ISSUED NOVEMBER 14, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

AMIRUL ISLAM dba J P Market 1910 Lincoln Boulevard Santa Monica, CA 90405, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7442 File: 20-304234 Reg: 98042574 Administrative Law Judge at the Dept. Hearing: Lori Moreland Date and Place of the Appeals Board Hearing: July 6, 2000 Los Angeles, CA Redeliberation: August 3, 2000

Amirul Islam, doing business as J P Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 45 days, with 20 days thereof stayed, the stay conditioned upon one year of discipline-free operation, for having sold an alcoholic beverage to a minor, for his clerk having falsely identified himself to a police officer, and for having offered or advertised for sale and rental video recordings of harmful matter, all contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising

[1]The Department's Decision Under Government Code Section 11517, subdivision (c), dated June 28, 1999, is set forth in the appendix, together with the proposed decision of the Administrative Law Judge.

from violations of Business and Professions Code §25658, subdivision (a), and Penal Code §§148.9, subdivision (a), and 313.1, subdivision (e).

Appearances on appeal include appellant Amirul Islam, appearing through his counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 7, 1995. Thereafter, the Department instituted an accusation against appellant containing three counts charging unlawful sales to minors (counts 1, 2, and 4), two counts charging the giving of false personal identification to a police officer (counts 3 and 7), and two counts charging sale or rental of video recordings of harmful matter in an area of the licensed premises not labeled "adults only," (count 5), and the display of harmful matter in an area of the licensed premises readily visible or accessible to children (count 6).

An administrative hearing was held on November 12, 1998. Subsequent to the hearing, the Administrative Law Judge (ALJ) issued her proposed decision which sustained one of the sale-to-minor charges (count 4),[2] one of the counts charging the giving of false personal identification to a police officer (count 7), and the charge that appellant displayed harmful matter in an area of the licensed premises readily visible or accessible to children (count 6).

The Department considered, but did not adopt the proposed decision, electing to decide the case itself pursuant to Government Code §11517, subdivision (c). In so doing, the Department granted its own motion to dismiss the count charging the display

[2] The Department presented no evidence as to the sale-to-minor charges in counts 1 and 2.

of harmful matter (count 6), made its own finding and determination, contrary to the proposed decision, that appellant had violated the requirement of Penal Code §313.1, subdivision (e), that an "adults only" sign be posted (count 5), and adopted the findings and determinations of the proposed decision applicable to the sale-to-minor violation and the giving of false personal information to a police officer.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) there was no compliance with Rule 141(b)(2); (2) there was no compliance with Rule 141(b)(5); (3) there is no evidence of violation of Penal Code §313.1, subdivision (e); (4) there is no evidence of violation of Penal Code §148.9, subdivision (a); and (5) the penalty is an abuse of discretion.

DISCUSSION

I

Appellant contends the failure of the ALJ to address in her proposed decision the appearance of the minor decoy constitutes a violation of Rule 141(b)(2), which requires that a decoy "shall display the appearance which could generally be expected of a person under 21 years of age . . . ."

The ALJ said nothing in the decision about the appearance of the decoy. In a number of prior cases, the Board has reversed decisions of the Department because it was not clear from the decisions that the ALJ's had considered more than simply the physical aspects of appearance in determining that decoys looked under 21.

The Department contends, however, that appellant did not raise this issue at the administrative hearing and therefore is precluded from raising it now. It argues that the failure of the ALJ to address the decoy's appearance is a result of the failure of

appellant to raise this issue at the hearing, and appellant ought not be allowed to be "rewarded" with a reversal under these circumstances.

Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; Hooks v. California Personnel Board (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; Shea v. Board of Medical Examiners (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; Reimel v. House (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; Harris v. Alcoholic Beverage Control Appeals Board (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

Neither party has cited any authority or presented any argument regarding what constitutes "raising an issue" at the administrative hearing. However, the reason that an issue must be raised at the trial (or administrative hearing) level, is to put everyone involved on notice that a party will be using that issue in support of his or her position so that the other party has a fair opportunity to respond to that issue. This also gives the trier of fact fair notice that this issue is in contention and will need to be resolved in his or her decision.

