement that the decoy make a face to face identification of the alleged seller of the alcoholic beverage. They argue that the testimony of the police officer and that of the decoy are

in such conflict that neither can be relied upon for a finding that the rule was satisfied.

Appellants correctly assert that the testimony of the officer and that of the decoy conflict. Although both testified the decoy had, in fact, identified the seller, each gave a somewhat different description of how it had occurred. The principal differences had to do with which side of the counter the officers (there were several), the decoy, and the clerk were standing, and whether the decoy merely spoke or both spoke and gestured when she identified the seller.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[3] It is not the Board's function to reconcile conflicts in the evidence.

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

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[3] California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

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]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Neither witness expressed any doubt that the minor had identified the seller. That they may have had different recollections concerning some of the lesser details of the identification process is not at all unusual or surprising. Each, it may be assumed, was giving his or her best recollection of events which occurred almost six months earlier. One or the other could be honestly mistaken. It would be more surprising if there was perfect consistency in their testimony, given that each testified without knowledge of the other's testimony.

There is no reason to depart from the general rule that it is left to the ALJ to resolve conflicts in the evidence. In this case, the ALJ obviously concluded that the conflict in details did not detract from the consensus that there had been the requisite identification.

III

The accusation charged that the decoy was permitted to purchase a four-pack of wine coolers. In fact, what was purchased was a four-pack of malt beverage coolers, called "flavored beer" on the label. Appellants contend, without citation of authority, that the variance between what was alleged and proved is fatal to the decision.

It is quite apparent that the accusation was prepared under a misapprehension that the Bartles & Jaymes coolers, were, as the product had once been, a wine-based product, one so popular that the term "wine coolers" became virtually generic.

In fact, sometime in 1997 or 1998, as earlier cases before the Board revealed, the makers of the product switched from a wine base to a malt beverage base. Labels were revised to reflect this change, but there was a period of time when both wine-based and malt beverage-based coolers were being sold. As might be expected, this led to some confusion in several Department proceedings.

However, it is difficult to find that appellants were prejudiced by the mischaracterization of the contents of the coolers. The accusation charged the unlawful sale of an alcoholic beverage, and the product sold was an alcoholic beverage. (See People v. Richardson (1946) 74 Cal.App.2d 528 [169 P.2d 44, 53] ("The variance between the indictment and the proof with respect to revolvers and automatics is immaterial ... inasmuch as the statute requires only that a firearm be carried at the time of the arrest or the commission of the offense.") Here the statute requires only the sale of an alcoholic beverage; whether it be a wine cooler or a malt beverage cooler is immaterial.

IV

Citing the Board's decision in Tolentino (1998) AB-7035, appellants argue that the penalty, a 25-day suspension, was improperly enhanced because of a prior violation in a matter in which Southland, although served with the decision which had been entered as the result of the franchisee's execution of a stipulation and waiver, had not been served with the accusation.

In Tolentino, the Board ruled that an intermediate "strike" could not be counted against Southland, for purposes of revocation, for that reason. In so doing, the Board rejected the Department's argument that Southland could have appealed from the

decision.

This case is different. It is one thing to say that Southland cannot permanently be deprived of its license rights when it stands by while its franchisee stipulates to an intermediate violation without Southland's involvement, or by extension, that the intermediate strike counted for purposes of Business and Professions Code §25658.1. But it is quite another when the franchisee is still in control of the store's operation, and would in the ordinary case, have no basis for objecting to an enhancement of the standard penalty - which was not the case in Tolentino. In such circumstances, there is no practical way to penalize the franchisee in an appropriate manner without affecting Southland's interests. Southland's solution, to the extent it has one, is simply to pay more attention to the relationships between its franchisees and the Department.

V

Appellants contend that the Department improperly refused to grant discovery with regard to the identification of certain witnesses, to which they claim entitlement under Government Code §11507.6, and refused to provide a court reporter for their motion to compel discovery, which they claim violated Government Code §11512, subdivision (d).

The Board has addressed these issues in a number of decisions in the very recent past. (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.)

Exhibit 4 shows that the only purchase made by the decoy involved in this case

was the one at issue in this case. Under such circumstances, appellants could not have been prejudiced by the denial of the limited discovery to which they might have been entitled under those decisions.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, 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.