ISSUED MARCH 22, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION and BARRY A. GAUTHIER dba 7-Eleven Food Store 109 West Lambert Road Brea, CA 92621, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7026a File: 20-214181 Reg: 97041573 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: July 6, 2000 Los Angeles, CA

The Southland Corporation and Barry A. Gauthier, doing business as 7-Eleven Food Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale beer and wine license for 35 days, with 10 days thereof stayed for a probationary period of one year, for their clerk, Carlos Torres, having sold an alcoholic beverage (beer) to Matt Keyworth, 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

[1]The decision of the Department, dated December 3, 1998, is set forth in the appendix.

Professions Code §25658, subdivision (a).

Appearances on appeal include appellants The Southland Corporation and Barry A. Gauthier, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.[2]

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 the sale of an alcoholic beverage to Matt Keyworth, a 19-year-old minor. Although not alleged in the accusation, Keyworth was acting as a decoy for the Los Angeles Police Department.

An administrative hearing was held on October 1, 1998. At that hearing, the parties stipulated that the facts alleged in the accusation, that there had been a sale of an alcoholic beverage to a minor, were true and correct. Appellants then presented testimony in support of defenses asserted by them. Matt Keyworth, the minor decoy, was called as a defense witness, and examined by counsel for both parties. In addition, appellants made an offer of proof of the expert testimony of Dr. Edward Ritvo regarding the apparent age of Keyworth. The proposed testimony was excluded.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellants had failed to sustain any defense to the charge.

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[2] This case was restored to the July calendar pursuant to stipulation.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the decision is based on an inappropriate standard under Rule 141(b)(2); (2) the Department abused its discretion with respect to the penalty it imposed, by considering two prior violations which lacked an appropriate evidentiary base; (3) appellants were denied discovery to which they were entitled under Government Code §11507.6; and (4) appellants' proposed expert testimony was improperly excluded.

DISCUSSION

I

Appellants contend that the decision is flawed in that the Administrative Law Judge (ALJ) did not consider all indicia of age in determining that there was compliance with Rule 141(b)(2).

The Board has visited this issue on numerous occasions. It has uniformly ruled that, where the ALJ limits his analysis to the decoy's physical appearance, and fails to indicate that he has considered other important indicia of age such as demeanor, poise, presence, or level of maturity, to name some, the decision must be reversed. This case is no exception.

II

Appellants contend that the Department abused its discretion with respect to the penalty it imposed, by considering two prior violations which lacked an evidentiary base.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However,

where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The contention that the two prior violations lack an evidentiary base is specious. Each was established by authenticated copies of a decision and the underlying accusation. (See Exhibits 4 and 5.)

Appellants are left only with the fact that the accusation set forth what it alleged were the dates of violation, while the decision assumed those were the dates the accusation was filed. We know from Exhibits 4 and 5 that those are not the dates of violation, but, because of the absence of proof, do not know whether the dates are filing dates. This is immaterial.

The mere discrepancy in the dates set forth in the accusation, and what could be mistaken dates as to when the accusations were filed, do not detract in any way from the proven fact that appellants committed two violations, on May 20, 1994, and December 29, 1994, respectively.

Appellants suggest further that, because both of these violations preceded the adoption of Business and Professions Code §25658.1[3], the current violation

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[3] Business and Professions Code §25658.1 provides as follows:

"(a) Notwithstanding any other provision of this division, no licensee shall petition the department for an offer in compromise pursuant to Section 23095 for a second or any subsequent violation of Section 25658 that occurs within 36 months of the initial violation.

(b) Notwithstanding Section 24200, the department may revoke a license for a third violation of Section 25658 that occurs within any 36-month period. This provision shall not be construed to limit the Department's authority to revoke a license prior to a third violation when circumstances warrant that penalty."

must be considered a "first strike," which would not justify a suspension of the length imposed. However, there is nothing in §25658.1 which precludes the Department from considering prior violations.

The decision recites that the two prior violations were considered as aggravating factors in the imposition of the penalty. The Board and the Department have generally used five years as a measure of remoteness, beyond which time a prior violation may customarily not be considered in aggravation. As the violations in question are no more distant from the current violation than 37 and 30 months, respectively, we see no reason why they could not properly be considered as factors in aggravation.

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. They also claim error in the Department's failure to provide a court reporter for the hearing on their motion to compel discovery. Appellants cite 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 an evidentiary hearing and not to a hearing

The Board has issued a number of decisions directly addressing these issues. (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 has 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," as used in subdivision (a) of that section was not restricted to percipient witnesses. We concluded 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."

The Board also held in the cases mentioned above that a court reporter was not required for the hearing on the discovery motion. We continue to adhere to that position.

IV

Appellants contends that they should have been permitted to introduce the testimony of Dr. Edward Ritvo, a psychiatrist whose specialty pertains to children, adolescent teenagers and young adults. Dr. Ritvo's proposed testimony would have been that, having observed the decoy testify and having considering his physical appearance, behavior and demeanor, the decoy did not, in his opinion, have the appearance of a person under the age of 21.

In excluding Dr. Ritvo's proposed testimony, the ALJ stated:

> "I've been trying minor decoy cases for about three years now, and I don't think I've ever had any expert testimony of this type in any of those hearings. I don't feel that the testimony of Dr. Ritvo, who was not present in the premises on the date of the sale, would be helpful to me in making my determination."

He also premised his ruling on Evidence Code §352, balancing the proposed testimony versus the time which would be consumed.

The Board has uniformly sustained rulings excluding proposed expert testimony concerning the apparent age of the minor, and does so here.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration in light of the comments herein.[4]

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

Board member Ray T. Blair, Jr., did not participate in the deliberation of this appeal.

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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.