ISSUED APRIL 5, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DANIEL B. WONG dba Food Fair Market 611 Bush Street San Francisco, CA 94108, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7422 File: 21-27245 Reg: 98044822 Administrative Law Judge at the Dept. Hearing: Lee Tyler Date and Place of the Appeals Board Hearing: September 22, 2000 San Francisco, CA

Daniel B. Wong, doing business as Food Fair Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked his license for appellant's employee selling 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).

Appearances on appeal include appellant Daniel B. Wong, appearing through his counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated May 27, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 19, 1974. Thereafter, the Department instituted an accusation against appellant charging that, on September 9, 1998, appellant's clerk, Ricky Wong ("the clerk") sold an alcoholic beverage to Kristina Guard, who was 18 years old at that time. Guard was then working as a police decoy for the San Francisco Police Department.

An administrative hearing was held on March 23, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Kristina Guard ("the decoy"), by Lynda Zmak, a San Francisco police officer present during the decoy operation, and by the clerk.

Subsequent to the hearing, the Department issued its decision which determined that the illegal sale had occurred as alleged.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raised the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(5) was violated; (3) the April 1998 prior violation was improperly considered in imposing the penalty; and (4) appellant's discovery rights were violated.

DISCUSSION

I

Appellant contends that Rule 141(b)(2) was violated because the ALJ used the wrong standard to evaluate the apparent age of the minor and reached the "outrageous" conclusion that the decoy displayed the appearance of a person under the age of 21.

Appellant contends that the decoy appeared to be 30 years of age, and

points to her makeup, her jewelry, her employment at an insurance brokerage firm, her participation in "nearly countless decoy operations." He also remarks on the ALJ's comment that the photograph taken of the decoy on the night in question caused her "to look older than her years." (Finding III.A.) He neglects to mention, however, that following the statement about the photograph, the ALJ said, "However, her actual real-life appearance, as exhibited at the hearing, showed her appearance to be that of a person under 21 years of age."

Appellant is really asking the Board to reject the ALJ's conclusion, even though the ALJ had the opportunity, which this Board has not had, to see the decoy in person and observe both her physical appearance and her demeanor. To do so, we would have to conclude that the ALJ's determination was so unreasonable as to be considered an abuse of discretion. This we cannot do and must, therefore, uphold the ALJ's determination.

The ALJ discussed the decoy's physical appearance, but also considered her demeanor, and ultimately concluded that she "showed her appearance to be that of a person under 21 years of age." (Finding III.A.) This evaluation clearly falls within Rule 141(b)(2).

II

Appellant contends that the officer who asked the decoy to identify the clerk was not "the peace officer directing the decoy," and, therefore, Rule 141(b)(5) was not strictly adhered to, as required by Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126].

The decoy testified that Sergeant Palma was directing her during this decoy

operation [RT 38]. Officer Zmak testified that she and Sergeant Palma worked the decoy operation together, but Palma was her supervisor that night and the decoy reported to Sergeant Palma as well [RT 80]. Zmak also testified that it was her responsibility to go back into the store with the decoy to make the identification and that she initiated the identification process, Palma not being present at the time [RT 82-83].

Appellant argues that Palma was directing the decoy and, therefore, Palma was the one who was required to ask the decoy to identify the clerk. Since Zmak asked the decoy to identify the clerk, and Palma was not even present, appellant contends that the rule has not been complied with.

The ALJ determined that Zmak was directing the decoy at the time of the identification and that the requirements of Rule 141(b)(5) and Acapulco were satisfied. (Determination of Issues, 2d ¶.)

Acapulco involved Rule 141(b)(5), but in that case it was "undisputed that no attempt (reasonable or otherwise) was made to reenter Acapulco's premises (or remain on those premises) so that the decoy who purchased the beer could make a face-to-face identification of the bartender . . . ." (Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th at 581-582.) The court noted, in footnote 8 [page 582]: "The concession in this case that no attempt was made to comply with rule 141, subdivision (b)(5) makes it unnecessary to decide what would constitute a sufficient effort to reenter or what would constitute a face-to-face identification by the decoy." The court similarly left undecided any question of who qualified as "the peace officer directing the decoy."

Webster's Third New International Dictionary, page 640, includes as definitions of the verb "direct": 1) "to regulate the activities or course of . . . to guide and supervise . . . to carry out the organizing, energizing, and supervising of esp. in an authoritative capacity"; 2) "ADMINISTER, CONDUCT"; 3) "to assist by giving advice, instruction, and supervision"; and 4) "to request or enjoin esp. with authority . . . to issue an order to."

Zmak was clearly part of the team that was conducting this decoy operation, and the very fact that she asked the decoy to identify the clerk indicates that she was directing the decoy. She may not have been the only peace officer directing the decoy, or even the primary one, but she was "directing the decoy" within the dictionary definitions and the literal meaning of Rule 141(b)(5).

III

Appellant contends that use of one of two prior sale-to-minor violations as a "strike," was improper. In the prior violation, which occurred in 1998, the same clerk sold to the same decoy. That matter was resolved by appellant's stipulation to the violation and waiver of his rights to a hearing, reconsideration, or appeal.

In the hearing on the present matter, in response to questions from counsel for the Department, the decoy testified that she had purchased an alcoholic beverage at appellant's premises during a previous decoy operation and that the same clerk sold to her in that transaction as in the present one [RT 26]. On cross-examination, the following dialogue took place between appellant's counsel and the decoy [RT 41]:

Q. ". . . . Do you now have a specific recollection of identifying the clerk

on the prior time that you purchased alcohol at that store?"
A. "I do not have a specific recollection, no."

No further reference was made to this issue in any of the testimony. Appellant argues, however, that "the fact of the Rule 141(b)(5) violation as to the April 1998 event was established by testimony." (App. Opening Br. at 11.) He apparently bases his objection to use of the 1998 prior on the single statement of the decoy quoted above.

Appellant analogizes to criminal law, where, if a criminal defendant "makes sufficient allegations that his conviction, by plea, in the prior felony proceedings was obtained in violation of his constitutional *Boykin-Tahl* rights, the trial court must hold an evidentiary hearing," at which the defendant has the opportunity to prove that the prior conviction was constitutionally invalid. (People v. Allen (1999) 21 Cal.4th 424 [87 Cal.Rptr. 2d 682].) If so proved, the prior conviction cannot be used for penalty enhancement in a subsequent case.

The short answer to this analogy is that criminal law principles do not apply to administrative license proceedings. (See Nelson v. Dept. of Alcoholic Beverage Control (1959) 166 Cal.App. 2d 783 [333 P2d771]; Oxman v. Dept. of Alcoholic Beverage Control (1957) 153 Cal.App. 2d 740 [315 P.2d 484].)

In addition, the testimony of the decoy, that is, her single statement that she did not have a specific recollection of identifying the clerk in the previous instance, does not, contrary to appellant's assertion, establish as a fact that Rule 141(b)(5) was not complied with in the earlier case.

IV

Appellant claims he was prejudiced in his 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. He also claims error in the Department's failure to provide a court reporter for the hearing on his motion to compel discovery. Appellant cites 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 §11507.6, 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 in all respects except the issue of compliance with appellant's discovery request, which is remanded to the Department for further proceedings in accordance with this Board's previous decisions.[2]

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

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[2]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.