The court in Harris v. Alcoholic Beverage Control Appeals Board, supra, 197 Cal.App.2d at 187, quoting Bohn v. Watson (1954) 130 Cal.App.2d 24, 37 [278 P.2d 454], made the following statement, which appears particularly pertinent to the present appeal:

> "The rule compelling a party to present all legitimate issues before the administrative tribunal is required in order to preserve the integrity of the proceedings before that body and to endow them with a dignity beyond that of a mere shadow-play. Had Bohn desired to avail herself of the asserted bar of limitations, she should have done so in the administrative forum, where the

> commissioner could have prepared his case, alert to the need of resisting this defense, *and the hearing officer might have made appropriate findings thereon*." [Emphasis added.]

Here, appellant did not raise the issue of Rule 141(b)(2) in its pleadings or in its closing argument at the hearing. Counsel for the Department asked the decoy several questions about her height and weight and what she was wearing at the time of the decoy operation [RT 13-15]. During cross-examination, appellant's counsel asked the decoy about her eye shadow [RT 16:15-16:26] and nail polish [RT 25:27-26:5]. He also asked about where she worked [RT 16:27-17:3] and when she graduated from high school [RT 16:4-16:8]. No questions about the decoy's appearance were asked of any of the other three percipient witnesses. In his closing argument, appellant's counsel went item by item through each count of the accusation and detailed why he thought each one was wrong. With regard to Count 4, which charged the sale to this decoy, counsel argued only that Rule 141(b)(5) had been violated [RT 95:25-97:18]. He did not give any indication to the Department or the ALJ that he believed the answers to those few questions about the decoy's appearance established a defense under Rule 141(b)(2).

When the Department rejected the ALJ's proposed decision, appellant was sent notice of that rejection, along with a copy of the proposed decision, and offered the opportunity to submit written argument to the Department before it rendered its decision under Government Code §11517, subdivision (c). Appellant's counsel submitted written argument on March 25, 1999, in which he essentially reiterated his closing arguments. With respect to Count 4, he again limited his argument to Rule 141(b)(5).

Absent some compelling authority indicating otherwise, this Board is not prepared to say that the relatively few questions asked about the decoy's appearance

can be considered "raising the issue" such that the ALJ was fairly put on notice that appellant believed compliance with Rule 141(b)(2) was in question. Without the issue being properly raised, the ALJ was under no duty to address this issue.

Appellant relies on the appeal of Kim (1999) AB-7103, in which the ALJ did not make a finding regarding the decoy's appearance and the Board reversed the determination, saying:

> "The ALJ revoked the license, so we can infer that he thought the decoy looked under 21. In light of this Board's previous cases involving this issue, an inference is not sufficient. The Board has stated that the ALJ must make a finding "delineating enough of these aspects of appearance to indicate that [the ALJ is] focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years." (Circle K Stores, Inc., supra.) With no finding at all regarding the decoy's appearance, we cannot simply assume that the ALJ properly focused on the whole person of the decoy, and not just his physical appearance, in assessing whether he conveyed the appearance of a person under the age of 21 years."

Kim differs from this case in that the appellant in that case actually raised the issue of the decoy's appearance during the administrative hearing. Therefore, the issue was properly before the ALJ, who should have addressed it.

Appellant argues that "Where there is testimony on the subject matter, and where compliance with Rule 141 is always at issue, it is incumbent upon the Department to deal with that issue." (App.Cl.Br. at 3.) The answer to this is that the only issue raised with regard to Rule 141 was that having to do with subdivision (b)(5). The Department's decision dealt with all the issues that were raised, and the failure to address the decoy's appearance was due to the failure of appellant to apprise the ALJ, before he rendered his proposed decision, or the Department, before it rendered its decision, that he believed he had a defense under Rule 141(b)(2). Appellant chose not to raise 141(b)(2) as a defense at the administrative hearing; rather, he chose to raise

only 141(b)(5) as a defense. Having made that choice, appellant cannot now say he should be absolved of responsibility for selling to a minor because the ALJ failed to address an affirmative defense that appellant did not raise.

II

Appellant contends Rule 141(b)(5)[3] was violated because the Department investigator who asked the decoy to identify the seller was not "the peace officer directing the decoy" as required by the rule. Appellant relies on the court's holding in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126], that "strict adherence" to the requirements of Rule 141 by law enforcement is required for a sale-to-minor-decoy charge to be sustained.

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 . . . ." (Ibid., 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."

