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

AB-7547
File: 20-214247 Reg: 99045754

THE SOUTHLAND CORPORATION and JAY H. STEINBACH
dba 7-Eleven Store #2237-19198
1596 North Palm, Fresno, CA 93728,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: May 24, 2001
San Francisco, CA

ISSUED DECEMBER 11, 2001

The Southland Corporation, doing business as 7-Eleven Store #2237-19198 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked the license held jointly by appellant and Jay H. Steinbach for their employee selling an alcoholic beverage to a minor, 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 The Southland Corporation, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon; and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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

FACTS AND PROCEDURAL HISTORY

An off-sale beer and wine license was issued to The Southland Corporation and Jay H. Steinbach on July 1, 1988. Thereafter, the Department instituted an accusation against the licensees charging that, on November 17, 1998, their clerk sold an alcoholic beverage (beer) to 19-year-old Janice Rose Williams. Williams was working as a decoy for the Fresno Police Department at the time of the sale.

An administrative hearing was held on July 8 and October 14, 1999, at which time documentary evidence was received, and testimony was presented by Fresno police officer John Meyers, by Williams (hereinafter "the decoy"), and by David Wheeler, a market manager for appellant The Southland Corporation. Jay Steinbach did not appear, and the hearing proceeded as a default hearing as to him. Only The Southland Corporation appealed the decision to this Board, and "appellant" herein shall refer to The Southland Corporation.

Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale had occurred as alleged in the accusation. Appellant thereafter filed a timely appeal in which it raises the following issues: (1) the Department improperly revoked the license as to co-licensee The Southland Corporation; (2) the Department mistakenly applied Business and Professions Code[2] §25658.1 as if it required mandatory revocation; (3) prior violations were not established by sufficient competent evidence; (4) Rule 141(b)(2) was violated; and (5) appellant's rights to discovery and to a transcript of the hearing on their motion to compel were violated.

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[2]Statutory references herein refer to the Business and Professions Code unless otherwise noted.

DISCUSSION

I

Appellant contends the Administrative Law Judge (ALJ) erroneously believed that Coletti v. State Board of Equalization (1949) 94 Cal.App.2d 61 [209 P.2d 984], required revocation of the license as to both co-licensees. It cites this Board's decision in The Southland Corporation (Tolentino) (12/31/98) AB-7035, in which the Board expressed its opinion that Coletti did not preclude the Department from considering alternatives to revocation as to an innocent licensee.

Appellant notes that "the offending co-licensee, Steinbach, had been removed from the licensed premises and its operation contemporaneously with the commencement of the administrative hearing." This is apparently an attempt to establish appellant, The Southland Corporation, as an innocent licensee entitled to consideration of some penalty other than outright revocation.

The basis of appellant's argument, that the ALJ cited Coletti for the proposition that there were no alternatives to revocation, is simply not true. Rather, in rejecting appellant's argument that prior disciplinary actions should be disregarded because Steinbach's acts in signing stipulations and waivers with regard to them were unauthorized, the ALJ cited Coletti for the proposition that, "As co-licensees, each is responsible for the acts of the other." In this respect, the present appeal is unlike The Southland Corporation (Tolentino), where the ALJ clearly based his order of outright revocation, despite the Department's recommendation of a lesser penalty, on his belief that Coletti compelled that result.

II

Appellant contends that the Department mistakenly assumed §25658.1 mandated revocation for a "third strike." This is evidenced, appellant argues, by the decision simply stating, as the sole basis for revocation, that 1) §25658.1 allows the Department to revoke for a third violation within 36 months; 2) this was appellant's third violation within 36 months; 3) therefore, the license is revoked.

Section §25658.1, subdivision (b), states that

> "the department may revoke a license for a third violation of Section 25658 [prohibiting sales of alcoholic beverages to minors] that occurs within any 36-month period. This provision shall not be construed to limit the department's authority and discretion to revoke a license prior to a third violation when the circumstances warrant that penalty."

As appellant correctly points out, §25658.1 permits revocation after a "third strike," it does not mandate revocation in that situation. (See 98 Ops. CA Atty Gen. 4470 (1998).)

Appellant argues that, given the "special and unusual circumstances" of this case, "some alternatives to outright revocation could have at least been explored had the Administrative Law Judge believed that he was empowered to do so." Since he believed he was without such power, appellant asserts, the revocation was an abuse of discretion.

