ISSUED JANUARY 4, 2000

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

AIED B. YAKOW dba Dash In Mini Mart 988-H Escondido Avenue Vista, CA 92083, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7268 File: 20-317683 Reg: 98043511 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: December 3, 1999 Los Angeles, CA

Aied B. Yakow, doing business as Dash In Mini Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 25 days for his clerk having sold an alcoholic beverage to 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).

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

Appearances on appeal include appellant, appearing through his counsel, Ralph Barat Saltsman and Stephen 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 April 15, 1996. Thereafter, the Department instituted an accusation against appellant charging that, on June 13, 1997, appellant's clerk, Ayad Yaco, sold a six-pack of Corona beer to Cindy Zepeda, a minor decoy then 19 years of age.

An administrative hearing was held on August 26, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Rick Castro, the San Diego County Deputy Sheriff conducting the decoy operation, and Cindy Zepeda, the decoy, regarding the transaction which formed the basis for the accusation.

Subsequent to the hearing, the Department issued its decision which determined that the statute had been violated, and imposed a 25-day suspension.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) there was no compliance with rule 141(b)(2); (2) expert testimony was improperly excluded; (3) appellant was improperly denied discovery; (4) the Department, in violation of Government Code §11512, subdivision (d), failed to provide a court reporter at the discovery hearing; and (5) the penalty was based, improperly, on a prior violation from a different license.

DISCUSSION

I

Appellant contends that there was no compliance with Rule 141(b)(2) in that the Department did not properly apply the rule in evaluating the appearance of the decoy.

The Administrative Law Judge (ALJ) stated, in Finding III-1:

> "Although Cindy Zepeda (hereinafter the 'minor') was about five feet nine inches in height and weighed about 175 pounds as of June 13, 1997, her youthful looking face is such as to give her the appearance which could generally be expected of a person under twenty-one years of age and who would be reasonably asked for identification to verify that she could legally purchase alcoholic beverages.

Once again we encounter a problem with a finding by an ALJ that appears to focus solely on the decoy's physical appearance, a circumstance that has resulted in reversal in a number of cases. Exacerbating this, the determining factor seems to be the decoy's face alone. The ALJ's characterization of the decoy's face as "youthful looking" is of little help, since that term is imprecise, and not limited in application to persons under the age of 21.

The ALJ's reference to the decoy's height and weight, again a focus on physical characteristics, suggests that but for the "youthful looking face," he might have taken her appearance to be that of a person over the age of 21. This, it seems to us, pinpoints the problem with the use by law enforcement of decoys

large in stature. Their appearance sends, at best, a mixed message to a clerk charged with selling only to one of lawful age, and at worst can mislead, when the "youthful looking" face does not clearly convey that its bearer is under the age of 21.

This Board has repeatedly told the Department that, in its consideration of a Rule 141(b)(2) defense asserted by a licensee, the administrative law judge must explain why he is satisfied that the decoy presents the appearance which could generally be expected of a person under the age of 21 years. We made it clear that we did not expect an exhaustive discussion of every possible consideration, but simply enough to satisfy this Board that the correct legal standard had been applied and that sufficient indicia of age in addition to physical characteristics were considered in order to show that, in reaching a conclusion as to the decoy's appearance, the whole person had been considered. We cited such obvious considerations as poise, demeanor, maturity and mannerisms, but made it clear there were other aspects of appearance that could be relevant as well.

We feel several observations are in order. First, the requirements of Rule 141 are specific. Second, we have been admonished by a court of appeal that the rule's requirements are to be complied with strictly. Third, where a Department decision deviates from the language of the rule, it conveys the idea that the specific requirements of the rule as written have not been, or cannot be, met.

It follows that, to allow a reviewing tribunal to conclude that the law enforcement agency complied with the requirements of the rule as to the apparent age of the minor decoy, the Department and its ALJ's must set forth the reasons (read "findings") they believe justify the conclusion that the decoy presented an appearance, at the time of the transaction, which could generally be expected of a person under the age of 21 years.[2] It is these findings which provide the Board the necessary bridge between the evidence presented and the conclusions reached by the trier of fact, and permit this Board, and the courts, to ascertain whether there actually was adherence to the terms of the rule.