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[3]Rule 141(b)(5) states:
"Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages to make a face to face identification of the alleged seller of the alcoholic beverages."

In the present case, the ALJ found that four people entered the premises after the sale to the decoy: Santa Monica police officers David Hunske and Andrea Woods; Department investigator Anthony Posada; and decoy Christina Holms. (Prop. Dec., Finding IV, 3.) He based this on the testimony of officer Hunske [RT 30, 44] and investigator Posada [RT 61]. In the same finding, the ALJ also found that, as they stood across the counter from the clerk, Hunske told the clerk that he had sold to a minor [RT 30], Posada asked the decoy if the clerk was the person who sold the beer to her, and the decoy answered or indicated "Yes" [RT 33-34, 45, 61-62].

Appellant contends that only "the peace officer directing the decoy" may have the decoy make the identification, and Posada was not "the peace officer directing the decoy." Department investigators are "peace officers" (Bus. & Prof. Code §25755), so the only question is whether Posada can be considered to have been directing the decoy.

On cross examination, Detective Hunske testified as follows [RT 43]:

Q. Were you in charge of this operation?
A. We did it as a group. I was in charge of an ABC grant.
Q. Do you know what GALE stands for?
A. I think it's Grants Assisting Law Enforcement.
Q. That's state funding to operate, among other things, decoy investigations; is that right?
A. Yes.
Q. And you were the GALE officer?
A. Yes.
Q. So is it safe to say that you were in charge of this operation?
A. Yes.

Posada testified that he "was assigned to accompany the Santa Monica vice unit. They were conducting a decoy operation" [RT 61]. Although Posada was not directing the decoy operation as a whole, he was providing some sort of guidance or help that night, as indicated by Hunske's testimony that he and the decoy left the store

after the purchase and "Investigator Posada, in our van, told us it was a violation" [RT 29-30].

Webster's Third New International Dictionary, page 640, includes as definitions of "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."

The first two definitions shown above would apply to Hunske, who was the Santa Monica police officer in charge of the GALE grant. The third and fourth definitions can be applied to Posada, who advised and instructed the Santa Monica police during the decoy operation and, we can infer, in that capacity requested the decoy to identify the seller of the beer.

Posada was clearly part of the team that was conducting this decoy operation, and the very fact that he asked the decoy to identify the seller, with the other officers there, indicates that he was directing the decoy. He may not have been the only peace officer directing the decoy, or even the primary one, but he was "directing the decoy" within the literal meaning of Rule 141(b)(5).

Besides fitting within the literal meaning of Rule 141, finding that Posada was directing the decoy does not do violence to the rule's intent, which is to promote fairness in decoy operations. Posada was part of the decoy team, and the Santa Monica police officers who could issue a citation were present at the time of Posada's question and the decoy's answer. Posada's question was not asked surreptitiously, so the officers knew exactly what the decoy was being asked and what she answered, and the clerk was present and within a few feet of the decoy and the officers.

III

Appellant contends there is no evidence of violation of Penal Code §313.1, subdivision (e), since there was no evidence presented to show that the videos involved were for sale or rent or advertised the sale or rental of the videos.

Penal Code §313.1, subdivision (e), provides:

> "Any person who sells or rents video recordings of harmful matter shall create an area within his or her business establishment for the placement of video recordings of harmful matter and for any material that advertises the sale or rental of these video recordings. This area shall be labeled 'adults only.' The failure to create and label the area is an infraction, punishable by a fine not to exceed one hundred dollars ($100). The failure to place a video recording or advertisement, regardless of its content, in this area shall not constitute an infraction. Any person who sells or distributes video recordings of harmful matter to others for resale purposes shall inform the purchaser of the requirements of this section. This subdivision shall not apply to public libraries as defined in Section 18710 of the Education Code."

The ALJ, in her proposed decision, determined that the section had not been violated because there was no evidence that the videos were for sale or rent.

The Department's decision substituted a new Finding VIII, which included a statement that the photographs on the video jackets "constituted harmful matter as defined in Penal Code §313(a)." It also added that, "It is reasonable to infer from the evidence that [appellant] was offering the videos for sale or rental, and that the video jackets were advertising the sale or rental of the video recordings which they contained."