The Department agrees that §25658.1 is permissive. It argues that the ALJ was also well aware of that fact, and expressly acknowledged the Department's discretion under that section when he stated, in Determination of Issues III, "Pursuant to Section 25658.1, the Department may revoke a license for a third violation of Section 25658 that occurs within any 36-month period."

The parties disagree as to the implications of the following dialogue between Mr. Loehr, counsel for the Department, and the ALJ during closing argument:

> "MR. LOEHR: Thank you, Your Honor. The Department has recommended revocation of license in this case. As the exhibits indicate, as well as the case-in-chief, this is the fourth violation of selling to minors in statute in about a four-year period. This is not responsible practice. I think the record speaks for itself. As well as the testimony that you heard in the case-in-chief. The Department submits on that, sir.
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> "ADMINISTRATIVE LAW JUDGE: Okay. You're not staying the revocation for the license to be transferred? You're not giving any consideration to that?
>
> "MR. LOEHR: No, sir.
>
> "THE COURT: All right. . . ."

[RT 10/14/99 at 51-52.]

The Department argues that, "[h]ad either the Administrative Law Judge or counsel for the Department felt that revocation was mandatory, a comment to that effect would logically have occurred during the above cited exchange." Further evidence that neither the ALJ nor the Department considered revocation mandatory, according to the Department, is found in the ALJ's consideration of a penalty other than outright revocation, and the Department's statement that revocation was appropriate because the licensee had not acted in a responsible manner.

Appellant, on the other hand, contends this dialogue shows the ALJ was aware of other possible penalties, but believed he was powerless to stray from the Department's position in imposing a penalty.

The fact that the ALJ mentioned no other bases for revocation does indicate, as appellant contends, that he based the revocation on §25658.1. It does not prove, however, that the ALJ believed he was required by the statute to order revocation.

Given the Department's reason for recommending revocation presented to the ALJ during closing argument, it appears that the Department did not automatically impose revocation, but exercised its discretion in imposing that penalty. We cannot say on this record that the ALJ or the Department held, and acted upon, an erroneous belief that §25658.1 mandated outright revocation in a "third strike" case such as this.

III

Appellant contends the prior violations for sales to minors should not be considered in determining the penalty because the findings do not identify the dates of the violations, and the documents admitted are inherently unreliable.

Appellant is correct in stating that the dates of the prior violations are not included in the Findings of the decision. Finding VI lists dates in connection with the prior accusations which appear to be the dates the accusations were filed by the Department. However, this Board, as a reviewing tribunal, is not precluded from examining the record to determine the evidence upon which the Department's determination was made. (City of Carmel-by-the Sea v. Board of Supervisors (1977) 71 Cal.App.3d 84, 91 [139 Cal.Rptr. 214].) The accusations for both prior violations are included in the record in Exhibits 4 and 5. These show dates for the violations of July 3 and December 30, 1996, both within the requisite 36-month period of §25658.1.

Appellant asserts that the Stipulation and Waiver signed by Steinbach on February 21, 1997, is unreliable because it has no Registration Number ("Reg.") on it. This lack, however, is of no consequence with regard to establishing the prior violation. The Stipulation and Waiver is part of Exhibit 4, which also contains an accusation and a decision, both of which bear the file number 20-214247 and Reg. 96037945. The

Stipulation and Waiver bears file number 20-214247 and is dated February 21, after the February 6, 1997, date of the accusation, and before the April 17, 1997, date of the decision. These are indications that the Stipulation and Waiver in Exhibit 4 is the proper one for Reg. 96037945. These indications are bolstered by the certification of the Department attorney that the documents in Exhibit 4 are true and correct copies of the documents on file at Department Headquarters. In any case, the Stipulation and Waiver is not necessary to establish the prior violation; the decision, which recites that it is made pursuant to stipulation and waiver, is the effective document evidencing the prior discipline, and the accusation provides the necessary date of the violation.

With regard to the documents in Exhibit 5 (Reg. 97039360), appellant asserts that there is a "serious question as to the propriety of the proceeding in Reg. 97039360," because the Stipulation and Waiver in that matter was signed by Steinbach only a few days after the Accusation was mailed to The Southland Corporation and there was no showing that appellant "could react to the March 21, 1997 mailing [of the accusation] before franchisee Steinbach raced to the Department to stipulate and waive." (App. Br. at 14, 15.)

