BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-7646

7-ELEVEN, INC., JESSE M. SUN, and MABEL M. SUN dba 7-Eleven #18352
18461 Roscoe Boulevard, Northridge, CA 91325,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-214335 Reg: 99047310

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: March 1, 2001
Los Angeles, CA

ISSUED APRIL 27, 2001

7-Eleven, Inc., Jesse M. Sun, and Mabel M. Sun, doing business as 7-Eleven #18352 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk, Sukhwinder Jit Singh Mangat, having sold an alcoholic beverage (a bottle of Budweiser beer) to Katy Paschal, a minor, 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 7-Eleven, Inc., Jesse M. Sun, and Mabel M. Sun, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing

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[1]The decision of the Department, dated May 19, 2000, made pursuant to Government Code §11517, subdivision (c), together with the proposed decision of the Administrative Law Judge, is set forth in the appendix.

through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. On September 17, 1999, the Department instituted an accusation against appellants charging a violation of Business and Professions Code §25658, subdivision (a), as the result of the sale of beer to Katy Paschal, who at the time of the sale was 19 years of age. Although not noted on the accusation, Paschal was acting as a decoy for the Los Angeles Police Department.

An administrative hearing was held on December 7, 1999, at which time oral testimony was presented by Los Angeles police officer Martin Bertsch and Paschal ("the decoy") in support of the charge of the accusation, and by Mabel Sun and her clerk, Sukhwinder Jit Singh Mangat.

Subsequent to the hearing, the Administrative Law Judge issued his proposed decision, which determined that the charge of the accusation had been sustained, that appellant had failed to establish any defenses, and which ordered a 25-day suspension. The Department elected not to adopt the proposed decision, and after notifying the parties to that effect, issued its own decision pursuant to Government Code §11517, subdivision (c).

In so doing, the Department adopted the Findings of Fact, Determinations of Issues, and Order of the proposed decision, with a sole exception. The Department did not simply adopt Finding of Fact 9 as written, having to do with the appearance of the decoy, but enlarged upon it. That finding had originally stated:

"Minor Paschal had an overall youthful appearance and wore no makeup or

> jewelry, except an earring in one ear and a wrist watch. She was then 5' 6" tall and weighed 150 pounds. Her hair and clothes were casual and typical for a girl her age. She wore jeans, a shirt, a pullover sweater and tennis shoes.
>
> "The minor was an individual who could reasonably be taken to be under twenty-one years of age at the time of the sale."

In its stead, the Department made the following finding (the new text is in bold-face type):

> "Minor Paschal had an overall youthful appearance and wore no makeup or jewelry, except an earring on one ear and a wrist watch. She was then 5' 6" tall and weighed 150 pounds. Her hair and clothes were casual and typical for a girl her age. She wore jeans, a shirt, a pullover sweater and tennis shoes. **(See generally Exhibits 2 and B). There was nothing in minor Paschal's appearance at the hearing slightly more than 4 months after the July 30, 1999, incident, that is her physical appearance, her poise, demeanor, maturity and mannerisms to indicate in any way an age beyond her actual 19 years and she displayed the appearance which could generally be expected of a person under 21 years of age. The appearance of Katy Paschal at the hearing was substantially the same as her appearance presented to respondent's clerk on July 30, 1999."**

Appellants have filed a timely appeal from the Department's order, contending that (1) Rule 141(b)(2) was violated; (2) the prior discipline upon which the penalty enhancement was based was not established by competent evidence; and (3) appellant was denied its right to discovery and to a transcript of the hearing on its discovery motion.

DISCUSSION

I

Appellants contend, in substance, that the Department, in an attempt to supplement what it viewed as an inadequate finding on the issue of the decoy's appearance under Rule 141(b)(2), made a finding that could only have been made by the Administrative Law Judge, who was in a position to view the decoy as she testified.

