ISSUED DECEMBER 21, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

SANTA MONICA BREWING COMPANY dba The Brewhouse 1246 Santa Monica Mall Santa Monica, CA 90401, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7219 File: 41-298761 Reg: 98042670 Administrative Law Judge at the Dept. Hearing: Craig Bestwick Date and Place of the Appeals Board Hearing: November 5, 1999 Los Angeles, CA

Santa Monica Brewing Company, doing business as The Brewhouse (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its on-sale beer and wine public eating place license for 25 days, with 10 days thereof stayed for a probationary period of two years, for appellant's bartender having sold an alcoholic beverage (beer) to a minor decoy, 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

[1]The decision of the Department, dated August 20, 1998, is set forth in the appendix.

Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Santa Monica Brewing Company, appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on October 3, 1994. Thereafter, the Department instituted an accusation against appellant charging that appellant's bartender, Joseph Wilkinson, sold an alcoholic beverage (beer) to Christina Holmes, who was then approximately 19 years of age.

An administrative hearing was held on June 30, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Ms. Holmes concerning the transaction, and by Lewis Harsanyi on behalf of the licensee. Ms. Holmes testified that she ordered a beer, was served the beer in a glass, and paid for it, all without having been asked her age or for identification.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been committed by appellant's bartender, that no defenses had been established, and that appellant's license should be suspended for the period indicated.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) The Department violated Rule 141(b)(5); (2) the Department failed to prove an alcoholic beverage was sold; and (3) the Department

failed to demonstrate the prior discipline which formed the basis for an enhanced penalty.

DISCUSSION

I

Appellant contends that there was no compliance with Rule 141(b)(5). Appellant argues that the record contains too many variables and unknowns for it to be relied upon to demonstrate compliance with the rule. Appellant refers to a 45-minute lapse of time between the sale and the identification; the lack of knowledge whether a citation was issued, or when; and whether the identification was face to face.

The first sentence in appellant's brief states that "this case looks fairly simple until one inspects it closely." It could be said of appellant's brief that it sounds persuasive until one inspects it closely.

The suggestion that the identification might be questionable because there was a 45-minute time lapse between the sale and the identification is specious. First, the passage of such a short period of time, in and of itself, is insignificant, and not such that the decoy's recollection of who sold the beer to her might have been impaired. What is significant is the reason for the lapse of time; the bartender fled the scene shortly after being confronted by the police officer who had accompanied the decoy to the premises, and he did not return to the premises until persuaded to do so by Mr. Harsanyi [RT 20, 22].

Appellant suggests that it is not known whether a citation issued. Rule 141 does not require the issuance of a citation. It only requires that there be an identification before a citation is issued.

The argument that it is not known "with precision or accuracy whether the identification (if any) was face-to-face" ignores Ms. Holmes' testimony [RT 12-13] that she identified the bartender while standing five or six feet away from him, and this took place after a delay of 45 minutes. This delay, of course, was the result of the bartender's initial flight.

Appellant's reliance on The Southland Corporation/R.A.N. (1998) AB-6967 and Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126] is unjustified. The police complied with Rule 141, and the Department's evidence established such compliance to the extent required by those decisions.

II

Appellant contends the record lacks proof that an alcoholic beverage was sold. Appellant relies upon the testimony of Harsanyi that appellant did not sell Budweiser beer, the brand the decoy believed she had ordered.

Ms. Holmes testified she ordered a beer. She believed she ordered Budweiser; in any event, her testimony is clear that she ordered beer. The law, in such circumstances, presumes that she was served what she had ordered. (See Griswold v. Department of Alcoholic Beverage Control (1956) 141 Cal.App.2d 807 [297 P.2d 762, 764] ("there was a rebuttable presumption that the student got what he ordered"); Molina v. Munro (1956) 145 Cal.App.2d 601 [302 P.2d 818]; Penal Code §382.)

III

The accusation alleged, and the Administrative Law Judge (ALJ) found, that appellant had committed an earlier sale-to-minor violation in May 1995.

The Department argued to the ALJ that, because this was appellant's second violation, the suspension should be for 25 days, the Department's customary recommendation in such a case. The ALJ followed the recommendation, but stayed a portion (five days) of the suspension, presumably based upon appellant's evidence of its alcohol compliance program (see RT 19).

Appellant now contends the record lacks evidence of any prior violation occurring in May 1995.

Appellant is technically correct. The evidence in the record shows a violation committed in February 1995. Nonetheless, we do not believe the penalty should be changed.

The variance between the date set forth in the accusation, and the dates contained in the documents offered in evidence to prove the prior violation does not appear to be significant. There is no basis for appellant to contend there was no previous violation, and appellant has not so claimed. Instead, appellant has simply emphasized the fact that there was no May 1995 violation.

The date on the accusation is the date the Department issued the registration number. The date in Exhibit 2 is the true date of the violation, February 2, 1995.

Exhibit 2 clearly establishes the existence of a prior violation with a registration number which corresponds to the registration number set forth in the accusation. The violation in that matter was alleged to have taken place on February 2, 1995.

We do not believe the slight discrepancy in dates has prejudiced appellant, there

being no doubt the violation occurred at the approximate date alleged.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., 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.