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

AB-7594

CHONG Y. and JAY RHEE dba Lake Food Center
1585 Madison Street, Oakland, CA 94612,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 21-100733 Reg: 99047000

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: February 15, 2001
San Francisco, CA

ISSUED APRIL 18, 2001

Chong Y. and Jay Rhee, doing business as Lake Food Center (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 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).

Appearances on appeal include appellants Chong Y. and Jay Rhee, appearing through their counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

---

[1]The decision of the Department, dated February 10, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued in April 1988. Thereafter, the Department instituted an accusation against appellants charging that, on April 28, 1999, appellants' clerk sold an alcoholic beverage to Eric Learn, who was then 19 years old. Learn was acting as a police decoy under the direction of the Oakland Police Department at the time.

An administrative hearing was held on December 9, 1999, at which time oral and documentary evidence was received. At that hearing, the Department presented testimony by Learn ("the decoy") and by Oakland police officer Mike Gissini. Appellants presented the testimony of appellant's clerk, Jim Young Park ("the clerk") and co-appellant Jay Rhee.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged in the accusation had been proven.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(4) was violated; (3) the decoy's appearance violated the fairness requirement of Rule 141(a); and (4) the Department abused its discretion in imposing the penalty of a 25-day suspension. Issues (1) and (3) are closely related and will be discussed together.

DISCUSSION

I

Appellants contend that the decoy did not meet the requirement of Rule 141(b)(2), that he display the appearance that could generally be expected of a person under the age of 21, because he had a moustache, a lined forehead, and wore a

baseball cap. They also argue that the decoy's appearance violated the Department's published Decoy Program Guidelines (Exhibit E) ("the Guidelines"), thereby violating the requirement in Rule 141(a) that law enforcement agencies may only use decoys "in a fashion that promotes faimess."

The Administrative Law Judge (ALJ) addressed the decoy's appearance in both Finding III:

> ". . . . [The decoy] was wearing khaki trousers, a T-shirt, a long-sleeved button-down shirt, boots and a navy-blue baseball cap that had Cal printed above the brim. He wore the hat brim forward. He had a slight moustache. He had shaved mid-afternoon before going on duty. He is soft-spoken. His whole appearance, including his physical attributes and his mannerisms, is that of a person 19 years of age."

and Finding XII:

> "The decoy's height, slight moustache and brow wrinkles did not detract from his youthful appearance at the hearing. A photograph taken of the decoy, wearing his cap, shortly after the confrontation the evening of the transaction, confirms this finding. The decoy appeared, both in the photograph and at the hearing, under the age of 21 years and presented an appearance, both physically and in manner, reflecting his true age."

Appellants argue that "It is common knowledge that young men choose to grow out their facial hair to appear older. It has that effect. Allowing decoys to have facial hair and appear older as a result makes a mockery of Rule 141(b)(2) and denies the licensees the very protection the Rule was intended to provide." (App. Brief at 5-6.)

We do not disagree that facial hair is worn by young men, at least partly, to appear older and that it generally does have that effect. However, we disagree with the statement that allowing use of a decoy with facial hair "makes a mockery of Rule 141(b)(2)." While facial hair may make a young man appear older, the ALJ clearly took into account this decoy's moustache and yet concluded that "[h]is whole appearance,

including his physical attributes and his mannerisms, is that of a person 19 years of age." (Finding III, supra.) Responding to appellants' contention that "the decoy's height, his slight moustache, his purported five o'clock shadow, his wearing of a cap and the lines in his forehead deprived the clerk from exercising good judgment" (Finding XI), the ALJ specifically found that "[t]he decoy's height, slight moustache and brow wrinkles did not detract from his youthful appearance . . . ." (Finding XII, supra).

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

This principle has particular application when the issue, as here, involves a factual determination regarding whether a person appears to be within a certain age group. As this Board has said in other cases, it is the responsibility of the trier of fact to determine whether the decoy selected by the law enforcement agency possesses the requisite appearance under Rule 141(b)(2).

---

[2]The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

The ALJ sees the decoy as he testifies, is able to observe his physical appearance, his demeanor, his poise as a witness, and, to a limited extent his personal mannerisms. The Board, on the other hand, sees only a photograph, if that. While it is true that, in some cases, some characteristic of the decoy's appearance may cause the Board to question the fairness of the use of that decoy, this is not such a case.

The Guidelines, which are aimed at law enforcement agencies conducting decoy programs, state in the Introduction that "Those agencies that choose to use the program can ensure program credibility, community support, and successful prosecution by following the guidelines in this pamphlet." The Guidelines address requirements and recommendations for conducting a decoy program, including the provisions of Rule 141. Among the items covered is "Selection of Decoy." Under "Appearance" it says, "Male decoys should not be large in stature or have a beard or mustache."

