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

AB-7523

KYUNG H. and SEUNG I. KIM dba Santa Ana Shell
8275 East Santa Ana Canyon Road, Anaheim, CA 92808,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-301796 Reg: 99046396

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 3, 2001
Los Angeles, CA

ISSUED JUNE 21, 2001

Kyung H. Kim and Seung I. Kim, doing business as Santa Ana Shell (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license, but stayed the revocation for a two-year probationary period on condition that the license be suspended for 30 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 Kyung H. Kim and Seung I. Kim, 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.

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[1]The decision of the Department, dated October 21, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 7, 1995. Thereafter, the Department instituted an accusation against appellants charging that on October 30, 1998, appellant's clerk, Daniel R. Hemphill ("the clerk"), sold an alcoholic beverage (beer) to 19-year-old Robert Treichler. At the time of the unlawful sale, Treichler was working as a decoy for the Anaheim Police Department.

An administrative hearing was held on August 3, 1999, at which time documentary evidence was received, and testimony was presented by Eddie Fletcher and Randy West, both Anaheim police officers; Treichler ("the decoy"); the clerk; and appellant Seung I. Kim.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged and no defenses had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the decoy's appearance violated Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)), and (2) appellants' rights to discovery were violated.

DISCUSSION

I

Appellants contend the decoy's size and composure made him unqualified to act as a decoy because he did not present the appearance generally to be expected of a person under the age of 21. Appellants describe him as "Tall, strong, self-assured, a veteran of police-related activities, including prior decoy operations, all [of which] gave the appearance of someone over the age of twenty-one." (App. Br. at 7.)

The decoy, at the time of the sale, was approximately 6'2" in height and weighed

about 175 pounds. He had been in the police Explorer program previously and had risen to the rank of lieutenant, supervising 50 other Explorers. On the night he purchased an alcoholic beverage at appellants' premises, he went to 27 different locations, and was not nervous about being a decoy.

The ALJ discussed the decoy's appearance in Finding II.D.:

> "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. Although the decoy had been an Explorer with the Anaheim Police Department for several years and is now a police cadet, 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 photograph in Exhibit 4 which was taken on October 30, 1998, accurately depicts what the decoy looked like and what he was wearing on that date."

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]

These principles have particular application when the issue, as here, involves a factual determination regarding whether a person appears to be of a certain age group.

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[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].

As the 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 possessed the requisite appearance under Rule 141(b)(2).

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 there is some characteristic of the decoy's appearance that causes the Board to question the fairness of the use of that decoy, this is not such a case. 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's appearance violated the rule, and an equally partisan response that it did not.

Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

II

Appellants claim they were prejudiced in their 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 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.

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 with respect to the Rule 141(b)(2) and court reporter issues, and the matter is remanded to the Department for compliance with appellant's discovery request as limited by the Board's prior decisions.[3]

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

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[3] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.