The Department has sometimes argued that we are "stretching" the rule to include not only how law enforcement does its job, but how the ALJ must word his opinion. The Department is correct in its assertion that we are telling the ALJ's they need to consider certain things and to include necessary elements in their decisions. What the Department does not seem to understand is that we cannot

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[2] We are well aware that the rule requires the ALJ to undertake the difficult task of assessing that appearance many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date. A specific finding by the ALJ to the effect that the minor's appearance was substantially the same at both times shows that the ALJ was aware of, and took into consideration, the rule's requirement that the minor's apparent age must be judged as of the time, and under the actual circumstances, of the alleged sale.

justifiably conclude that the ALJ's determination that subdivision (b)(2) was complied with was sound unless we know that the right standard was used and it was applied properly. When the ALJ indicates by the words he uses that he applied the wrong standard, we cannot sustain the decision. It is the same as if the ALJ had used the standard of "beyond a reasonable doubt" to judge whether a party had met its burden of proof, instead of using the proper "preponderance of the evidence" standard. We also need to know what facts caused the ALJ to reach his or her conclusion that the rule was complied with. Without that, we are left to guess at what evidence led to the conclusion and, therefore, cannot know whether substantial evidence supports the finding.

The court in Topanga Assn. For a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836], discussed the importance of administrative findings which are supported by the agency's analysis of the relevant facts:

"Our ruling in this regard finds support in persuasive policy considerations. ... [T]he requirement that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law, and is 'remarkably uniform in both federal and state courts.' As stated by the United States Supreme Court, the 'accepted ideal . . . is that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." (S.E.C. v. Chenery Corp. (1943 318 U.S. 80, 94.)'

"Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. In

addition,[3] findings enable the reviewing court to trace and examine the agency's mode of analysis.

"Absent such road signs, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable."

[Internal citations and footnotes have been omitted.]

It is disingenuous of the Department to contend that Rule 141 "was never intended to serve as guidance on how an Administrative opinion is worded." Every relevant statute and regulation is intended to serve as guidance on how an adjudicatory opinion is worded. The particular words used in a statute or regulation are assumed to be chosen to convey a certain meaning. Other words cannot be indiscriminately substituted for the statutory terms without the great risk of meaning something other than what the statute was designed to mean.

II

Appellant contends that the ALJ improperly excluded the expert testimony of Dr. Edward Ritvo, a professor of psychiatry at UCLA. According to appellant, the

[3]In footnote 14 of the Topanga decision, the court cited the words of Mr. Justice Cardozo: "We must know what [an administrative] decision means ... before the duty becomes ours to say whether it is right or wrong."

expert testimony would assist the trier of fact “on the topic of how the clerk assessed the decoy.” (App.Br., page 6.)

The ALJ rejected the proposed testimony, stating that he did not believe the subject matter, i.e., the appearance of the decoy, was beyond common experience, and that he thought its probative value would be outweighed by undue consumption of time. In so doing, the ALJ made specific reference to Evidence Code §§352 and 801.

Evidence Code §352 provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The ALJ undoubtedly believed the proffered evidence would only necessitate undue consumption of time, since the other considerations in §352 do not appear pertinent. Cases too numerous to require citation hold that a court has "broad discretion" in assessing whether the probative value of testimony will be outweighed by the delay it engenders. In this case, the ALJ was confronted with the additional consideration that the proffered testimony was in the form of an expert opinion.

Under §801 of the Evidence Code, an expert may testify as to his or her opinion if the opinion is on “a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."

We agree with the Department that the determination of a person's age is not a matter "beyond common experience." On each occasion where an ALJ is called upon to determine the apparent age of a decoy, he must exercise a judgment that necessarily is based upon his own experience. We do not see how he would have been assisted in the exercise of that judgment by the opinion of appellants' expert, who, in turn, would be asked to speculate what the clerk may have thought about the decoy's age when he made the sale. Instead, we see only the real likelihood that these disciplinary proceedings would be prolonged while expert countered expert on a subject the ALJ deals with on a regular basis.

III

Appellant claims he was prejudiced in his ability to defend against the accusation by the Department's refusal and failure to provide him 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.

This is but one of a number of cases where appeals of interlocutory discovery rulings are presented together with the appeal of the Department’s

suspension or revocation order.[4] All of such cases present the same or very similar issue with respect to discovery, and all require a similar result.