Appellants argue that the Guidelines, although not having the force and effect of a statute or regulation, are relevant here since they are expressly designed to guide law enforcement agencies in complying with the fairness requirement of Rule 141(a). They contend that the statement in the Guidelines about no facial hair on male decoys "is the Department's stated view that a decoy with a beard or mustache would be unfair. Having stated that view in advising police how to select a decoy, it is an abuse of discretion to ignore that fact when the decoy here has a mustache and that mustache was one of the things the clerk saw as he determined that the decoy looked older than 21." (App. Brief at 6.)

We would agree that there is some anomaly in the Department issuing

guidelines that say a decoy should not have a beard or moustache and then arguing that the guidelines are irrelevant and a moustache does not disqualify a young man as a decoy. However, we believe that appellants go too far in labeling this advice to law enforcement as "the Department's stated view that a decoy with a beard or mustache would be unfair." Likewise, appellants overstate the import of the guidelines when they contend that the Department has abused its discretion in prosecuting a violation where the decoy had a moustache.

The Guidelines are not statutes or duly adopted regulations or statements of Department policy. They "merely set forth suggested procedures for police agencies to follow." (Provigo Corp. v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561, 570 [28 Cal.Rptr.2d 638].) While they may indicate the Department's recognition that, at some point, the size and physical characteristics of a decoy could be unfair, they are not a Department statement to the effect that the use of male decoys who are "large in stature" or who have facial hair will always be unfair.

The present appeal is a case in point. The ALJ considered all the characteristics that were alleged to make this decoy look so much older than his actual age as to be unfair, and he was still able to conclude that the decoy, in spite of those characteristics, looked under 21 years of age. Finding XVI states simply that "The Department has shown strict compliance with Rule 141." This finding means that the ALJ found no unfairness in the appearance of the decoy. Under the circumstances, we cannot say that the ALJ's conclusion was clearly erroneous or unreasonable.

II

Appellants contend that the decoy was twice asked about his age, but only answered the first question, and did that ambiguously. The decoy's failure to answer the second question was a violation of Rule 141(b)(4),[3] according to appellants.

The clerk looked at the decoy's California driver's license and then asked the decoy his age. The decoy replied, truthfully, that he was 19. The clerk returned the driver's license to the decoy and sold him two bottles of "wine cooler." (Finding VI.) The clerk testified that he also asked the decoy if he were old enough to buy alcohol and that the decoy did not respond to the question [RT 80-81]. The decoy testified that the clerk only asked him how old he was and did not ask any other questions at all [RT 23-24, 27, 39]. The officer testified that the clerk said he had checked the decoy's identification, but did not say he had asked the decoy his age or whether he could buy alcohol [RT 55-56].

Appellants' contention depends upon the Board rejecting the finding of the ALJ that the clerk did not ask a second question about the decoy's age. The ALJ, in Finding X, reviewed the testimony of the clerk, the decoy, and the officer regarding whether the clerk asked the decoy a second question about his age and concluded that, "Having observed the witnesses [sic] demeanor and weighed their respective interests in this matter, it is found that the clerk made no such statement/question."

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage

---

[3] "A decoy shall answer truthfully any questions about his or her age; . . ."

Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) The Board is not in a position to say that the ALJ made an unreasonable finding on this question based on his assessment of the credibility of the various witnesses.

III

Appellants make two arguments in support of their contention that the 25-day suspension imposed was an abuse of the Department's discretion: 1) there was no evidence to support aggravation of the penalty, and 2) the evidence used to prove the date of the prior violation was inadmissible hearsay.

Penalty Aggravation

In Determination of Issues IV, the ALJ noted that the clerk sold alcoholic beverages to the decoy even though the decoy did not look older than 21, the decoy told the clerk he was only 19, and he showed the clerk his identification that stated, in bold print under his birthdate, that he would not be 21 until 2001. In Determination of Issues V, the ALJ stated that those circumstances were "sufficiently aggravating to warrant an enhancement [of the penalty] regardless of a prior history. The violation in 1998, having been proven, is an additional aggravating factor to consider. The imposition of a ten day enhancement beyond the Department's usual discipline of fifteen days is not, under the circumstances, an abuse of discretion."

In this Board's experience, the Department's "usual discipline of fifteen days" is for a *first* sale-to-minor violation, or at least where it has been a long time (probably more than five or six years) since a previous sale-to-minor violation. The 25-day suspension imposed here is the usual penalty imposed for a second sale-to-minor

violation, the increase being based on a combination of aggravation and the concept of progressive discipline. The ALJ considered the prior violation as an aggravating circumstance, and that, by itself, supports the penalty imposed. The comments the ALJ made about the clerk's actions being aggravation, therefore, were not necessary to justify the penalty imposed and, as surplusage, may be disregarded.

