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

AB-7611

MOHAMMAD IDREES dba Mi T Mart
11852 Santa Monica Boulevard, Los Angeles, CA 90025,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-313395 Reg: 99047165

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: March 1, 2001
Los Angeles, CA
ISSUED JUNE 19, 2001

Mohammad Idrees, doing business as Mi T Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 30 days for appellant's 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 appellant Mohammad Idrees, appearing through his counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele Wong.

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[1]The decision of the Department, dated March 2, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 21, 1995. Thereafter, the Department instituted an accusation against appellant charging that, on May 12, 1999, appellant's clerk, V. Guzman ("the clerk"), sold beer, an alcoholic beverage, to 18-year-old Cindy Lepe. Lepe was acting as a decoy for the Los Angeles Police Department at the time of the sale.

An administrative hearing was held on January 5, 2000, at which time documentary evidence was received, and testimony was presented by Brian Gallagher, one of the Los Angeles police officers who accompanied Lepe on the decoy operation, and by Lepe, the minor decoy (hereinafter "the decoy").

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged.

Appellant thereafter filed a timely appeal in which he raises the following issues: (1) Rule 141(b)(2) was violated; (2) the penalty was an abuse of discretion; and (3) appellant's rights to discovery and to a court reporter at the hearing on his motion to compel discovery were violated.

DISCUSSION

I

Appellant contends the ALJ erred in finding the decoy displayed the appearance generally to be expected of a person under 21, having blurred the distinction between the decoy's apparent age at the hearing and her apparent age during the decoy operation. He asserts that, although the decoy was a "very tall, slender, sophisticated young woman wearing make up and jewelry," she giggled during the administrative

hearing, and the ALJ "seized upon" this "one element of childish behavior exhibited . . . at the . . . hearing" and assumed that she also giggled during the decoy operation. The decoy also wore make-up during the decoy operation, but did not wear "all the elements of the make-up she had applied before the decoy operation itself." (App.Br. at 9.)

The ALJ found, with regard to the decoy's appearance (Finding III.A.):

> "Cindy Lepe was, at the time of the sale, wearing blue jeans and a t-shirt with a Gap logo in the center. Lepe stood about 5 feet, 6 inches tall and weighed about 120 pounds. Her dark hair was worn down and came a bit below her shoulders. She wore light mascara, light lipstick and silver rings on her right ring and left middle fingers. She wore a wristwatch and had a pair of sunglasses worn above her hairline, not covering her eyes. Lepe appeared at the hearing and, despite having turned 19 years of age and wearing her hair an inch or two shorter, her appearance there, that is, her physical appearance and her demeanor, was that of a person her age, such that a reasonably prudent licensee would request her age or identification before selling her an alcoholic beverage. She looked and acted a bit like a juvenile, giggling while answering questions. The appearance of Cindy Lepe at the hearing was substantially the same as her appearance before [appellant's] clerk on May 12, 1999, except that she said nothing at all to the clerk until after the sale took place. Her appearance at the hearing was also remarkably similar to the photograph contained in Exhibit 5."

There is no indication here that the ALJ "blurred the distinction" between the decoy's appearance at the hearing and during the decoy operation. The reference to the decoy giggling comes after the ALJ has described the decoy and concluded that she appeared to be her own age, that is, 19 years old. The mention of giggling coming in the sentence just before the ALJ states that the decoy's appearance was substantially the same at the hearing as it was during the decoy operation, does not mean the ALJ assumed that the decoy also giggled during the decoy operation.

There is simply no evidence to support appellant's assertion (App.Br. at 9) that, "Had [the decoy] not been giggling during the Administrative Hearing, it would be quite

clear and evident that she did not display the appearance one would generally expect to find in somebody under the age of 21."

The make-up worn by the decoy during the decoy operation was "light mascara, light lipstick." At the hearing, she wore only mascara. Appellant does not explain how this minimal make-up could have affected the perception of the decoy's apparent age either at the hearing or during the decoy operation.

As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he or she possessed the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages.

This Board is not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy did not have the appearance required by the rule, and an equally partisan response that she did.

II

Appellant contends the Department abused its discretion in imposing the penalty (a 30-day suspension). He argues that the documentary evidence of a prior sale-to-minor violation (Exhibit 3, reg. # 96037596) is insufficient to establish the present violation as a "second strike" because 1) the accusation stating the date of the prior alleged violation does not bear a "Filed" stamp, and 2) there are two counts listed on that accusation, with two different dates, only one of which is within 36 months of the present violation, and "The decision [in reg. # 96037596] does not state that the

violation alleged as May 29, 1996 (count 2) was a count that was sustained." (App.Br. at 11.)

Appellant contends that, because the accusation in Exhibit 3 lacks a file stamp, "There is nothing about the accusation that indicates that the Department actually filed this same accusation with these dates of violation alleged therein." However, the documents making up Exhibit 3 – an order dated November 5, 1996; a decision dated October 24, 1996; and a two-count accusation dated September 10, 1996 – are properly certified and all bear file number 20-313395 and registration number 96037596. The accusation is signed by the district administrator, Edward Mimiaga.

This Board addressed the lack of a file-stamped copy of an accusation in Southland Corporation and Joseph and Roberta L. Whitfield (2000) AB-7313. There the appellant objected to use of an accusation which lacked a "Filed" stamp and on which the registration number was handwritten. This Board said: "As long as the documents are properly certified and clearly indicate their relationship by the Reg. # (regardless of whether it is typed or handwritten), we see no reason to disregard them."

Appellant argues that nothing shows this accusation, with these dates, was actually filed. We find this unpersuasive in light of the decision and order entered which bear the same file and registration numbers and the certification that the document "is a true and correct copy of the document on file and of record in the Inglewood District Office." We may presume that the custodian of the records at the Inglewood District Office regularly performed his or her duty to ensure that the proper accusation accompanied the decision and order for registration number 96037596. (Evid. Code §664.) It is certainly possible that some error could be made, but appellant's mere

speculation that this is not the proper accusation does not compel us to reject the presumption that an official duty has been regularly performed.

Appellant's contention that the decision in registration number 96037596 does not show that the May 29, 1996, sale-to-minor violation was sustained is simply wrong. Count 1 of the accusation alleges a violation of Business and Professions Code §25602, subdivision (a) (sale to an obviously intoxicated person), on April 15, 1996, and count 2, a violation of Business and Professions Code §25658, subdivision (a) (sale to a minor), on May 29, 1996. The decision states, in part: "Determination of issues presented: That [appellant] violated or permitted violation [of] Business and Professions Code Section(s) 25602(a) & 25658(a)." The only allegation that §25658, subdivision (a), was violated is that in count 2, which states that the violation occurred on May 29, 1996. Therefore, the decision clearly sustained the May 29, 1996, sale-to-minor violation.

The decision in registration number 96037596 sustained a sale-to-minor violation occurring on May 29, 1996, which is within 36 months of the May 12, 1999, sale-to-minor violation which is the subject of the present appeal. Therefore, it was proper for the Department to treat the present violation as a "second strike."[2]

III

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

[2]Appellant does not contest the enhancement by the ALJ of the usual 25-day suspension for second strike cases.

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.

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 reversed, and the matter is remanded for further proceedings in accordance with this Board's previous decisions with regard to that issue. [3]

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

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[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.