The Department's decision also included a new Determination IX:

> "The evidence established that [appellant] violated Penal Code § 313.1(e) on December 17, 1999, in that he offered for sale or rental, and advertised for sale or rental, video recordings of harmful matter as set forth in Finding VIII. It is not necessary to establish the violation for there to be an actual sale or rental of a harmful matter video. Common dictionary definitions of the word 'sell' include 'to make a practice of offering or stocking for sale; have or offer regularly for sale; deal in: as, a department store *sells* many things.' Webster's New World

> Dictionary, College Edition, The World Publishing Company, 1962. Also the legislative history during the 1989 legislative session which led to the addition of subsection (e) to Penal Code Section 313.1, and the 1990 addition to subsection (e) of the words 'and for any material which advertises the sale or rental of these video recordings,' support the conclusion that the Legislature did not intend to require an actual sale or rental of a harmful matter video, [in] order to establish a violation." [Emphasis in original.]

Appellant argues that there is absolutely no evidence to support the Department's inference that the videos were for sale or rent or the video jackets advertised the sale or rental of the videos. The mere presence of the videos, appellant argues, does not indicate they were for sale or rent.

The Department argues that the video jackets were on a shelf behind the counter, visible to any patron who came to the counter. Their location and visibility means that they were on display, and common sense and experience tells us that items displayed in stores are for sale or rent. The Department states that the inference it drew from the display of videotapes is a perfectly reasonable one. As such, the Department concludes, the Board must sustain the Department's finding and determination, even if other reasonable inferences could be drawn.

Even though appellants may have a point about the police not asking the right questions during their investigation (or Department counsel not asking the right questions at the hearing), the Department is entitled to be sustained as long as its finding is not unreasonable and is supported by substantial evidence. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].)

The record shows that the videotapes were on a shelf two and a half to three feet long at about "head level" behind the counter where the clerk stood. Some of the videotapes were facing so that the front of the jackets showed and some showed only the spines or the ends of the jackets. The videos were located so that a person standing at the patron side of the counter could see them.

The Appeals Board must accept all reasonable inferences which support the Department's findings. (Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737].) We believe that the display of the videos on the shelf as shown in the record is sufficient to support the inference drawn by the Department that the videos in the store were for sale or rent. Appellant has made no contention nor presented any evidence to refute that inference by showing, for example, that the videos were a private collection that someone was keeping at the store. The inference of the Department is reasonable and supported by substantial evidence; as such, the finding and determination regarding this issue must be sustained.

IV

Appellant argues there is no evidence that the clerk violated Penal Code §148.9, subdivision (a), because the Department did not prove that the clerk's intention when he gave names other than his own was "to evade the process of the court, or to evade the proper identification of the person . . . ." Appellant points out that the clerk did not speak or understand English well and at some point he did give his correct name.

Penal Code §148.9, subdivision (a), provides:

> "Any person who falsely represents or identifies himself or herself as another person or as a fictitious person to any peace officer . . . upon a lawful detention or arrest of the person, either to evade the process of the court, or to evade the

> proper identification of the person by the investigating officer is guilty of a misdemeanor."

As the Department points out in its brief, appellant is really asking the Board to re-evaluate the evidence and reach a conclusion different from that reached by the ALJ. There is no question that the clerk gave the officer several different names, and the name used on the citation issued to him, Azmirul Islam, was not his real name. The clerk's real name, Foroq Rahmen, was not determined until some time later.

In People v. Hunt (1990) 225 Cal.App. 3d 498 [275 Cal.Rptr. 367], the defendant gave the officer a false name after the vehicle in which he was riding was stopped for making an illegal turn and the officer intended to cite defendant for not wearing a seat belt. Defendant had no identification and the officer received information from DMV that the person whose name defendant used was approximately seven inches shorter than defendant. The court found these circumstances justified an inference that defendant had the requisite intent to evade.

In the present case, the clerk had no identification and gave not one, but several, different names to the officer. This was in a situation in which the clerk was going to be cited for selling an alcoholic beverage to a minor. These circumstances justify an inference that the clerk gave a false name with the intent of evading legal prosecution.

V

Appellant also contends the penalty imposed, a 45-day suspension with 20 days stayed, is an abuse of discretion.

Appellant's argument is based on his contention that most, if not all, of the counts of the accusation should be reversed. Because we sustain all counts, that argument fails.

ORDER

The decision of the Department is affirmed.[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 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.