When the Department objected to appellant's request for the names of other licensees who had sold to the decoy in question, appellant followed the procedure set out in §11507.7. A hearing was held before the ALJ on appellant's motion to compel discovery, following which the ALJ denied the motion.

Any analysis of this issue must start with the recognition that discovery is much more limited in administrative proceedings than in civil cases. Each has its own discovery provisions, and they are very different. Discovery in civil cases is governed by the Civil Discovery Act, found in the Code of Civil Procedure, §§2016-2036. Discovery in administrative proceedings is controlled by the Administrative Procedure Act (APA), in Government Code §§11507.5-11507.7, the complete text of which is set forth in the Appendix.

The Civil Discovery Act is broadly inclusive, authorizing a number of techniques for obtaining information from an adversary in the course of litigation and expressly states that the matter sought need not be admissible if it "appears reasonably calculated" that it will lead to admissible evidence. Section 2017 provides that a party may obtain discovery

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[4] Prior to 1995, review of an administrative law judge's ruling on discovery issues was by petition to the superior court.

> "regarding any matter not privileged, that is relevant to the subject matter involved in the pending action … if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence."

Section 2019 of the Civil Discovery Act spells out the methods of discovery available. These include oral and written depositions; interrogatories to a party; inspection of documents, things and places; physical and mental examinations; requests for admissions; and simultaneous exchanges of expert trial witness information.

The APA, on the other hand, is more restrictive, specifying (in §11507.5) that "The provisions of §11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter." Section 11507.6 then spells out specific types of material that are discoverable, and does not include any provision for permitting discovery of material that is not specifically listed or provided for in that section. The section limits discoverable material, by its very terms, to that which is more or less directly related to the acts or omissions giving rise to the administrative proceeding, thereby helping ensure that the material will be relevant. Only subdivision (e) requires specifically that material discoverable under that subdivision be relevant and admissible.

The sweeping methods and tools of discovery available in superior court proceedings through the Civil Discovery Act are conspicuously absent from the APA's discovery provisions. There is no language in the APA's discovery

provisions at all comparable to the language in the Civil Discovery Act which spells out the broad scope and methods of discovery there authorized.

We find little relevance, and less persuasion, in the cases cited by appellant in support of his contention that the Civil Discovery Act provisions should apply in administrative proceedings. The cases cited arise, for the most part, in the context of civil judicial proceedings and address only issues under the Civil Discovery Act.

Arnett v. Dal Cielo (1996) 14 Cal.4th 4 [56 Cal.Rptr.2d 706], a case upon which appellant relies heavily, held that an investigative subpoena issued by the Medical Board of California was not "discovery" within the specific legal meaning of that term[5] in a statute providing that certain hospital peer review records were "not subject to discovery," and affirmed lower court orders enforcing subpoenas directed at such records. Although the case arose in the context of an administrative agency proceeding, it involved an administrative investigation, not an adjudicatory proceeding, and the question of what discovery was available in an administrative adjudicatory proceeding was not before the Court.

We disagree vehemently with appellant's argument, based upon Arnett (and amounting to mental sleight-of-hand), that since the Court stated that the word

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[5] The "specific legal meaning" of the word "discovery" was stated by the Court to be "the formal exchange of evidentiary information and materials between parties to a pending action"; this was in contrast to the general definition of "discover" as "the ascertainment of that which was previously unknown; the disclosure or coming to light of what was previously hidden." (14 Cal.4th at 20.)

"discovery" had the same legal meaning when used in the APA as in the Civil Discovery Act, it logically follows that "the rules governing the discovery process in the Administrative Procedure Act are identical to the rules governing the discovery process in the Civil Discovery Act."

The Court actually held to the contrary in Arnett when it discussed adjudicatory administrative disciplinary proceedings under the APA. The APA, the Court observed at page 23, embodies "a special statutory scheme ... 'providing the exclusive right to and method of discovery' in proceedings under the Administrative Procedure Act" such as administrative hearings on disciplinary charges. Thus, even if the word "discovery" has the same legal meaning in both discovery acts, that is no basis, in logic or in law, to import into an administrative proceeding the broad, sweeping discovery techniques provided for in civil litigation by the Civil Discovery Act.

