ISSUED MARCH 21, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION dba 7-Eleven Store No. 19223 9701 Carmel Mountain Road San Diego, CA 92129, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7315 File: 20-215176 Reg: 97042055 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: January 20, 2000 Los Angeles, CA

The Southland Corporation, doing business as 7-Eleven Store No. 19223 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked the off-sale beer and wine license held jointly by Southland and its franchisees for an employee of the franchisees having sold a six-pack of Budweiser beer to a 19-year-old 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 December 17, 1998, is set forth in the appendix.

Appearances on appeal include appellant The Southland Corporation, appearing through its counsel, Jeffrey A. Vinnick, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

The off-sale beer and wine license involved in this appeal was issued on March 14, 1978, to appellant Southland and its then franchisees, Kathy Jo and David D. Spear. Thereafter, the Department instituted an accusation charging that Esther Ann Stephens, a clerk employed by the franchisees, sold an alcoholic beverage to Wesley P. Mayer, who was then 19 years of age, and who at the time was acting as a police decoy.

An administrative hearing was held on April 22 and October 22, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction at issue. Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation, and, finding it to be the third such violation within a period of 36 months, ordered the license revoked.

Appellant Southland thereafter filed a timely notice of appeal.[2] In its appeal, Southland raises the following issues: (1) whether the Department abused its discretion by ordering outright revocation of the license; (2) whether, under the circumstances of this case, there was good cause to conclude that continuation of

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[2] Southland is the sole appellant. As acknowledged in the Department's decision, the franchisees surrendered the store to Southland. Kathy Jo Spear appeared and participated in the administrative hearing, but has not appealed.

the license in Southland's name only would be contrary to the public welfare and morals; (3) whether revocation, in the circumstances of this case, constitutes punishment; (4) whether there was compliance with the requirement of Rule 141(b)(3) that the minor decoy present identification when requested to do so; and (5) whether there was compliance with the requirement of Rule 141(b)(2) that the minor display the appearance which could generally be expected of a person under the age of 21 years. Issues 1, 2, and 3 are substantially related, and will be discussed as one.

DISCUSSION

I

Southland claims the Department abused its discretion when it ordered the license revoked. Southland contends good cause for revocation is lacking, since it now operates the store with its own properly trained personnel, and is capable of safeguarding the public safety, morals and welfare. Southland stresses the extensive training programs offered its franchisees, and the remedial steps it has taken, including the installation of a cash register system which prompts the sale associate to examine the customer's identification, as well as its use of signs and point-of-sale material intended to discourage minors from attempting to purchase alcoholic beverages. Southland also argues that, as a franchisor, it should not be held responsible for the acts of its independent contractor franchisee.[3]

The Department stresses the fact that, despite the prophylactic measures

[3] The Board discussed at length, and rejected, this argument in The Southland Corporation (Tolentino) (December 31, 1998) AB-7035. We adhere to that view.

implemented by Southland and made available to its franchisees, this store is responsible for three sales to minors within 16 months. The Department argues that its order is an exercise of discretion, consistent with the Legislature's declaration of concern about sales to minors, a concern reflected in the enactment of Business and Professions Code §25658.1.

Unlike some other cases this Board has reviewed where the Department ordered outright revocation of the license held by Southland and a franchisee, where the Board concluded that the Department erroneously believed it had no alternative but to order outright revocation, there is no evidence of that here.

In The Southland Corporation (Sukhija) (April 10, 1998) AB-6930, the Board addressed at considerable length the power possessed by the Department when dealing with a franchisor-franchisee relationship, where the franchisor and franchisee are co-licensees. It there said:

> "The Department argues that it is the relationship of Southland and the Sukhijas as co-licensees that is critical, and not whether they are partners or are in an independent contractor relationship. "It is that relationship . . . that determines to whom the Department looks for the responsibility of the operation of a licensed premises, and where it derives its authority to discipline." (Dept.Br. at 3).
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> "While Southland's relationship with its franchisee may be in the nature of an independent contractor relationship, that is a function of the contract between them. The Department is not a party to that agreement, and is not bound by it. The cases cited by Southland all involve, one way or another, either the relationship between the two parties to the agreement, or the relationship with a third party who dealt with only one of the parties to the agreement.
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> "Here, the Department issued its license to Southland and the franchisees. It is entitled to look to either or both for compliance with the obligations assumed by the acceptance of that license. Whether they be considered partners or joint venturers or something else, the clear fact is that they jointly obligated themselves to comply with all the laws applicable to one who holds a license to sell alcoholic beverages. That a separate agreement between the co-licensees allocates those responsibilities to one or the other has

no binding force insofar as the Department is concerned.