In Long's Drug Stores (1999) AB-7356, the Board determined that the standard employed by the ALJ did not comply with Rule 141(b)(2), stating:

> 'The use of the "reasonable" standard instead of the "generally to be expected" standard of the statute is also wrong. It could be "reasonable" to conclude that a person was under 21 even if that person's appearance was not that which would "generally be expected" of people under the age of 21. It is certainly conceivable that a decoy who could reasonably be considered to be under 21 might also be reasonably considered to look over the age of 21, and might display an appearance that was not at all that which could generally be expected of a person under the age of 21."

We can speculate that the Department, recognizing, at least in this case, that the ALJ's finding was vulnerable as a result of the Board's ruling in Long's Drug Stores, was, by its action, attempting to head off a reversal.

We are disturbed by the method which the Department chose. Rather than send the case back to the ALJ for further hearings and/or findings, the Department has conjectured on the appearance displayed by the decoy with nothing more to guide it than the decoy's testimony about the way she was dressed, a still photograph of the decoy, and an almost indecipherable surveillance video.

The Department contends this constitutes substantial evidence. We disagree. We are not persuaded that the Department can effectively appraise the overall appearance and demeanor displayed by a decoy it has never seen solely on the basis of a poor video recording, a still photograph, or the decoy's own description of what she was wearing. We view the Department's additional finding as an arbitrary assumption that the Administrative Law Judge, who was able to observe the decoy as she testified, might have made such a finding.

Where the issue of apparent age depends so much on personal observation, we

are reluctant to approve of anything less.

II

Appellants contend that the prior discipline which was relied upon by the Department for the enhancement of the penalty was not established by competent evidence. Appellants assert that there is nothing on the accusation which is part of Exhibit 2, the documentation upon which the Department relied to establish the prior discipline, to show that it was ever filed.

Appellant concedes there was a prior violation, but says there is no evidence when it occurred. Since the accusation lacks a file stamp, appellant argues, there is no evidence to support the finding that the violation occurred within the same 36-month period as the current violation.

This issue has come to the Board on earlier occasions. The Board addressed the lack of a file stamped copy in Southland Corporation/Whitfield (2000) AB-7313. There the appellants objected to the use of an accusation which lacked a "Filed" stamp and on which the registration number was handwritten. This Board said that as long as the documents were properly certified and clearly indicated their relationship to the registration number, regardless of whether typed or handwritten, it saw no reason to disregard them.

We find unpersuasive appellants' argument that there is nothing to show the accusation was ever filed, in light of the fact that the decision and order bear the same file and registration numbers and the certification that the document "is a true and correct copy of the document on file and of record in the Van Nuys District office." We

may presume that the custodian of the records at the Van Nuys District Office regularly performed his or her duty to ensure that the proper accusation accompanied the decision and order for registration number 99047310. (Evid. Code §664.) It is certainly possible that some error could be made, but mere speculation that the accusation is not the correct one is insufficient to overcome the presumption that an official duty was regularly performed.

We know that a 25-day suspension is not unusual for a second sale-to-minor violation. We also know that the Department tends to look back as long as five years in its consideration of a licensee's prior disciplinary history. Hence, the enhancement of the penalty is not a matter of concern, since the degree of discipline, so long as it is within the bounds of discretion, is the prerogative of the Department.

We think the evidence is sufficient to assure us that the current violation is a true second strike under §25658.1.

III

The Department refused to disclose the identities of licensees who made sales to the decoy in this case during various periods, including the same day as the sale in this case, and refused to provide a transcript of the hearing on appellant's motion to compel the production of such material. Appellant challenges both rulings.

This is another of the many cases which have presented this issue, and should be treated in similar manner. The Board has routinely ruled that appellant was entitled to the identities of licensees who made sales to the decoy on the same day as the sale alleged in the accusation, but not to a transcript of the discovery hearing. We do so in this case as well.

ORDER

The decision of the Department is reversed for the reasons stated in parts I and III herein, and the case is remanded to the Department for such further proceedings as may be appropriate in light of our comments herein.[2]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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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.

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.