**ISSUED MAY 25, 2000**

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

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| WAN H. and BOO J. KIM<br>dba Beach Liquor<br>19731 Beach Boulevard<br>Huntington Beach, CA 92648,<br>Appellants/Licensees,<br><br>v.<br><br><br>DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,<br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | AB-7330<br><br>File: 21-275764<br>Reg: 98044063<br><br>Administrative Law Judge<br>at the Dept. Hearing:<br>John P. McCarthy<br><br>Date and Place of the<br>Appeals Board Hearing:<br>February 3, 2000<br>Los Angeles, CA |

Wan H. and Boo J. Kim, doing business as Beach Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 30 days for appellants' clerk having sold 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 December 24, 1998, is set forth in the appendix.

Appearances on appeal include appellants Wan H. and Boo J. Kim, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on March 18, 1993. Thereafter, the Department instituted an accusation against them charging that, on April 10, 1998, Irineo Moreno, appellants' clerk ("the clerk"), sold a six-pack of Budweiser beer to Chad Monroe, an 18-year-old police decoy ("the decoy").

An administrative hearing was held on November 2, 1998, at which time oral and documentary evidence was received and testimony was presented by the decoy, Huntington Beach police detective Steven Bushhousen, the clerk, and appellant Boo Ja Kim.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged and that no defenses had been established.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Department did not apply the correct legal standard in evaluating the apparent age of the decoy; (2) expert opinion testimony was improperly excluded; (3) the Department failed to establish the date of a prior violation; (4) appellants' discovery rights were violated; and (5) a court reporter was not provided to record the hearing on appellants' Motion to Compel.

DISCUSSION

I

Appellants contend the ALJ did not use the standard required by Rule 141(b)(2) when evaluating the appearance of the decoy. That rule requires that "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense; . . ." Instead of using this standard, appellants argue, the ALJ used a test involving whether a "reasonably prudent licensee" would request identification.

Finding III.A. of the decision states:

> "Chad Monroe was, at the time of the sale, wearing a heather-gray t-shirt with an Olympic logo on the front and blue jeans. He wore a pair of old brown hiking boots. He was clean shaven, with his hair cut short on the sides and back. His hair was combed straight back on top and held there with some gel. (Exhibit 6.) Monroe stood under 6 feet in height . . . and weighed in the vicinity of 170 pounds. Monroe appeared at the hearing and his appearance there, that is, his physical appearance and his demeanor, was that of a youthful person well under the age of 21 years, such that a reasonably prudent licensee would request his age or identification before selling him an alcoholic beverage. (*See also* Exhibit 6.)"

Although most of this finding describes the decoy's physical characteristics, the ALJ clearly considered more than that in his evaluation of the decoy's apparent age. He specifically refers to the decoy's "appearance . . . that is, his physical appearance and his demeanor . . . ." The ALJ described the decoy as "a youthful person," which is not a particularly helpful description,[2] but then continues, saying

[2] "Youthful" is a term often used by ALJ's in decoy cases. We point out that a person does not have to be, or appear to be, under 21 to appear "youthful." A "youthful" appearance is not the standard used by Rule 141(b)(2).

that the decoy's appearance was that of a person "well under the age of 21 years, . . ." He goes on to say that the decoy's appearance was "such that a reasonably prudent licensee would request his age or identification before selling him an alcoholic beverage." There is some unnecessary language here, but the basic requirements of Rule 141(b)(2) are present and are not negated by any of the additional words used.[3]

II

Appellants contend that the ALJ improperly excluded the expert testimony of Dr. Edward Ritvo, a professor of psychiatry at UCLA. According to appellants, the expert testimony would have assisted the trier of fact on the issue whether the decoy presented the appearance which could reasonably be expected of a person under the age of 21 years.

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. Here the ALJ was confronted with the additional consideration that the proffered testimony was an expert opinion.

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[3]The ALJ rejected the clerk's testimony that the decoy appeared to be 21 or 22. He then said:

> "In addition, clerk Moreno requested [the decoy's] identification. That, in itself, is evidence that Moreno considered [the decoy's] appearance to be youthful. There was no violation of Rule 141(b)(2)."

This Board has rejected use of a clerk's request for ID as evidence that the decoy looked under 21. Many licensees require clerks to request ID for anyone who looks under 30. The fact that a clerk may have considered a decoy to appear "youthful" enough to be under 30 does not support a conclusion that the decoy appeared to be under 21. (See footnote 2., supra, regarding use of the term "youthful.")

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. Whenever an ALJ is called upon to determine the apparent age of a decoy, he or she must exercise a judgment that necessarily is based upon his or her own experience. We do not see how the ALJ 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

Appellants contend that the date of one of two prior violations alleged in the accusation was not properly established, and, therefore, there is no evidence in the record to support the ALJ's finding that a prior sale-to-minor violation occurred in May 1997. They ask that the decision be reversed as to penalty and remanded to the Department for reconsideration without consideration of that prior violation.

The Department submitted two prior decisions and the accusations upon which they were based. The decisions, each of which was based on a stipulation and waiver (i.e., each was uncontested), and the accusation for Reg. #94029685 were admitted into evidence, but the accusation in Reg. #97040764 was rejected after objection by appellants because it did not comport with the copy they

received in pre-hearing discovery. [RT 12-16.] Nothing in the decision in Reg. #97040764 indicates the date of the violation.

Appellants are concerned about the date in Reg. #97040764 because it would make the present violation a "second strike" under Business and Professions Code §25658.1. The date of the violation must have been after the January 1, 1995, effective date of the statute and within 36 months of any subsequent violation for the penalties of that section to apply. We have reversed penalties in cases where they were imposed based on §25658.1, but prior violation dates were not properly proven. (See Kim (1999) AB-7103; Loresco (2000) AB-7310.)

In the present matter, however, the ALJ did not base his penalty assessment on §25658.1, but on the existence of two prior sale-to-minor violations since 1994. Acknowledging that the accusation in Reg. #97040764 was not in evidence, the ALJ said (Det. of Issues III.):

> "Nevertheless, there have been two prior disciplinary decisions resulting from violations of Section 25658(a) since 1994 and respondent Boo Kim testified credibly that she thought the second one occurred in May 1997.
>
> "The suspension order which follows is appropriate given respondents' disciplinary history and it is hoped that some measures will be taken to ensure that no further such violations occur."

The ALJ had a sufficient basis for using the 1997 violation in imposing the penalty, and a 30-day suspension is well within the Department's discretion.

IV

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.

This is but one of a number of cases which this Board has heard and decided in recent months. (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 §11506.6, but that "witnesses" in subdivision (a) of that section was not restricted to percipient witnesses. We concluded that:

> "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."

We believe the "discovery issue" in the present appeal must be disposed of in accordance with the cases listed above.

V

Appellant also contends that the decision of the ALJ to conduct the hearing on its discovery motion without a court reporter present 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 Department contends that this reference is only to the evidentiary hearing, and not to a hearing on a motion where no evidence is taken.

This issue has also been decided in the cases mentioned in II, above. The Board held in those cases that a court reporter was not required for the hearing on the discovery motion. We have not been persuaded to change our mind.

ORDER

The decision of the Department with regard to Rule 141(b)(2), expert testimony, and the prior violation is affirmed. The remainder of the decision is reversed and the case is remanded to the Department for compliance with appellants' discovery request as limited by this opinion, and for such other and further proceedings as are appropriate and necessary.[4]

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

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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.