ISSUED APRIL 5, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

ACAPULCO RESTAURANTS, INC. dba Acapulco Restaurants 2022 First Street Simi Valley, CA 93065, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7266 File: 47-267148 Reg: 98042733 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: April 6, 2000 Los Angeles, CA Redeliberation: August 3, 2000

Acapulco Restaurants, Inc., doing business as Acapulco Restaurants (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's employee furnishing an alcoholic beverage to a person under the age of 21, 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).

[1]The decision of the Department, dated October 22, 1998, is set forth in the appendix.

Appearances on appeal include appellant Acapulco Restaurants, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on December 19, 1991. Thereafter, the Department instituted an accusation against appellant charging that appellant's bartender, Domingo Hernandez Cruz, sold or furnished a beer to Trevor Shalhoob, who was then 18 years old.

An administrative hearing was held on September 7, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Shalhoob, who, at the time of the transaction, was acting as a minor decoy for the Simi Valley Police Department; John Adamczyk, a Simi Valley police officer; Becky Collins, another minor decoy; Diane Gargiulo, a waitress in appellant's premises; and Thomas Bryan, a regional manager for appellant.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged.

Appellant thereafter filed a timely appeal in which it raises the following issues: (1) there was no face-to-face identification of the seller by the decoy as required by Rule 141(b)(5) (4 Cal. Code Regs. § 141, subd. (b)(5)); (2) the beer was not "furnished" to the decoy; (3) expert testimony was improperly excluded at the hearing; and (4) the Department violated appellant's rights to discovery.

DISCUSSION

I

Appellant contends the decoy did not make a face-to-face identification of the seller as required by Rule 141(b)(5).[2] Appellant also argues that the Department's decision is deficient and must be reversed because the decision does not address this issue. The Department argues that appellant did not raise the defense of a Rule 141(b)(5) violation at the hearing and may not now assert either that the identification did not occur as required or that the ALJ erred in not addressing the issue in his proposed decision.

Appellant distinguishes Harris v. Alcoholic Beverage Control Appeals Board (1961) 197 Cal.App.2d 182 [17 Cal.Rptr. 167], cited by the Department for the proposition that issues raised for the first time on appeal cannot be considered by this Board. Appellant states: "in Harris, the appellant . . . stipulated to the evidence at the administrative hearing and provided no evidence in response thereto. No issues were raised during the course of that evidentiary hearing conducted by stipulation. Here, there was extensive testimony concerning the very issue now being discussed at this appellate level." (App. Cl. Br. at 3.) Appellant asserts that

---

[2]Rule 141(b)(5) states:

"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 attempt to enter 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."

"testimony produced during the course of cross-examination of the decoy raised the issue of noncompliance with Rule 141(b)(5)." (App.Cl.Br. at 5.)

Neither party has cited any authority or engaged in any argument regarding what constitutes "raising an issue" at the administrative hearing. However, the reason that an issue must be raised at the trial (or administrative hearing) level, is to put everyone involved on notice that a party will be relying on that issue in support of his or her position so that the other party has a fair opportunity to respond to that issue. This also gives the trier of fact fair notice that this issue is in contention and will need to be resolved in his or her decision.

The court in Harris v. Alcoholic Beverage Control Appeals Board, supra, 197 Cal.App.2d at 187, quoting Bohn v. Watson (1954) 130 Cal.App.2d 24, 37 [278 P.2d 454] made the following statement, which appears particularly pertinent to the present appeal:

> "The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play. Had Bohn desired to avail herself of the asserted bar of limitations, she should have done so in the administrative forum, where the commissioner could have prepared his case, alert to the need of resisting this defense, *and the hearing officer might have made appropriate findings thereon*." [Emphasis added.]

Here, appellant did not raise the issue of Rule 141(b)(5) in the pleadings. Counsel for the Department asked the decoy and the police officer if the decoy had identified the person who sold the alcoholic beverage to him and both responded that he had [RT 31:11-14; 58:21-59:9]. During cross-examination, counsel for appellant asked the decoy four questions about his identification of the seller, but

did not ask any of the other three percipient witnesses about it and did not mention it in his closing argument. He did not give any indication to the Department or the ALJ that he believed the answers to those questions established a defense under Rule 141(b)(5).

