ISSUED JULY 6, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION, RIPUDAMAN N. GILL, and TARLOK S. GILL dba 7-Eleven Food Store 1665 S. Robertson Blvd. Los Angeles, CA 90035, Appellants/Licensees,	)	AB-7380
	)	File: 20-214650
	)	Reg: 98044891
	)	Administrative Law Judge at the Dept. Hearing: John P. McCarthy
v.	)	
	)	Date and Place of the Appeals Board Hearing: May 4, 2000 Los Angeles, CA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	

The Southland Corporation, Ripudaman N. Gill, and Tarlok S. Gill, doing business as 7-Eleven Food Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk, Kulwinder Singh, having sold an alcoholic beverage to Patrick Arnold, an 18-year-old minor, acting as a decoy for the Los Angeles Police

[1]The decision of the Department, dated March 18, 1999, is set forth in the appendix.

Department, such sale 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).

Appearances on appeal include appellants The Southland Corporation, Ripudaman N. Gill, and Tarlok S. Gill, appearing through their 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

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against them charging the violation described above.

An administrative hearing was held on January 25, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles police officer Carmine Sasso, who observed the transaction, and by Patrick Arnold, the minor decoy, regarding the circumstances of the transaction. According to both, Arnold was not asked for identification when he purchased a 20-ounce bottle of St. Ides Special Brew, labeled a "malt beverage" and said to contain 6 percent alcohol by volume.

Subsequent to the hearing, the Department issued its decision which determined that the violation of Business and Professions Code §25658, subdivision (a), had been established, and ordered appellants' license suspended.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) Rule 141(b)(2) was violated; (2) the

penalty constitutes an abuse of discretion; (3) expert testimony was improperly excluded; (4) appellants' discovery rights were violated; and (5) the Department erred in failing to provide a court reporter for the hearing on the discovery motion.

DISCUSSION

I

Appellants contend that the Administrative Law Judge (ALJ) erred in two respects in his determination that there was no violation of Rule 141(b)(2). They contend he failed to make a finding of fact that the decoy displayed the appearance which could generally be expected of a person under 21 years of age, and the reason he did not do so was that he could not; appellants argue that a mustache grown by the decoy between the time of the sale and the time of the hearing so altered his appearance that such a finding could not be made.

The absence of a specific finding of fact concerning the decoy's appearance is of little consequence in light of the ALJ's thorough assessment of the decoy's appearance in his findings and determinations. Nor is the issue concerning the mustache of consequence.

The ALJ described the decoy's appearance as follows:

> "Patrick Arnold was, at the time of the sale, wearing a gray t-shirt, gray Dickey's pants and black Nike 'tennis' shoes. He was clean shaven. Arnold stood about 5 feet, 8 inches tall and weighed between 145 and 150 pounds. At the hearing, Arnold sported a small mustache. Even with the mustache, Arnold's appearance at the hearing, that is, his physical appearance and his demeanor, was that of a youthful black male 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."

In his Determination of Issues I, the ALJ specifically addressed appellant's

contention regarding the decoy's mustache:

> "That the decoy wore a mustache when he presented himself at the hearing matters little. As stated above, even with the mustache Patrick Arnold appeared well under the age of 21. It is not difficult to conclude that without the mustache he similarly appeared under the age of 21 on August 27, 1998, at respondents' premises. This decoy presented the appearance which could generally be expected of persons under 21 years of age under the circumstances present at respondents' store. There was no violation of Rule 141(b)(2)."

It seems to us that to ask much more from the ALJ in his assessment of the appearance of the minor is unreasonable. He addressed the decoy's appearance in the language of the rule and in a practical sense. We are satisfied that he ruled correctly.

This is not a case where a facial feature which might add maturity to one's appearance, such as a beard or gray hair, was present at the time of the sale but not at the later hearing. Here the feature which ordinarily is thought to cause a male to look older did not prevent him from conveying the appearance of a person "well under" the age of 21.

II

Appellants contend that the penalty, although admittedly "consistent with a second offense," is inconsistent with the decision, which recites that "it was not established when the [prior] offense took place." Appellants cite the decision of the Board in Kim (Santa Ana Shell) (September, 1999) AB-7103, where, because the dates of the prior violations had not been established, an order of revocation was reversed.

Kim is not directly applicable. In Kim, the dates were critical to the

application of Business and Professions Code §25658.1, subdivision (b), to show that there were three violations within a 36-month period.

Appellants have acknowledged that the standard penalty for a second violation is 25 days. This was a second violation. There is nothing in the decision that premises the enhancement on §25658.1.[2]

The decision establishing the first violation was pursuant to a stipulation and waiver. Since we know that, in the normal course, the filing of a stipulation and waiver is either concurrently with or soon after the filing of the accusation, it would appear reasonable to infer, based upon the date of the decision, that the earlier violation was sufficiently proximate as to justify an enhanced penalty for the more recent violation. Certainly, if the prior violation was remote, appellants were in a position to so inform the ALJ.[3]

III

Appellants argue that the testimony of Dr. Ritvo, a psychiatrist and physician specializing in the care and treatment of adolescents, young adults and teenagers, was improperly excluded. The offer of proof was that Ritvo would testify that he had reviewed the investigator's reports, had observed the minor, and would testify about the apparent age of the decoy.

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[2] Although, at the hearing, Department counsel characterized this as a "strike two" case, the Department acknowledges that, if this were a "third strike revocation case" under §25658.1, it would have to establish each violation date.

[3] The Department's assertion that "the registration date for the prior violation" was March 6, 1996 (Dept. Br., page 4) is not helpful. Aside from the fact that there is no evidence in the record of the registration date, that date has meaning only with respect to the filing of an accusation.

This is just one of many cases where the proffered testimony has been rejected, in rulings the Board has consistently affirmed. There is no reason for this case to be treated any differently.

IV

Appellants claim they were prejudiced in their ability to defend against the accusation by the Department's refusal and failure to provide 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. They also claim error in the Department's failure to provide a court reporter for the hearing on their motion to compel discovery. 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 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 has 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," as used in subdivision (a) of that section was not restricted to percipient witnesses. We 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. We continue to adhere to that position.

ORDER

The decision of the Department is affirmed with respect to the Rule 141(b)(2), penalty, exclusion of expert testimony, and discovery hearing transcript issues, subject to our remand to the Department for compliance with appellant's discovery request as limited by the Board's prior decisions.[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.