Evidence of Prior Sale-to-Minor Violation

Appellants argue that the evidence offered to prove the date of the prior sale-to-minor violation (Exhibit 4) is inadmissible hearsay. Exhibit 4 consists of four documents: 1) a decision, dated November 19, 1998, finding cause for, and ordering, discipline against appellants, in file #21-100733, registration # 98044934; 2) a "Stipulation and Waiver" in file #21-100733, registration #98044934, dated October 15, 1998, signed by one of the appellants, acknowledging receipt of the accusation, stipulating that disciplinary action could be taken "on the accusation," and waiving rights to a hearing, reconsideration, and appeal; 3) an Accusation, dated October 15, 1998, and file-stamped October 30, 1998, designated file #21-100733 and registration #98044934, charging appellants, through their employee, with a sale to a minor on September 10, 1998; and 4) a certification that the designated documents with file #21-100733 and registration #98044934 to which it is attached "are true and correct copies of documents on file and of record in the Sacramento Headquarters Office of the California State Department of Alcoholic Beverage Control," dated December 3, 1999. The Accusation is the only document that mentions the date of the prior sale-to-minor violation.

These documents all contain hearsay statements since they are "evidence, other

than by a testifying witness, introduced to show the proceedings that occurred in the prior case." (People v. Reed (1996) 13 Cal.4th 217, 224 [52 Cal.Rptr.2d 106].) Appellants contend they are not admissible because they do not comply with the hearsay exception provided by Evidence Code §1280.[4] They contend that there was no testimony regarding the manner in which the documents were prepared, and the writings were not "made at or near the time of the act, condition, or event."

We reject this contention. The Stipulation and Waiver is admissible as an admission by appellants and the Accusation, which contains the date of the prior violation, is admissible to show what it was appellants stipulated to. (See People v. Reed, supra.) In addition, all three documents are admissible under the official records exception to the hearsay rule found in Evidence Code §1280.

Appellants' argument that the documents do not qualify under Evidence Code §1280 because there was no testimony regarding the manner in which they were prepared is unavailing. The trier of fact has broad discretion in determining whether the foundational requirements of §1280 have been established, and that exercise of discretion will only be overturned on review if it is shown clearly to be an abuse of discretion. (People v. Martinez (2000) 22 Cal.4th 106, 120 [91 Cal.Rptr.2d 687].)

---

[4] Evidence Code §1280 provides:

> "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies:
> (a) The writing was made by and within the scope of duty of a public employee.
> (b) The writing was made at or near the time of the act, condition, or event.
> (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

The court in People v. Dunlap (1993) 18 Cal.App.4th 168 [23 Cal.Rptr.2d 204], rejected a similar objection made to admission of a computer printout of criminal history information, certified by a district attorney's office, that was used to link the defendant, by showing his aliases and various spellings of his name, to the abstracts of judgment from prior convictions. The court found the §1280 exception applicable based on the duty of public employees to record and report a person's criminal history and the presumption under Evidence Code §664 that an official duty has been regularly performed. It also questioned the reasoning of People v. Matthews (1991) 229 Cal.App.3d 930 [280 Cal.Rptr. 134], which had disallowed the admission of computer printouts of criminal history based in part on the failure to provide testimony about how the records were prepared or the sources of information used. The Dunlap court noted that the Matthews court " 'apparently overlook[ed]' the fact that the official records exception, unlike the business records exception, does not require foundational testimony by the custodian or other qualified witness as to the record's identity and mode of preparation, and . . . 'did not discuss and apparently did not consider, either judicial notice or the presumption that official duty was regularly performed, as those concepts might bear on the foundational issue.' " (People v. Martinez, supra, 22 Cal.4th at 116, quoting People v. Dunlap, supra, 18 Cal.App.4th at 1481.)

In re Shannon C. (1986) 179 Cal.App.3d 334 [224 Cal.Rptr. 516], a proceeding to declare a child free of parental custody and control and cited by appellants in support of their contention that the foundational requirements were not met here, is distinguishable. In Shannon C., the trial court admitted copies of "employment schedules" from the U.S. Navy, pursuant to Evidence Code §§1530, 1531, and 1532, to

show the whereabouts during a certain period of the father, who was on active duty in the Navy at the time. Reversing on appeal, the appellate court pointed out that these sections of the Evidence Code are concerned with using a copy of a writing that is in official custody, the attestation or certificate which accompany copies of an original writing, and the establishment of a presumption affecting the burden of producing evidence on the issue of the existence and content of a recorded writing. None of the statues used by the trial court, said the appellate court, "allows a copy of a writing to be admitted in evidence for the truth of the matter contained in the writing;" the admissibility of the original writing must be based on an exception to the hearsay rule, such as Evidence Code §1280. (In re Shannon C., supra, 179 Cal.App.3d at 342.) The court stated that it, like the trial court, could not take judicial notice of foundational facts pursuant to Evidence Code 452, subdivision (h), "because neither the Naval records nor their accompanying certificate of attestation contain any information required by section 1280." In any case, the court concluded, the records admitted "are schedules showing where the ship was supposed to go, not where it actually went. In these circumstances, we cannot use the device of judicial notice to supply evidence required by section 1280." (In re Shannon C., supra, 179 Cal.App.3d at 343.)

