**ISSUED MAY 25, 2000**

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

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| THE SOUTHLAND CORPORATION<br>and DHARAM and RAJINDER BHATIA<br>dba 7-Eleven Store #22174<br>8982 East Chapman Avenue<br>Garden Grove, CA 92641,<br>Appellants/Licensees,<br><br>v.<br><br>DEPARTMENT OF ALCOHOLIC<br>BEVERAGE CONTROL,<br>Respondent. | ) | AB-7325<br><br>File: 20-319056<br>Reg: 98044088<br><br>Administrative Law Judge<br>at the Dept. Hearing:<br>John P. McCarthy<br><br>Date and Place of the<br>Appeals Board Hearing:<br>February 3, 2000<br>Los Angeles, CA |

The Southland Corporation and Dharam and Rajinder Bhatia, doing business as 7-Eleven Store #22174 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for appellants' 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 appellants The Southland Corporation and Dharam and Rajinder Bhatia, 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.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 20, 1996. Thereafter, the Department instituted an accusation against appellants charging that, on April 10, 1998, appellant's clerk, Parmjeet Singh ("the clerk"), sold a six-pack of Coors Light beer to Theresa Garrity, a 19-year-old police decoy ("the decoy").

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 Garden Grove police officer Orlonzo Reyes and by the decoy.

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

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Department did not apply the correct legal standard in evaluating the apparent age of the decoy; (2) expert opinion testimony was improperly excluded; (3) the Department failed to establish the date of a prior violation; (4) appellants' discovery rights were violated; and (5) a court reporter was not provided to record the hearing on appellants' Motion to Compel.

DISCUSSION

I

Appellants contend the ALJ did not use the standard required by Rule 141(b)(2) when evaluating the appearance of the decoy. That rule requires that "The decoy shall display 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; . . ." Instead of using this standard, appellants argue, the ALJ used a test involving whether a "reasonably prudent licensee" would request identification.

Finding III.A. of the decision states:

> "Theresa Garrity was, at the time of the sale, wearing a black straight skirt and a lighter blue shirt with long sleeves and a collar over a navy blue t-shirt. She wore black shoes similar to a man's loafer, with a heavy sole and welt. Her blond, shoulder-length hair was gathered together with a headband. She stood about 5 feet 8 inches tall and weighed about 135 pounds. Garrity appeared at the hearing and her appearance at the hearing, that is, her physical appearance and her demeanor, was that of a youthful person under the age of 21 years, such that a reasonably prudent licensee would request her age or identification before selling her 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, her physical appearance and her demeanor . . . ." The ALJ described the decoy as "a youthful person," which is not a particularly helpful description,[2] but then continued, saying

[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).

that the decoy's appearance was that of a person "under the age of 21 years." He also said that the decoy's appearance was "such that a reasonably prudent licensee would request her age or identification before selling her an alcoholic beverage." There is some unnecessary language here, but the basic requirements of Rule 141(b)(2) are present and are not negated by any of the additional words used.[3]

II

Appellants contend that the ALJ improperly excluded the expert testimony of Dr. Edward Ritvo, a professor of psychiatry at UCLA. According to appellants, the expert testimony would have assisted the trier of fact on the issue whether the decoy presented the appearance which could reasonably be expected of a person under the age of 21 years.

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. In this case, the ALJ was confronted with

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[3] The ALJ rejected, as inconsistent with the decoy's appearance, appellants' argument that the decoy's sophistication and "business attire" made it easy to perceive her as older. He then said:

> "In addition, clerk Singh requested [the decoy's] identification. That, in itself, is evidence that he considered her appearance to be youthful. Theresa Garrity presented the appearance of one under the age of 21 years. There was no violation of Rule 141(b)(2)."

