ISSUED MARCH 21, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION, KHIM TE, and KEVIN YUONG dba 7-Eleven #2174-18974 5103 East Pacific Coast Highway Long Beach, CA 90804, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7430 File: 20-328637 Reg: 98045021 Administrative Law Judge at the Dept. Hearing: Arnold Greenberg Date and Place of the Appeals Board Hearing: July 6, 2000 Los Angeles, CA

The Southland Corporation, Khim Te, and Kevin Yuong, doing business as 7-Eleven #2174-18974 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, 10 of which are stayed for a two-year probationary period, for appellants' 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).

[1]The decision of the Department, dated June 10, 1999, is set forth in the appendix.

Appearances on appeal include appellants The Southland Corporation, Khim Te, and Kevin Yuong, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 30, 1997. Thereafter, the Department instituted an accusation against appellants charging that, on August 5, 1998, appellants' employee, Vincent Callaghan ("the clerk"), sold an alcoholic beverage to John C. Jacobs ("the minor"), who was under the age of 21 and working as a decoy for the Long Beach Police Department.

An administrative hearing was held on March 18, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proven 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) Rule 141(b)(2) was violated when the ALJ used the wrong standard to evaluate the decoy's appearance; (2) Rule 141(b)(5) was violated since it was not proven by credible testimony that the required face-to-face identification took place; and (3) appellants were denied their discovery rights and their right to a transcript of the hearing on their motion to compel discovery.

DISCUSSION

I

Appellants contend that the decision is flawed because the Administrative Law Judge (ALJ) considered only the decoy's physical appearance in determining that there was compliance with Rule 141(b)(2).

Finding of Fact IV. (A) states:

> "John C. Jacobs (hereinafter 'minor') is clean shaven except for sideburns which reach to the middle part of his earlobes. His hairline has somewhat receded, but that recession was genetic rather than a process of his maturation. He is five feet, ten inches tall, and weighs 165 pounds. On August 5, 1998, he was dressed in a t-shirt, black corduroys, and tennis shoes. His physical appearance is such as to reasonably be considered under 21 years of age. The minor's appearance at the time of his testimony was substantially the same as his appearance at the time of the sale by [appellants'] clerk during the evening of August 5, 1998."

The ALJ addressed appellants' argument in the first part of Determination of Issues III:

> "[Appellants] assert that the Department has failed to comply with Rule 141(b)(2), which prescribes that the decoy shall display the appearance which could generally be expected of a person under the age of 21 years, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense. Here, there was no artifice employed so as to disguise the minor as a person exceeding the age of 20. Indeed, the minor's receding hair line was not due to his increased years but had been a product of the minor's own genetic composition. The minor's dress, indeed, was that of a young person under the age of 21. His long sideburns were not an affectation designed to deceive the seller of alcoholic beverage. There was no artifice of dress, ornament, or other appearance so as to mislead the [appellants] or [their clerk] and excuse them from requesting appropriate identification. . . ."

The Board has visited this issue on numerous occasions. It has uniformly ruled that, where the ALJ limits his analysis to the decoy's physical appearance, and fails to indicate that he has considered other important indicia of age such as

demeanor, poise, presence, or level of maturity, to name some, the decision must be reversed. This decision must be reversed not only because of the defects of analysis just noted, but also because of other egregious errors in analysis.

The ALJ in this case apparently took into consideration what he termed the lack of "artifice employed so as to disguise the minor as a person exceeding the age of 20." This implies that the ALJ believed the decoy met the requirements of Rule 141(b)(2) because there was no intentional disguising of the minor to make him look over 21. This is a patently erroneous analysis and we unequivocally reject it. If a minor were intentionally disguised, that would invalidate the operation, but the lack of disguise cannot, by itself, indicate compliance with Rule 141(b)(2).

Similarly, the ALJ referred to the decoy's receding hairline, apparently finding no fault in using such a decoy because "that recession was genetic rather than a process of his maturation." It is not clear what distinction the ALJ is making here, but he seems to be saying that the decoy has a prematurely receding hairline, not a hairline that has receded because he is old. A receding hairline is usually associated with an age considerably greater than 21, and using a decoy with such a physical characteristic is a highly questionable practice. The Board addressed a similar situation in Jinon Corporation (2000) AB-7071a, where the decoy had gray hair:

> "Gray hair is commonly associated with maturity - prematurely gray is the expression used to describe the condition of a younger person whose hair has begun to gray. Some people treat gray hair to conceal it. Others wear it proudly. Gray hair is an integral and significant aspect of appearance. In the context of a decoy operation, and Rule 141's announced objective of fairness as an overriding goal, the use of a decoy with prematurely gray hair is sufficiently questionable that, in our opinion, it is unacceptable and should not be condoned."