Appellant also cites Shively v. Stewart (1966) 55 Cal.Rptr. 217 [421 P.2d 651], for the proposition that the same rules of discovery apply in the context of administrative proceedings as in proceedings governed by the Code of Civil Procedure. However, Shively was decided prior to the adoption of the APA discovery provisions in Government Code §§11507.5 through 11507.7. Shively, therefore, has little value as a precedent regarding the applicability or interpretation of APA discovery provisions, since the Court did not have the opportunity to

address the code provisions which govern in this case. The Court simply determined that some sort of discovery was available in administrative proceedings, even without specific statutory authority. But, even there, the Court voiced the caveat that "to secure discovery, there must be a showing of more than a wish for the benefit of all the information in the adversary's files." (Shively v. Stewart, supra, 55 Cal.Rptr. at 221.)

Similarly, Lipton v. Superior Court (1996) 48 Cal.4th 1599 [56 Cal.Rptr.2d 341], did not involve an adjudicatory administrative proceeding; it was a civil action alleging an insurance company's bad faith in defending against a legal malpractice claim. The Court held only that liability reserves established in a malpractice action, and reinsurance records, were discoverable under the broad scope of the Civil Discovery Act and the case law interpreting it, since they might lead to the discovery of admissible evidence on the issues raised in a bad faith action.

"[T]he exclusive right to and method of discovery as to any proceeding governed by [the APA]" is provided in §11507.6. (Gov. Code, §11507.5.) The plain meaning of this is that any right to discovery that appellant may have in an administrative proceeding before the Department must fall within the list of specific items found in Government Code §11507.6, not in the Civil Discovery Act. This view is supported by Romero v. California State Labor Commissioner (1969) 276 Cal.App.2d 787 [81 Cal.Rptr. 281, 284]:

> "Except for disciplinary proceedings before the State Bar, . . . the Civil Discovery Act (Code Civ.Proc., §2016 et seq.) does not apply to administrative adjudication. (See Shively v. Stewart, supra; Everett v. Gordon (1968) 266 A.C.A. 732, 72 Cal.Rptr. 379; Comments, Discovery in State Administrative Adjudication (1958), 56 Cal.L.Rev. 756; and Discovery Prior to Administrative Adjudications–A Statutory Proposal (1964) 52 Cal.L.Rev. 823.)" [Emphasis added.]

In addition, §11507.7 requires that a motion to compel discovery pursuant to §11507.6 "shall state . . . the reason or reasons why the matter is discoverable under that section . . . ." [Emphasis added.]

Therefore, we believe that appellant is limited in his discovery request to those items that he can show fall clearly within the provisions of §11507.6.

Appellant contends that his request for the names and addresses of licensees who, within 30 days before and after the date of the sale here, sold alcoholic beverages to the decoy in this case falls within §11507.6, subdivision (1), which entitles a party to "the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, . . ."

The ALJ, in ruling on appellant's Motion to Compel, concluded that the licensees whose names appellant has requested were not "witnesses" because they did not see or hear the transaction alleged in the accusation.

Appellant has argued that §11507.6 does not limit the "witnesses" in this subdivision to percipient witnesses, or those who observed the acts alleged in the

accusation. He asserts that he is merely trying to ascertain the names of people who could provide information that would go to testing the credibility of the decoy who will be called as a witness by the Department. We must decide, therefore, whether the term "witnesses" as used in §11507.6 includes only percipient witnesses.

General definitions of the term "witness" are so broad that they are not helpful in determining the meaning of the term in the context of administrative discovery. California Code of Civil Procedure §1878 defines "witness" as "a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit." This definition obviously refers to anyone who gives testimony in a trial or by affidavit or deposition. It is not limited to those who are percipient witnesses or even to those whose testimony is relevant. Another sense of the word "witness" is that of one who has observed an act and can remember and tell about what he or she has observed. This definition is even broader than the statutory one; it includes anyone who has seen anything and who can communicate to others what he or she has seen. Since discovery, whether the broader civil discovery or the narrower administrative discovery, is not intended to be a "fishing expedition," these definitions are clearly too broad and not particularly helpful to us in determining what "witness" means in §11507.6.