This Board has rejected use of a clerk's request for ID as evidence that the decoy looked under 21. Many licensees require clerks to request ID for anyone who looks under 30, or even older. The fact that a clerk may have considered a decoy to appear "youthful" enough to be under 30 does not support a conclusion that the decoy appeared to be under 21. (See footnote 2., supra, regarding use of the term "youthful.")

the additional consideration that the proffered testimony was in the form of 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

Finding V recites that appellant was previously subject to discipline for a violation of §25658, subdivision (a), resulting in a decision dated March 13, 1997, which imposed an all-stayed suspension of 10 days. It then states: "It was not established in the record when the incident which resulted in that decision occurred."

Appellants contend that they should not have been subject to a suspension of 25 days, since the ALJ specifically found that the date of the prior violation had not been established, and there was no other evidentiary basis in the record for

imposing an aggravated penalty. They argue that a 25-day suspension is imposed pursuant to §25658.1 when a licensee has a second sale-to-minor violation within a 36-month period, and if the date of the prior sale-to-minor violation is not established, this violation should not be result in a "second offense" penalty. To do so, appellants assert, is an abuse of the Department's discretion.

The Department submitted copies of a decision based on a stipulation and waiver and an accusation, both designated as Reg. #97039117. The accusation, however, differed from the one appellants had received in discovery. The accusation appellants received in discovery apparently had no registration number, while the document submitted at the hearing had been altered and bore a typewritten "97039117" for the registration number. The ALJ excluded the accusation since it differed from that received by appellants in discovery. [RT 46-49.] There is nothing in the decision in Reg. #97039117 that indicates the date of the violation.

For purposes of §25658.1, the date of the violation is of paramount importance, because it must have been after January 1, 1995 (the effective date of the statute) and within 36 months of any subsequent violation for the penalties of that section to apply. This Board has reversed the Department's penalty assessments in cases where prior violation dates were not properly proven and penalties were imposed based on §25658.1. (See Kim (1999) AB-7103; Loresco (2000) AB-7310.)

Ordinarily, first sale-to-minor violations are subject to 15-day penalties. In the case of a second violation within 36 months of the first one, §25658.1,

subdivision (a), provides that the Department may not accept a fine in lieu of a suspension, and the Department usually imposes a 25-day suspension.

While the Department may not have routinely ordered 25 days' suspension for a second sale-to-minor violation before §25658.1, it was always within its discretion to do so. After §25658.1 became effective, it appears that 25-day suspensions became the norm when there were two violations relatively close together, undoubtedly so that there would be a more logical progression in the discipline if a third violation occurred in the 36-month period and revocation were ordered.

In the present matter, we do not know whether the ALJ based the penalty on §25658.1 or the Department's inherent discretion, since he gave no reason for the penalty imposed. It seems obvious, however, that the penalty took into consideration the existence of the prior sale-to-minor violation.

It was not an abuse of discretion for the Department to consider the prior violation, even though there was no specific evidence in the record of the date of that violation. Since appellants' license was issued in May 20, 1996, the prior violation could not have occurred before that date. The violation presently in issue occurred on April 10, 1998, less than 23 months after the license was issued. Therefore, the prior violation had to have occurred less than 23 months before the present one. The prior was, therefore, appropriately considered by the Department whether the penalty was imposed under §25658.1 or as an exercise of the Department's existing discretion.

IV

Appellants claim they were prejudiced in their ability to defend against the accusation by the Department's refusal and failure to provide them 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.

This is but one of a number of cases which this Board has heard and decided in recent months. (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:

> "We believe 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."

We believe the "discovery issue" in the present appeal must be disposed of in accordance with the cases listed above.

V

Appellant also contends that the decision of the ALJ to conduct the hearing on its discovery motion without a court reporter present also constituted error, citing 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 the evidentiary hearing, and not to a hearing on a motion where no evidence is taken.

This issue has also been decided in the cases mentioned in II, above. The Board held in those cases that a court reporter was not required for the hearing on the discovery motion. We have not been persuaded to change our mind.

ORDER

The decision of the Department with regard to Rule 141(b)(2), expert testimony, and the prior violation is affirmed. The remainder of the decision is reversed and the case is remanded to the Department for compliance with appellants' discovery request as limited by this opinion, and for such other and further proceedings as are appropriate and necessary.[4]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] 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.