Appellant notes that the ALJ refused to admit the Department's Exhibit 3 (documents regarding another prior discipline) into evidence because it was not established that The Southland Corporation was formally served with the Accusation before Steinbach signed a Stipulation and Waiver in that matter. It also points to this Board's decision in The Southland Corporation (1998) AB-7035, which, appellant says, held that it was "unlawful and an abuse of discretion to revoke a license in a circumstance where one of the co-licensees did not receive fair notice and due process

where that franchisor was 'neither served nor appeared.' " Appellant contends "[t]he same equities and principles of fundamental fairness and due process apply here" that caused the Board to reverse the decision of the Department in AB-7035, supra.

None of appellant's contortions of logic can make the present case fit within the facts of AB-7035. In that case, as appellant notes, the franchisor was "neither served nor appeared." In the present case, appellant admittedly was served, and any lack of time for appellant to "realistically react" before the Stipulation and Waiver was signed ignores both legal and practical realities. Legally, appellant received the faimess and due process to which it was entitled, and appellant has presented nothing to show any actual infringement on those rights. Practically, appellant ignores the reality of telephones, pagers, e-mail, and other modern technology that would have allowed appellant to immediately communicate with Steinbach upon receipt of the accusation. Whatever happened, appellant cannot be said to have been deprived of the right to due process to which it is entitled.

IV

Appellant contends that Rule 141(b)(2) was not complied with in that the Fresno Police Department used "a truly matronly woman as a decoy," and the ALJ did not use the correct standard in determining the decoy's apparent age.

Appellant refers to the clerk's belief that the decoy was about 26 years old, lists the decoy's height and weight, notes that her hair was straight at the time of the sale and curly at the time of the hearing, and states that the decoy wore hiking boots at the time of the sale which somehow added to her overall size instead of just her height. Presumably, the Board is expected to draw from these circumstances a conclusion that

the decoy had the appearance of "a truly matronly woman" who did not look as if she were under 21. Obviously, that is impossible.

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 possesses the requisite appearance under Rule 141(b)(2). The ALJ saw the decoy as she testified, was able to observe her physical appearance, her demeanor, her poise as a witness, and, to a limited extent, her 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 in this matter, simply because appellant says we should.

The ALJ deals with the decoy's appearance in Finding IV:

> "1. At the time of the sale, Janice Williams was 5'7" tall and weighed 160 lbs; on the date of the hearing she weighed 165 lbs. At the time of the sale of beer to Ms. Williams she was wearing a white V-neck tee shirt, black drawstring pants, hiking boots and a red sweat shirt type of sweater. She had her hair in a braid and the braid was tied at the end with a rubber band; she was not wearing any jewelry. Although Ms. Williams indicated that on the date of the sale of beer to her she applied foundation and mascara, which was similar to the foundation and mascara she wore on the date of this hearing, they were not discernible to this Administrative Law Judge at the time of the hearing. Her appearance, that is her physical appearance and her demeanor were such as could generally be expected of a person under 21 years of age so that a reasonably prudent person would request proof of majority before selling her an alcoholic beverage."

The decoy's appearance was also addressed in Finding VI - Special Findings of Fact and Legal Argument:

> "A. . . . .¶ Respondent argues that subsection (b)(2) of Rule 141 was violated because Ms. Williams did not display to Ms. Munoz the appearance which could generally be expected of a person under 21 years of age. It is noted that on November 17, 1998, Ms. Williams was 5'7" in height and weighed 160 lbs. As

> described above, her appearance, that is her physical appearance and her demeanor were such as could generally be expected of a person under 21 years of age. Accordingly, there was compliance with subsection (b)(2) of Rule 141."

Appellant argues that Rule 141(b)(2) was violated because the ALJ did not make a specific finding that the decoy displayed "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 at the time of the alleged offense." Appellant's objections appear to be that the ALJ used language not found in the rule and that he did not determine the decoy's appearance as of the time of the sale.

The additional language objected to in Finding IV – "so that a reasonably prudent person would request proof of majority before selling her an alcoholic beverage" – has been objected to in prior appeals. The Board determined in those cases that the language was merely surplusage, and as long as the findings required by the Rule were present, the additional language did not affect the validity of the findings. (See, e.g., Kim (5/25/00) AB-7330; Circle K Stores, Inc. (7/10/00) AB-7421.)

In Finding VI, quoted above, the ALJ specifically determined that the decoy had the appearance of a person under the age of 21 at the time of the sale. Appellant's contention that such a finding is lacking is simply wrong.

V

Appellant claims it was prejudiced in its 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. It also claims error in the Department's

failure to provide a court reporter for the hearing on its motion to compel discovery. Appellant cites 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 noted 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, subject to our remand 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

[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.