...

"Southland concedes that the franchise form of business has not yet been analyzed or examined in cases dealing with control of alcoholic beverages, but argues that "the principles endorsed in the cases discussing civil liability are equally applicable to the considerations involved in assessing responsibility for liquor license violations."

"Southland relies heavily on the case of Cislaw v. Southland Corporation (1992) 4 Cal.App.4th 1284 [6 Cal.Rptr.2d 386], a case where Southland was exonerated from liability in a civil wrongful death action brought against Southland and one of its franchisees which had sold clove cigarettes to plaintiffs' 17-year-old son, who died of respiratory failure after smoking them. There is nothing in the decision that suggests that Southland's independent contractor status under its franchise agreement, albeit sufficient to immunize Southland against liability for the tort of its franchisee, precludes the Department from exercising its constitutionally-mandated duty and power to suspend or revoke a license when necessary in order to protect the public welfare and morals.

"The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals. We are aware of nothing in the Department's charter that mandates it to accord special consideration or more lenient treatment to a person or firm merely because that person or firm does business in the mode of a franchisor or franchisee. To the extent the Department chooses to do so, that is a function of its exercise of discretion, based upon 'good cause.'

"Another reason the Department must be able to discipline Southland derives from the fact that Southland's '7-Eleven' service mark is the name by which the retail business is held out to the public. When there is a violation of the Alcoholic Beverage Control Act by that business, the public (including the police) will inevitably associate the illegal activity with that store and the name by which that store is held out to the public. If the business then continues without interruption, as Southland seeks in this case, the public could be led to think the store has some sort of immunity, and could lose respect either for the Alcoholic Beverage Control Law or for the ability of the Department to enforce that law."

The Board went on, however, stating:

> "Nonetheless, we are persuaded by the arguments that the relationship between franchisor and franchisee with regard to the co-holding of an alcoholic beverage license may be such as to warrant the future adoption by the Department of special rules governing the consequences of disciplinary action initiated against a license where the franchisor, in compliance with the obligations of its franchise agreement, has neither been involved in the violation alleged nor has permitted it by any practices or policies it has implemented pursuant to that agreement. *The Department is in the best position to determine whether such rules would in fact be useful, and consistent with its enforcement obligations, and, unlike this Board, has the requisite jurisdiction to do so."* (Emphasis supplied.)

The Department has not adopted any special rules. Instead, it appears to be content to proceed on a case by case basis, depending upon the recommendations brought to it in the proposed decisions written by its administrative law judges.

This Board has not hesitated to reverse the Department where it appears that the ALJ's recommendation to the Department was based upon the mistaken premise that there was no alternative but to order the license revoked even as to an innocent licensee. See The Southland Corporation (Sukhija), supra.

But where, as here, there is no evidence that the Department's decision was based upon that mistaken premise, there is no basis for the Board to conclude the Department abused its discretion. Whether this Board would revoke the license, or stay revocation to permit a transfer to Southland, had it such power, is not the test. The Department, we must assume, views the situation in the light of its specific facts and the impact of those facts upon its overall enforcement responsibilities. That a penalty may be harsh is not a controlling consideration. In Martin v. Alcoholic Beverage Control Appeals Board (1959) 52 Cal.2d 287 [341 P.2d 296, 300], the California Supreme Court reaffirmed the sentiments expressed its earlier decision in Macfarlane v. Department of Alcoholic Beverage Control (1958) 51 Cal.2d 84 [330 P.2d 769, 773], that the mere fact that a penalty may seem harsh to some is no reason to set it aside.

