ISSUED JULY 3, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION, YOUNG B. KIM, and HELEN KIM dba 7-Eleven Store #22414 12752 Brookhurst Street Garden Grove, CA 92640, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7339 File: 20-240174 Reg: 98044107 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: March 2, 2000 Los Angeles, CA

The Southland Corporation, Young B. Kim, and Helen Kim, doing business as 7-Eleven Store # 22414 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk, Ha S. Huang, having sold an alcoholic beverage (a six-pack of Budweiser beer) to Shaun Sandoval, a minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising

[1]The decision of the Department, dated December 31, 1998, is set forth in the appendix.

from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants The Southland Corporation, Young B. Kim, and Helen Kim, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 15, 1989. Thereafter, the Department instituted an accusation against them charging a violation of Business and Professions Code §25658, subdivision (a), for having sold an alcoholic beverage to a minor.

An administrative hearing was held on October 28, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Jay Ostrow, a Garden Grove police officer, and Shaun Sandoval, a minor, who was acting as a police decoy when he purchased an alcoholic beverage at appellants' premises.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained by the proof, and ordered appellants' license suspended for 25 days.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: 1) An erroneous standard under Rule 141(b)(2) was used; (2) opinion testimony was improperly excluded; (3) the penalty constitutes an abuse of discretion; (4) appellants' discovery rights were violated; and (5) Government Code §11512, subdivision (d) was violated by the

Department's failure to provide a court reporter for the hearing on appellants' discovery motion.

DISCUSSION

I

Appellants contend that the Department used an erroneous standard when it concluded that the minor presented the requisite appearance under Rule 141(b)(2). Appellants argue that the ALJ erred when, after concluding that the decoy had the physical appearance and demeanor of a person under the age of 21, he went on to determine that a reasonably prudent licensee would request his age or identification before selling him an alcoholic beverage.

In addressing the Rule 141(b)(2) defense, the ALJ took into account the decoy's demeanor and his personal grooming, and manner of dress. While not the most thorough assessment of the whole person before him, we are inclined to think that the ALJ did not base his determination solely on the decoy's physical appearance, and that the determination sufficiently met the standard of the rule.

Nor do we think his reference to what a prudent licensee might do dilutes his determination or detracts from its compliance with the rule.

II

Appellants contend that the Department erred in excluding the testimony of Dr. Edward Ritvo, a psychiatrist, who would have given opinion testimony regarding the apparent age of the decoy.

The Board has affirmed the Department's exclusion of the proposed testimony in a number of cases. (See, e.g., Prestige Stations, Inc. (January 4,

2000) AB-7248.) This case raises no issue concerning such testimony not previously considered and rejected by this Board.

III

Appellants contend the Department improperly considered a sale to minor violation which occurred in December 1994 as a prior violation for the purposes of imposition of the penalty. Appellants suggest that when the Legislature enacted Business and Professions Code §25658.1, which authorized the Department to revoke a license after the third violation within a 36-month period, and which barred any petition for offer in compromise of any second violation within a 36-month period, it intended to preclude the Department from considering a violation which occurred before the effective date of the statute as an aggravating factor warranting an enhanced penalty.

In other cases where this issue has been raised, the Board has sustained the Department's action. The test is not whether the violation occurred before or after the effective date of §25658.1, but whether it is sufficiently proximate in time as to reasonably be considered as a factor in aggravation.

Here, the prior violation, also a sale to minor, was within three and one-half years of the current violation. That is not so remote that the Board could find the Department abused its discretion in considering the prior violation.

Whether the previous violation, assuming it is not remote, occurred before the effective date of the enactment of §25658.1 is critical only as to whether it can be counted as a "strike" within the scope of that statute.

IV

Appellants claim they were denied discovery rights under Government Code §11507.6 when the Department refused their request for the names and addresses of licensees whose clerks, during the 30 days preceding and following, had sold to the decoy who purchased an alcoholic beverage at appellants' premises. They also claim error in the Department's unwillingness to provide a court reporter for the hearing on their motion to compel discovery, which was denied in relevant part following the Department's refusal to produce the requested information. Appellants cite 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.

The Board has issued a number of decisions directly addressing this issue. (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."

The issue concerning the court reporter has also been decided in the cases mentioned above. The Board held that a court reporter was not required for the hearing on the discovery motion. We continue to adhere to that position.

ORDER

The decision of the Department is affirmed with respect to its determinations regarding Rule 141(b)(2), exclusion of expert testimony, imposition of penalty, and the requirement of a court reporter at the hearing on the discovery motion. The case is remanded to the Department for such further proceedings as may be necessary and appropriate following compliance with appellant's discovery request, as limited by this opinion.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, 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.