There is implicit in appellant's argument a basic appeal to fairness in the application of Rule 141. He argues that knowledge of the decoy's experience and actions in other establishments is essential to a meaningful cross-examination, to ensure that the decoy has not confused the transaction in its premises with what occurred in another on the same night or other nights during the period for which such information was requested.

For example, appellant points out (and the transcripts of almost every minor decoy case that has come to this board confirm) that a decoy will almost invariably visit a number of licensed premises on a single evening, and make purchases at several. The decoy's testimony regarding what occurred with the sellers at those locations where he or she was successful in purchasing an alcoholic beverage is, appellant asserts, critical, and the ability to test the veracity and reliability of such testimony crucial. He argues that other clerks who sold to that decoy will be able to offer relevant and admissible evidence of such things as the decoy's physical appearance, mannerisms, demeanor, manner of dress, and as well as other circumstances of the decoy operation, such as timing and sequence, which would assist in his efforts to effect a full and fair cross-examination.

We find appellant's arguments persuasive up to a point. In certain situations we can see some potential value to appellant in the experience of other sellers with

the same decoy. The relevance of these experiences, however, sharply dissipates as they become more removed in time from the transaction in question.

In all other subdivisions of §11507.6, the discoverable items are limited by their pertinence to the acts or omissions which are the subject of the proceeding. "Witnesses" in subdivision (1) must also be limited so that a discovery request does not become a "fishing expedition." It should not be limited, however, as strictly as the Department would have it, nor expanded as broadly as appellant contends.

We believe 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.

IV

Appellant contends that the decision of the ALJ to conduct the hearing on its discovery motion without a court reporter present[6] also constituted error, citing Government Code §11512, subdivision (d), which provides, in pertinent part, that "the proceedings at the hearing shall be reported by a stenographic reporter." The

[6] It is our understanding that the hearing on the motion was conducted telephonically. This, in and of itself, has no bearing on the issue.

Department contends that this reference is only to the evidentiary hearing, and not to a hearing on a motion where no evidence is taken.

We do not find the case law cited by either party particularly helpful. We read most of the authorities cited by appellant as concerned with disputes involving the preparation and certification of a trial transcript in connection with an appeal. We do think, however, that regulations of the Office of Administrative Hearings (OAH), which hears administrative cases under the Administrative Procedure Act for many agencies, provide significant guidance. The Department cites OAH Rule 1022, which deals with motions. Subdivision (h) of that rule leaves it to the discretion of the ALJ whether a motion hearing is recorded, stating that the ALJ "may" order that the proceedings on a motion be reported. (1 Cal. Code Regs., §1022, subd. (h).)

In addition, OAH has promulgated Rule 1038 dealing with "Reporting of Hearings." Subdivision (a) of that rule states that "Reporting of Hearings shall be in accordance with section 11512(d) [of the Government Code]." Subdivision (b) then says, "In the discretion of the ALJ, matters other than the Hearing may be reported." "Hearing" is defined in Rule 1002(a)(4) (1 Cal. Code Regs., §1002, subd. (a)(4)) as "the adjudicative hearing on the merits of the case." Therefore, OAH Rule 1038 also supports the Department's position that the hearing on the motion did not need to be recorded.

An analogous authority, Code of Civil Procedure §269, does not include motions among the components of a trial which must be reported and a transcript thereof prepared for an appeal, when requested by a party or directed by the court.

Appellant asserts that, without a record, the Appeals Board is deprived of the benefit of arguments made to the ALJ during the hearing on the Motion to Compel. We do not see how those arguments are relevant, and, even if so, why appellant cannot present them to the Board in his brief.

While there is no definitive statement in the APA as to whether motion hearings must be recorded, the regulations of OAH and the analogous provision for civil trials both indicate that recording is not required. This, coupled with the lack of practical disadvantage to appellant, compels us to find that recording was not required for the hearing on appellant's Motion to Compel.

V

Appellant contends that the Department misconstrued the terms of a stipulation concerning a previous violation under a different license, and as a result, improperly imposed an aggravated penalty.