It is apparent from the position of the Department in this case that it is dissatisfied with the results Southland has achieved with its training program and prophylactic measures, and its belief that Southland has an obligation to act more promptly and more vigorously than it has to date to ensure that its franchisees - its co-licensees - are vigilant in their efforts to prevent sales of alcoholic beverages to minors. Although the ALJ did not articulate these considerations, they were made known to him by counsel, and the Department, at the close of the hearing, urged him to enter an order of revocation.

Southland's brief quotes from the Board's recent decision in The Southland Corporation (Pannu) (November 3, 1999) AB-7154, in which the Board admitted, with reference to the mitigation evidence presented by Southland in that case, that it "can only speculate what the Department might have done with regard to its choice of discipline but for an apparently self-imposed and mistaken view to the disciplinary tools available to it." In the present case, there is no need to speculate. The Department has made its position clear.

We do not believe the penalty order warrants reversal.

II

Southland contends that there was not compliance with Rule 141(b)(3), which requires the decoy to present his or her identification to the seller when requested to do so. Southland asserts that the decoy held his driver's license in his hand in a manner which prevented the clerk from being able to observe the red stripe warning that its owner was not 21 years of age.

This argument lacks merit. It is contrary to the findings, which are supported by substantial evidence, that the decoy handed his license to the clerk.

Both the police officer [RT 48-49, 70] and the decoy [RT 20, 35] testified that the decoy handed his license to the clerk, and the ALJ implicitly so found.[4]

The issue is simply one of credibility. The ALJ chose to believe the police officer and the decoy, and to disregard the testimony of the clerk that the minor kept his license in his hand, partially concealed.

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] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

III

Appellant contends that the ALJ focused solely on the decoy's physical attributes in determining that he presented the requisite appearance of a person under the age of 21.

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[4] Finding of fact III-2: "The clerk looked at the driver's license, looked at the minor, returned it to the minor ..." (Emphasis supplied.)

Finding III states:

> "Although Wesley P. Mayer (hereinafter "the minor") was six feet two inches in height and weighed about one hundred seventy-five pounds as of June 13, 1997, his youthful looking face is such that it would be reasonable to consider him as being under twenty-one years of age. ..."

Although the ALJ did not use the word "physical" to qualify the language of Rule 141(b)(2), he did, so far as can be told from his decision, focus solely on the decoy's physical attributes to the exclusion of all other indicia of age.

The Department argues that the decoy was "teen-age thin," and that the fact that he wore a baseball cap backwards was further evidence of teen-age fashion.

Had Department counsel written the proposed decision, and listed the considerations he believed demonstrated an appearance of one under 21 years of age, as outlined in his brief, such a decision might well have met the requirements of Rule 141. But, what we are given to review is a proposed decision which, like so many others we have reviewed, fails to focus on the whole person and the image presented to a seller, but instead confines itself to a single criterion - physical appearance alone - that simply is inadequate in the context of a decoy operation governed by Rule 141.

The Department also points to the testimony of the clerk [RT 94] that she asked for identification because the decoy, "could have been, easily, 21, because he was so big, but ... he has a very young face." We do not think this tips the balance to the Department. The clerk was acting pursuant to store policy that anyone appearing under the age of 30 should be asked for identification, so her assessment of the decoy's face as "young" must be considered in that context.

This Board has repeatedly told the Department that, in its consideration of a Rule 141(b)(2) defense asserted by a licensee, the ALJ 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.[5] It is these findings which provide the Board the

[5] 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

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 justifiably conclude that the ALJ's determination that subdivision (b)(2) was complied with was sound unless we know that the correct standard was used and 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

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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.

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.)'
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> "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, findings enable the reviewing court to trace and examine the agency's mode of analysis.
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> "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.]

We do not know, given the passage of time since the hearing, whether the Department, and/or the Administrative Law Judge, will be able to make the requisite findings concerning the minor that will satisfy the rule, but that is a question which must be left to the Department to answer.

ORDER

The decision of the Department is reversed on the sole ground that it lacks sufficient findings to demonstrate that there was compliance with Rule 141(b)(2). The case is remanded to the Department for such further proceedings as may be necessary and appropriate in light of this decision.[6]

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

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[6] 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.