In the present case, the ALJ properly admitted the documents in question by taking judicial notice of the duties of public employees to prepare the documents in question and relying on the presumption of Evidence Code §664 that official duty has been regularly performed. No testimony was therefore required regarding the manner in which these documents were prepared.

Appellants contend that the second requirement of Evidence Code §1280, that

the writing was "made at or near the time of the act, condition, or event," is not met because they "are each dated weeks and months after September 10, 1998, the date of the alleged prior sale to the decoy." (APP. OPENING BR. at 10.) The event recorded by the Decision, however, is the Department's decision in the case, and the event recorded by the Stipulation and Waiver is the stipulation by appellants to the imposition of discipline and their waiver of rights to a hearing and appeal. These writings clearly took place "at or near the time" of the events they recorded.

With regard to requirement of §1280 that the writing be made "at or near the time of the act, condition, or event," the California Supreme Court has said,

> "we observe that the timeliness requirement 'is not to be judged . . . by arbitrary or artificial time limits, measured by hours or days or even weeks.' *Missouri Pacific Railroad Company* v. *Austin* (5th Cir. 1961) 292 F.2d 415, 423. Rather, 'account must be taken of practical considerations,' including 'the nature of the information recorded' and 'the immutable reliability of the sources from which [the information] was drawn.' (*Ibid.*) 'Whether an entry made subsequent to the transaction has been made within a sufficient time to render it within the [hearsay] exception depends upon whether the time span between the transaction and the entry was so great as to suggest a danger of inaccuracy by lapse of memory.' (2 McCormick on Evidence (4th ed. 1992) §289, p. 273, fn. omitted.)"

(People v. Martinez, supra, 22 Cal.4th at 128.)

The court in Martinez then went on to discuss the application of these principles to the computer printouts in question there, and concluded that

> "the Department's entry into CLETS of criminal information it receives does not depend on memory, but simply involves a transfer of information from one form of storage–the disposition reports–to another–the CLETS database. Under these circumstances, the Department's statutory recording duties are sufficiently specific to support the trial court's discretionary determination that the CLETS printout met the timeliness requirement of the official records exception."

Similarly, in the present appeal, the factual information in the Accusation, such as the

date of the violation, does not depend on the memory of the person making the writing, but is taken from the reports of Department personnel and merely transferred to the Accusation. Because an accusation, by its nature, is not dependent on memory and because it is prepared in contemplation that a licensee charged with a violation will challenge any inaccuracies contained in it, the time between its preparation and the event recorded is not crucial to its trustworthiness.

The Accusation is dated October 15, 1998, approximately 45 days after the date of the alleged violation it records. We cannot say that the ALJ abused his discretion in his implicit finding that this writing was made sufficiently near the time of the violation to assure its reliability.[5]

Appellants urge that the prior violation should be disregarded or the Board should at least remand this matter to the Department so that it may make findings regarding whether Rule 141 was strictly adhered to, as required by Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126]. They argue that, since the prior discipline was based on a Stipulation and Waiver signed by appellants two weeks before the Acapulco decision was issued, the facts of that violation have not been examined to determine whether there was strict compliance with Rule 141. If there was not strict compliance,

---

[5]Appellants refer to language in a footnote in the appeal of Kim AB-7103 (1999) where the Board discussed the requirements of Evidence Code §1280, indicating that an accusation dated July 24, 1995, was not made near the time of the violation that occurred on May 13, 1995. The question of the applicability of §1280 was not at issue in that appeal, and the dicta in the footnote is certainly not a ruling of this Board, as stated by appellants. To the extent that the dicta in Kim is inconsistent with our present analysis, it is neither controlling nor persuasive of the result in the present case.

appellants' argument goes, there was no violation, since non-compliance with Rule 141 is a complete defense to a sale-to-minor violation.

In other words, appellants argue that the Department may only use prior final determinations of violations as "strikes" for penalty enhancement if it first determines in each prior case whether there was compliance with Rule 141. Appellant has not cited any law which would demand re-litigation of every prior sale-to-minor case involving decoys, and we know of none to support appellant's cause. We have rejected this same argument at least twice previously (Rhee (Nov. 21, 2000) AB-7513; Tom (Nov. 21, 2000) AB-7572), and do so again here.

ORDER

The decision of the Department is affirmed.[6]

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

---

[6]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.