Similarly, use of a decoy with a prematurely receding hairline is unacceptable and should not have been condoned, much less justified, by the ALJ. This Board must defer to findings by the ALJ unless they are clearly erroneous. Decisions such as this one, that strain credulity in making findings of fact in favor of the Department, erode any appearance of fairness that attaches to the Department's administrative hearing process, both for licensees and for this Board. Such decisions will not be condoned by this Board.

II

Appellants contend there is no substantial credible evidence to support the finding that the face-to-face identification required by Rule 141(b)(2) was made, because both the officer and the minor decoy "indicated that their memories were faulty." (App. Opening Br. at 8.) Another of appellants' employees who was present during the identification testified very positively that when the decoy came back into the store, he stood close to the door, not in close proximity to the clerk. Given these discrepancies in the testimony and the reliability of the recollection of the witnesses, appellants argue, "it is inconceivable" a finding could be made that there was compliance with Rule 141(b)(5).

Officer Kuroda, when asked about the distance between the decoy and the clerk during the identification, said, "that I'm a little shaky on, but it was up close" [RT 18]. Shortly thereafter he said, "I know that it's within eight feet," although he could not give an exact distance [RT 19]. In response to the ALJ's question, "You have a clear, specific recollection of the decoy – the minor saying, 'This is the person who sold me the beer,' or words to that effect?" Kuroda answered "Yes."

[RT 18.] Kuroda's testimony did not lack reliability as to the identification being made; he was uncertain about the exact distance between the decoy and the clerk, but he was positive that the decoy was within eight feet of the clerk.

The decoy testified that, during his identification of the seller, he was standing "right next to the counter," that is, on the patron side of the counter at which the clerk was standing [RT 36]. On cross-examination, the decoy was asked about how many times he had been a decoy previously and about his clothing and hair. Then the following conversation took place [RT 44]:

> Q. Do you have a specific recollection of this particular location?
> A. No, I do not.
> Q. Some of your testimony is based upon what usually happens; is that correct?
> A. Yes.

While this part of the decoy's testimony casts some doubt on his recollection, appellant does not specify what part of the decoy's testimony may have been based on the usual procedure rather than his actual recollection of this particular incident.

Appellants called Elner Soberanis, another employee at the premises who was working on the night of this decoy operation. Soberanis testified that the decoy stood near the door of the premises while identifying the clerk who sold to him. He also indicated that the door was about 15 feet from the counter where the clerk was, and the decoy was standing about 4 feet inside the door. [RT 56-60.] This would make the decoy about 10 feet from the counter.

The ALJ addressed appellant's argument in the latter part of Determination of Issues III:

> "It is clear from the evidence that the minor did make a face-to-face identification of [the clerk], regardless of the contradictory distances attributed to the identification. There is unambiguous evidence that the minor's view of [the clerk] was unimpeded, whether that view was from a distance of 15 feet, 8, or a single foot."

The Appeals Board has held that there must be reasonable proximity during the identification such that the decoy may identify the alleged seller and the alleged seller is aware, or reasonably should be aware, that he is being identified. Although the ALJ addressed only the decoy's unimpeded ability to view the clerk, there was no evidence that anything interfered with the clerk viewing the minor, and the clerk should reasonably have been aware that he was being identified. Therefore, the ALJ's conclusion was valid: whether the minor was "15 feet, 8, or a single foot" he was still within reasonable proximity to the clerk when the identification was made, and "[i]t is clear from the evidence that the minor did make a face-to-face identification of [the clerk]."

III

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. 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, and that appellants were not entitled to the discovery they sought.

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, and concluded:

> "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 reversed as to all issues, with the

exception of the issue regarding Rule 141(b)(5), which is affirmed, and the matter is remanded to the Department for compliance with appellant's discovery request as limited by the Board's prior decisions, and for such other and further proceedings as may thereafter be appropriate.[2]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Board Member Ray T. Blair, Jr., did not participate in the deliberation of this appeal.

[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.