The stipulation in question (Exhibit 3) was entered into in connection with appellant's application for a transfer to him alone of a license previously held by a partnership consisting of himself and two others, apparently members of his family. The stipulation refers to an accusation charging violations of Business and

Professions Code §§24200, subdivisions (a) and (b), 25658, subdivision (a), and 23804, and Penal Code §§148 and 313.3(e); the imposition by the Department of a suspension of 50 days, with 30 days thereof stayed for one year; the desire of the applicant that his application be processed as expeditiously as possible; and, in the paragraph directly relevant to the present appeal, the following:

> "NOW, THEREFORE, applicant Aied YAKOW, in consideration of having the application for transfer completed at the earliest date possible, does hereby stipulate, consent and agree that, in the event there is any cause for disciplinary action resulting in the reimposition of the 30 days stayed penalty under Registration Number 95033126, such penalty will be accepted and served by the affiant at the premises and against the license when issued."

The Department contends that the violation under the previous license constitutes a second violation under the existing license, warranting the imposition of the penalty ordinarily imposed for a second violation. The Department bases its position on the fact that Yakow was the licensee before the transfer and is the licensee after the transfer; the location of the premises is the same before and after the transfer; both violations involved sales to minors; and the current violation occurred within three years of the prior violation. Were it otherwise, the Department argues, "any licensee could transfer the license to himself after a single 25658(a) violation and never accumulate a disciplinary history or suffer increased consequences for repeated violations." (Dept.Br., pages 5-6.)

The record does not disclose by whom the stipulation was drafted. It is not a model of clarity. However, it is our opinion, after considering not only the

stipulation, but the earlier decision to which it refers, that it was not error to impose an aggravated penalty in the present case. We also believe the Department is entitled to carry over discipline from the prior license under the circumstances present in this case.

Prior to the transfer of the previous license, appellant, as a member of the partnership which held the license, was equally responsible for the violations which resulted in the accusation and ensuing decision affecting that license. There is no persuasive reason why he should be permitted to escape the consequences of that license history simply by eliminating family members from the license. To that extent, the Department's objection to there being such an escape hatch for violators has merit, although we truly doubt the Department is as powerless to prevent this from happening as its brief suggests.

Note that we reach this conclusion without reference to the stipulation reflecting appellant's willingness to serve any reimposition of suspension that might arise. It will be noted that the stipulation was executed during the one-year period of the stay. Therefore, it is understandable that the licensee, perhaps at the Department's insistence, was willing to subject himself to the potential reimposition of the stayed portion of the suspension "in the event there is any cause for disciplinary action" as a quid pro quo for the Department's approval of the transfer. However, the sale-to-minor violation charged to the new license occurred after the

one-year period had expired, so, at least as far as the stipulation was concerned, it did not provide a vehicle for any reimposition of the stayed 30 days.

The last paragraph of the decision in the matter arising under the previous license contains the following commitment by the Department: "The Department agrees not to reimpose the stayed portion of the within suspension for a subsequent violation of 25658 during the one-year stay period" (emphasis in original). There is no explanation for this unusual gesture by the Department, but the obvious intent was to materially limit the consequences to the licensee of another sale-to-minor violation by tying the Department's hands, as to the stayed portion of the suspension, with respect to the penalty it could impose during the one-year period of the stay. We can only express our curiosity over what it was that induced the Department to agree to such a limitation on its ability to impose discipline, since the stipulation does not inform us of the reason. However, the stipulation does not contain any other limitation on the discipline the Department may impose for subsequent violations, either during or after the expiration of the stay period.

The issue here, therefore, is whether the Department may consider as aggravated a sale-to-minor violation that is appellant's second such violation.

> "The Department's order of January 25, 1996 was issued after the Respondent herein and his two co-licensees were found to have violated several statutes including Section 25658(a) of the Business and professions Code at the subject premises. Under these circumstances, the prior

violations and in particular the violation of Section 25658(a) should be considered an aggravating factor in the imposition of a penalty...."

We do not read the stipulation as precluding the Department from treating appellant as it would any other repeat violator. Absent unusual circumstances, none of which appear to be present here, the Department routinely orders a 25-day suspension in cases like this. We can find no abuse of discretion in the fact that it did 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 with respect to Rule 141(b)(2), for compliance with appellant's discovery request, as limited herein, and for such other and further proceedings as are appropriate and necessary.[7]

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

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[7] 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.