ISSUED JANUARY 4, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE CIRCLE K CORPORATION dba Circle K 11408 Ventura Avenue Ojai, CA 93023, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7031a File: 20-117228 Reg: 97041261 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: December 2, 1999 Los Angeles, CA

The Circle K Corporation, doing business as Circle K, appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, conditionally stayed, subject to a two-year period of discipline-free operation, for appellant's clerk having sold an alcoholic beverage (a six-pack of Budweiser beer) to a 19-year-old minor decoy, 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 Circle K Corporation, appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

[1] *The decision of the Department, dated December 10, 1998, is set forth in the appendix.*

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 28, 1981. Thereafter, the Department instituted an accusation against appellant charging that appellant's clerk, Tommie Whittle,[2] sold an alcoholic beverage (a six-pack of beer) to Jonathan Witkosky who was then approximately 19 years of age.

An administrative hearing was held on September 17 and October 26, 1998, at which times oral and documentary evidence was received. At that hearing, testimony was presented by Witkosky, the minor decoy, and Greg Velasquez, the Ventura County deputy sheriff directing the decoy's activities.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the conditionally-stayed suspension.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the decision lacks findings relevant to Rule 141(b)(2); (2) expert testimony was improperly excluded; (3) appellant's discovery rights were denied; and (4) the Department failed to provide a court reporter for the hearing on discovery.

DISCUSSION

I

Appellant contends the decision is defective because it lacks findings relevant to Rule 141(b)(2).

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[2] *Throughout the transcript the clerk is mistakenly referred to as Tommie "Ritvo". Ritvo is the name of the expert witness whose testimony appellant was precluded from using.*

This question was presented in Kyung and Seung I. Kim (September 2, 1999) AB-7103. The Board there said:

> "Appellants contend the ALJ did not address the defense made under Rule 141(b)(2), which requires that a decoy "shall display the appearance which could generally be expected of a person under 21 years of age . . . ."
>
> "The ALJ said nothing in the decision about the appearance of the decoy. In a number of prior cases, the Board has reversed the decision of the Department because it was not clear from the decision that the ALJ had considered more than simply the physical aspects of appearance in determining that decoys looked under 21. In Circle K Stores, Inc., AB-7080 (4/14/99), the Board said:
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> > 'It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.
> >
> > 'Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department's concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).'
>
> "In the present case, we don't know what the ALJ determined about the decoy's appearance, except by inference. The ALJ suspended the license, so we can infer that he thought the decoy looked under 21. In light of this Board's previous cases involving this issue, an inference is not sufficient. The Board has stated that the ALJ must make a finding 'delineating enough of these aspects of appearance to indicate that [the ALJ is] focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.' (Circle K Stores, Inc., supra.) With no finding at all regarding the decoy's appearance, we cannot simply assume that the ALJ properly focused on the whole person of the decoy, and not just his physical appearance, in assessing whether he conveyed the appearance of a person under the age of years. In spite of our concern about the problem of selling

> alcohol to minors, we feel compelled to reverse this decision of the Department for failing to meet the mandatory requirements of Rule 141."

It follows that the decision in the present case should also be reversed.

II

Appellants claim that the Administrative Law Judge (ALJ) improperly excluded a medical expert's opinion concerning the apparent age of the decoy.

Evidence Code §352 provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

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 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. On each occasion where an ALJ is called upon to determine the apparent age of a decoy, he must exercise a judgment that necessarily is based upon his own experience. We do not see how he 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 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.

This is but one of a number of cases where appeals of interlocutory discovery rulings are presented together with the appeal of the Department's suspension or revocation order.[3] All of such cases present the same or very similar issue with respect to discovery, and all require a similar result.

When the Department objected to appellant's request for the names of other licensees who had sold to the decoy in question, appellant followed the procedure set out in §11507.7. A hearing was held before the ALJ on appellant's motion to compel discovery, following which the ALJ denied the motion.

Any analysis of this issue must start with the recognition that discovery is much more limited in administrative proceedings than in civil cases. Each has its own discovery provisions, and they are very different. Discovery in civil cases is governed by the Civil Discovery Act, found in the Code of Civil Procedure, §§2016-2036. Discovery in administrative proceedings is controlled by the Administrative Procedure Act (APA), in Government Code §§11507.5-11507.7, the complete text of which is set forth in the Appendix.

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[3] Prior to 1995, review of an administrative law judge's ruling on discovery issues was by petition to the superior court.

The Civil Discovery Act is broadly inclusive, authorizing a number of techniques for obtaining information from an adversary in the course of litigation and expressly states that the matter sought need not be admissible if it "appears reasonably calculated" that it will lead to admissible evidence. Section 2017 provides that a party may obtain discovery

> "regarding any matter not privileged, that is relevant to the subject matter involved in the pending action ... if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence."

Section 2019 of the Civil Discovery Act spells out the methods of discovery available. These include oral and written depositions; interrogatories to a party; inspection of documents, things and places; physical and mental examinations; requests for admissions; and simultaneous exchanges of expert trial witness information.

