ISSUED JULY 6, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE CIRCLE K STORES, INC. dba Circle K Store #3085 13682 Euclid Street Garden Grove, CA 92643, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7322 File: 20-284733 Reg: 98044104 Administrative Law Judge at the Dept. Hearing: John P. McCarthy Date and Place of the Appeals Board Hearing: April 6, 2000 Los Angeles, CA

The Circle K Stores, Inc., doing business as Circle K Store #3085 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for appellant's employee 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]The decision of the Department, dated December 17, 1998, is set forth in the appendix.

Appearances on appeal include appellant The Circle K Stores, Inc., appearing through its 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

Appellant's off-sale beer and wine license was issued on December 9, 1993. Thereafter, the Department instituted an accusation against appellant charging that, on April 3, 1998, appellant's employee, Borhan Ali ("the clerk"), sold a six-pack of Budweiser beer to Luis Payan ("the minor"), who was then 19 years of age.

An administrative hearing was held on October 28, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by officer Scott Watson of the Garden Grove Police Department, and by the minor, who, at the time of the transaction, was acting as a decoy for the Garden Grove Police Department.

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

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)) was violated; (2) expert testimony was improperly excluded; (3) the penalty constitutes an abuse of discretion; and (4) appellant's discovery rights were violated.

DISCUSSION

I

Appellant contends Rule 141(b)(2) was violated because the ALJ used the wrong standard in evaluating the apparent age of the minor decoy, using a test of whether a reasonably prudent licensee would ask the minor for identification rather than comparing the minor to other persons under 21, as required by the rule.

The ALJ evaluated the apparent age of the minor in Finding III.A.:

> "Luis Payan was, at the time of the sale, wearing jeans of an undetermined color and a short-sleeved, button-front shirt with a collar over a t-shirt. He had on black street shoes and was clean shaven. His hair was worn in a crew cut, about 3/4 inch in length. Payan stood about 5 feet 6 inches tall and weighed a bit less than 160 pounds. Luis Payan appeared at the hearing and his appearance at the hearing, that is, his physical appearance and his demeanor, was that of a youthful person well under the age of 21 years, such that a reasonably prudent licensee would request his age or identification before selling him an alcoholic beverage."

Although most of this finding describes the decoy's physical characteristics, the ALJ clearly considered more than that in his evaluation of the decoy's apparent age. He specifically refers to the decoy's "appearance . . . that is, his physical appearance and his demeanor . . . ." The ALJ described the decoy as "a youthful person," which is not a particularly helpful description,[2] but then continues, saying that the decoy's appearance was that of a person "well under the age of 21 years, . . ." He goes on to say that the decoy's appearance was "such that a reasonably prudent licensee would request his age or identification before selling him an alcoholic beverage." There is some unnecessary language here, but the basic

[2] "Youthful" is a term often used by ALJ's in decoy cases. We point out that a person does not have to be, or appear to be, under 21 to appear "youthful." A "youthful" appearance is not the standard used by Rule 141(b)(2).

requirements of Rule 141(b)(2) are present and are not negated by any of the additional words used.

II

Appellant contends the ALJ improperly excluded the expert testimony of Dr. Edward Ritvo, a psychiatrist, regarding the evaluation of apparent age of adolescents.

Cases too numerous to require citation hold that a court has "broad discretion" in assessing whether the probative value of testimony will be outweighed by the delay it engenders. Here the ALJ was confronted with the additional consideration that the proffered testimony was an expert opinion.

Under §801 of the Evidence Code, an expert may testify as to his or her opinion if the opinion is on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."

We agree with the Department that the determination of a person's age is not a matter beyond common experience. Whenever an ALJ is called upon to determine the apparent age of a decoy, he or she must exercise a judgment that necessarily is based upon his or her own experience. We do not see how the ALJ would have been assisted in the exercise of that judgment by the opinion of appellants' expert, who, in turn, would be asked to speculate what the clerk may have thought about the decoy's age when he made the sale. Instead, we see only the real likelihood that these disciplinary proceedings would be prolonged while expert countered expert on a subject the ALJ deals with on a regular basis.

III

Appellant contends the Department improperly enhanced the penalty in this matter to 25 days when there was no proof that the prior sale-to-minor violation of appellant had occurred within 36 months of the present violation.

Appellant states that the ALJ "pointedly refused to consider the 'prior' violation but imposed the 25-day suspension nevertheless." (App. Opening Br. at 10.) This is not quite accurate. The ALJ, in Finding V., stated that a decision dated March 27, 1997, ordered appellant's license suspended for 10 days for a sale-to-minor violation, but that the date of the violation was not established. However, the ALJ does not say that he did not consider the prior violation in assessing the penalty, and clearly he did take it into consideration in ordering a 25-day suspension instead of the usual first-offense penalty of a 15-day suspension.

The prior violation was properly considered by the ALJ in aggravation. There is no contention that the prior violation did not occur, and it could not have occurred before the license was issued on December 9, 1993, or four years and four months prior to the present violation. Therefore, the prior was recent enough to reasonably be considered in aggravation of the present violation.

IV

Appellant claims it was prejudiced in its ability to defend against the accusation by the Department's refusal and failure to provide it 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 their 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 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:

> "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 issues regarding Rule 141(b)(2), the exclusion of expert testimony, and the aggravated penalty, and remanded to the Department for compliance with appellant's discovery request as limited by the Board's previous decisions.[3]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
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.