Absent some compelling authority indicating otherwise, this Board is not prepared to say that asking those few questions about the identification can be considered "raising the issue" such that the ALJ was fairly put on notice that appellant believed the identification was not properly made. Without the issue being properly raised, appellant's arguments about the burden of proof are moot.

Appellant attempts to exploit this requirement of fair notice by speciously arguing that it could not raise the issue of the deficiency of the ALJ's decision until the decision had been written and issued. While that is true, it ignores the cause of the deficiency – the failure of appellant to apprise the ALJ, before he rendered his decision, that it believed it had a defense under Rule 141(b)(5).

In any case, even if appellant had somehow raised the issue, the Board must draw all inferences in favor of the Department, and the record certainly supports the Department's position. Both the minor decoy and the police officer testified that, after the officers had identified themselves to the bartender, the officer went to the decoy, who was about 10 feet away from the bartender, and asked him if the bartender was the one who provided the beer. The decoy said "Yes, that's him." [RT 31, 42-43, 59.]

Appellant contends that this does not comply with the requirements of Rule 141(b)(5) because the decoy did not actually identify the seller, but only responded

affirmatively to the officer's pointing him out. In addition, appellant argues, any identification made was not face-to-face, apparently based on the decoy being 10 feet away from the bartender at the time.

We believe that the requirements of Rule 141(b)(5) concerning a face-to-face identification were satisfied here. Ten feet away is close enough so that the bartender should reasonably have known that he was being identified by the decoy. This Board found that about 10 feet between the decoy and the clerk during identification was sufficient proximity to make the identification face-to-face in both Circle K Stores, Inc. (2000) AB-7337 and in Prestige Stations, Inc. (2000) AB-7437. We see no reason to conclude differently here.

The rule does not specify any particular method that must be used to identify the seller. The fact that the officer pointed out the bartender and asked the decoy if that was the person who sold to him, rather than the decoy making an un-prompted identification cannot possibly make a difference as long as the identification is positively made by the decoy in a reasonable manner.

II

Appellant contends the beer was not "furnished" to the minor decoy, because the bartender did not place the bottle of beer on the bar counter, but on the service rail where drinks are prepared before serving.

Appellant contends that the Department's witnesses were unsure about where the beer was placed, while the waitress testified specifically that it was placed on the service rail, and appellant's regional manager testified that the "religiously observed procedure" is that beer is served only in a glass with a napkin

and may be placed on the service rail while the bartender continues to observe the intended purchaser.

Appellant argues that the evidence is not in conflict, so the ALJ's finding (Finding V) that the Department's witnesses were more credible than appellant's is a mischaracterization of the issue. However, the Department's witnesses were as definite about the beer having been placed on the bar counter (see, e.g., RT 45-46) as were the appellant's about the beer having been placed on the service rail. There clearly was a conflict in the evidence and the need for a determination of credibility. 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]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The ALJ found the Department's witnesses more credible, and, based on the testimony of the two decoys and the police officer, concluded that the bartender opened the bottle of beer and placed it on the bar counter, not the service rail, in front of the decoy, thereby "furnishing" the beer to the decoy.

III

Appellant contends the ALJ improperly denied appellant's request to call Edward Ritvo, M.D., a psychiatrist, as an expert witness. Appellant proposed to have Dr. Ritvo called to testify as to indicia of the decoy's age.

The Board has affirmed the Department's exclusion of Dr. Ritvo's testimony in a number of cases. (See, e.g., Prestige Stations, Inc. (Jan. 2000) AB-7248.)

This case raises no issue concerning such testimony not previously considered and rejected by this Board.

IV

Appellant claims it was prejudiced in its ability to defend against the accusation by the Department's refusal and failure to provide it 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. It also claims error in the Department's failure to provide a court reporter for the hearing on their motion to compel discovery. Appellant cites 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 on a motion where no evidence is taken.

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 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 §11507.6, but that "witnesses" in subdivision (a) of that section was not restricted to percipient witnesses, and 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. The Board continues to adhere to that position.

ORDER

The decision of the Department is affirmed in all respects except with regard to the issue of providing discovery, which is remanded to the Department for such further proceedings as may be necessary.[3]

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

---

[3]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.