BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION, SUND D. HONG, and KEUM J. HONG
dba 7-Eleven #25801
31696 Pacific Coast Highway, Laguna Beach, CA 92677,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7496

File: 20-214610 Reg: 99046280

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 3, 2000
Los Angeles, CA

ISSUED MARCH 23, 2001

The Southland Corporation, Sund D. Hong,[1] and Keum J. Hong, doing business as 7-Eleven #25801 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[2] which suspended their license for 20 days for appellants' clerk 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]In the record, this appellant's name is sometimes given as Sung and sometimes as Sund. We use the latter spelling here because that is the way appellant spelled his name when he testified at the administrative hearing. [RT 52.]

[2]The decision of the Department, dated September 9, 1999, is set forth in the appendix.

Appearances on appeal include appellants The Southland Corporation, Sund D. Hong, and Keum J. Hong, appearing through their counsel, Ralph B. Saltsman and Stephen W. 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 April 27, 1987. Thereafter, the Department instituted an accusation against appellants charging that, on October 23, 1998, appellants' clerk, Seong Cheol Cho ("the clerk") sold an alcoholic beverage (a six-pack of Budweiser beer) to Aaron Harris, who was 18 years old at the time. Harris was working as a police decoy under the direction of the Laguna Beach Police Department when he purchased the beer.

An administrative hearing was held on August 3, 1999, at which time documentary evidence was received and testimony was presented by Laguna Beach police officer James Cota, Aaron Harris ("the decoy"), and co-appellant Sund D. Hong.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been established as alleged and no defenses had been established under Rule 141 (4 Cal. Code Regs. §141) or Business and Professions Code 25660.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(3) was violated; (2) Rule 141(b)(2) was violated; (3) the penalty constitutes an abuse of discretion; and (4) appellants' rights to discovery were violated.

DISCUSSION

I

Appellants contend that the decoy was required by Rule 141(b)(3) to show the clerk his high school identification as well as his California driver's license, both of which he had with him, when the clerk asked to see his identification. Since he showed the clerk only his California driver's license, the rule was violated and the decision must be reversed pursuant to subdivision (c) of Rule 141, according to appellants.

Rule 141(b)(3) provides that "A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages; . . ."

The clerk asked to see the decoy's identification and the decoy gave him his California driver's license, which showed his true age and carried a red stripe stating "AGE 21 IN 2001." The clerk looked at it, returned it to the decoy, and proceeded to sell him a six-pack of Budweiser.

Appellants note that the clerk did not specify what identification the decoy should show, and since the high school identification was identification that the decoy carried, the decoy violated the Rule when he did not show it along with his California driver's license. Appellants contend "One can only assume that had he showed his high school identification, the sale would not have taken place. Compliance with Rule 141(b)(3) in this instance would have precluded sale of the alcoholic beverage in question." (App. Opening Br. at 8.)

The ALJ rejected appellants' argument without comment.

Appellants' speculation that the clerk would not have sold to the decoy if the decoy had shown his high school identification in addition to his California driver's license, is just that – speculation. If the clerk did not notice (or care about) the red stripe and the date of birth on the California driver's license, both clearly showing that the decoy was not old enough to legally purchase beer, who is to say if he would have been any more careful or concerned upon seeing the high school identification?

Appellants rely only on the language of the rule to support their position. While the rule could be read the way they insist it does, it is just as reasonable to read it as requiring no more than one item of identification to be shown unless the clerk specifically asked for more. Here the clerk did not, and we think the ALJ was justified in finding that the decoy showing just his California driver's license was sufficient under the rule. If the clerk had asked for additional identification, the result might well be different, but that is not the case here and we need not reach that question.

II

Appellants note that this decoy was 6'1" tall, weighed 160 pounds, "and possessed an air of maturity and sophistication that one would not normally expect to find in someone that age." They appear to attribute his precocious "maturity and sophistication" to his four years as an Explorer Scout and supervisor of other Explorer Scouts. Appellants contend that ALJ was derelict in providing "a rote recitation of the rule" in his decision and that the Board should "reject [the ALJ's] rote finding in light of the real evidence to the contrary."

With regard to the decoy's appearance, the ALJ said (Finding II.C.):

"The decoy is youthful looking and his appearance at the time of his testimony

> was substantially the same as his appearance at the time of the sale. The decoy displayed the appearance and demeanor of a person which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller at the time of the alleged offense. The photographs in Exhibits 3 and 4 which were taken on October 23, 1998 accurately depict the decoy's appearance as of that date."

This Board has said that the ALJ's should provide some analysis of the decoy's appearance and this decision does not provide that. However, the decision also specifically refers to both the decoy's appearance and his demeanor, so we can infer, since all reasonable inferences in favor of the decision must be indulged in, that the ALJ did consider more than just the decoy's physical appearance. The use of the language of the rule does not lead this Board to infer, as appellants do, that the ALJ failed to perform his duty to observe the evidence, consider it carefully, and make reasonable findings based on substantial evidence.

Similarly, this Board does not infer from the appearance and demeanor of the decoy that the ALJ acted improperly, as appellants do. His size is certainly not extraordinary for a person of 18 and the ALJ was in a much better position than this Board to judge whether he was extraordinarily mature and sophisticated for a person under 21.

III

Appellants contend that the "enhanced penalty" of 20 days' suspension is an abuse of discretion because the ALJ "misread" the prior violation as occurring in 1995 instead of 1994. Since the prior violation occurred in 1994, more than 36 months before the violation at issue in this appeal, appellants conclude that Business and Professions Code §25658.1 does not apply. "If Business and Professions Code

§25658.1 does not apply, one [i.e. appellants] wonders why an enhanced penalty was ordered by this Administrative Law Judge." (App. Opening Br. at 10.)

Finding I recites appellants' disciplinary history as:

> "On February 6, 1995 an Accusation was filed against [appellants] and they were subsequently found to have violated Section 25658(a) of the Business and Professions Code and received a ten day suspension with all ten days stayed.
>
> "On October 3, 1990 an Accusation was filed against [appellants] and they were subsequently found to have violated Section 25658(a) of the Business and Professions Code and paid a fine in lieu of a ten day suspension."

Appellants argue that there is no evidence of an accusation filed (or a violation occurring) on February 6, 1995; the accusation in Exhibit 2 (reg. # 95031862) bears no filing date, and, appellants state, "One wonders whether the accusation was filed at all." They contend that the ALJ "blindly recited" appellants' disciplinary history as shown in the accusation in the present matter (reg. #99046280). (Ibid.) They point out that Exhibit 2 shows the prior violation allegedly occurred on October 14, 1994, which is more than 36 months before the October 23, 1998, date of the violation at issue here.

Appellants are correct that the accusation in Exhibit 2 for registration #95031862 does not bear a filed date and does allege a violation date of October 14, 1994, which is more than 36 months before the violation date in the present matter. However, their wonder over the enhanced penalty is unjustified, since the Department is not restricted by §25658.1 to enhancing penalties *only* in cases where there are two or more violations within 36 months of each other. The Department has always had the authority, in its discretion, to use progressive penalties for subsequent violations, as long as the violations are similar in type and not too remote in time. Here the existence of the "prior violation" is established by the decision in registration #95031862 and the

date of the violation, although more than 36 months before the present violation, is not so remote in time that its use for purposes of enhancement can be considered an abuse of discretion.

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. Appellants 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 see no reason to depart from the conclusions in those cases.

ORDER

The decision of the Department is affirmed in all respects except as to the availability of discovery as limited by the Board's prior decisions, which issue is remanded to the Department for such further proceedings as are necessary and appropriate.[3]

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

---

[3]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.