The APA, on the other hand, is more restrictive, specifying (in §11507.5) that "The provisions of §11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter." Section 11507.6 then spells out specific types of material that are discoverable, and *does not* include any provision for permitting discovery of material that is not specifically listed or provided for in that section. The section limits discoverable material, by its very terms, to that which is more or less directly related to the acts or omissions giving rise to the administrative proceeding, thereby helping ensure that the material will be relevant. Only subdivision (e) requires specifically that material discoverable under that subdivision be relevant and admissible.

The sweeping methods and tools of discovery available in superior court proceedings through the Civil Discovery Act are conspicuously absent from the

APA's discovery provisions. There is no language in the APA's discovery provisions at all comparable to the language in the Civil Discovery Act which spells out the broad scope and methods of discovery there authorized.

We find little relevance, and less persuasion, in the cases cited by appellant in support of its contention that the Civil Discovery Act provisions should apply in administrative proceedings. The cases cited arise, for the most part, in the context of civil judicial proceedings and address only issues under the Civil Discovery Act.

Arnett v. Dal Cielo (1996) 14 Cal.4th 4 [56 Cal.Rptr.2d 706], a case upon which appellant relies heavily, held that an investigative subpoena issued by the Medical Board of California was not "discovery" within the specific legal meaning of that term[4] in a statute providing that certain hospital peer review records were "not subject to discovery," and affirmed lower court orders enforcing subpoenas directed at such records. Although the case arose in the context of an administrative agency proceeding, it involved an administrative *investigation*, not an adjudicatory proceeding, and the question of what discovery was available in an administrative adjudicatory proceeding was not before the Court.

We disagree vehemently with appellant's argument, based upon Arnett (and amounting to mental sleight-of-hand), that since the Court stated that the word "discovery" had the same legal meaning when used in the APA as in the Civil Discovery Act, it logically follows that "the rules governing the discovery process in the Administrative Procedure Act are identical to the rules governing the discovery process in the Civil Discovery Act."

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[4] *The "specific legal meaning" of the word "discovery" was stated by the Court to be "the formal exchange of evidentiary information and materials between parties to a pending action"; this was in contrast to the general definition of "discover" as "the ascertainment of that which was previously unknown; the disclosure or coming to light of what was previously hidden." (14 Cal.4th at 20.)*

The Court actually held to the contrary in Arnett when it discussed adjudicatory administrative disciplinary proceedings under the APA. The APA, the Court observed at page 23, embodies "a special statutory scheme ... 'providing the exclusive right to and method of discovery' in proceedings under the Administrative Procedure Act" such as administrative hearings on disciplinary charges. Thus, even if the word "discovery" has the same legal meaning in both discovery acts, that is no basis, in logic or in law, to import into an administrative proceeding the broad, sweeping discovery techniques provided for in civil litigation by the Civil Discovery Act.

Appellant also cites Shively v. Stewart (1966) 55 Cal.Rptr. 217 [421 P.2d 651], for the proposition that the same rules of discovery apply in the context of administrative proceedings as in proceedings governed by the Code of Civil Procedure. However, Shively was decided prior to the adoption of the APA discovery provisions in Government Code §§11507.5 through 11507.7. Shively, therefore, has little value as a precedent regarding the applicability or interpretation of APA discovery provisions, since the Court did not have the opportunity to address the code provisions which govern in this case. The Court simply determined that some sort of discovery was available in administrative proceedings, even without specific statutory authority. But, even there, the Court voiced the caveat that "to secure discovery, there must be a showing of more than a wish for the benefit of all the information in the adversary's files." (Shively v. Stewart, supra, 55 Cal.Rptr. at 221.)

Similarly, Lipton v. Superior Court (1996) 48 Cal.4th 1599 [56 Cal.Rptr.2d 341], did not involve an adjudicatory administrative proceeding; it was a civil action

alleging an insurance company's bad faith in defending against a legal malpractice claim. The Court held only that liability reserves established in a malpractice action, and reinsurance records, were discoverable under the broad scope of the Civil Discovery Act and the case law interpreting it, since they might lead to the discovery of admissible evidence on the issues raised in a bad faith action.

"[T]he exclusive right to and method of discovery as to any proceeding governed by [the APA]" is provided in §11507.6. (Gov. Code, §11507.5.) The plain meaning of this is that any right to discovery that appellant may have in an administrative proceeding before the Department must fall within the list of specific items found in Government Code §11507.6, not in the Civil Discovery Act. This view is supported by Romero v. California State Labor Commissioner (1969) 276 Cal.App.2d 787 [81 Cal.Rptr. 281, 284]:

> "Except for disciplinary proceedings before the State Bar, . . . *the Civil Discovery Act (Code Civ.Proc., §2016 et seq.) does not apply to administrative adjudication.* (See Shively v. Stewart, supra; Everett v. Gordon (1968) 266 A.C.A. 732, 72 Cal.Rptr. 379; Comments, Discovery in State Administrative Adjudication (1958), 56 Cal.L.Rev. 756; and Discovery Prior to Administrative Adjudications–A Statutory Proposal (1964) 52 Cal.L.Rev. 823.)" [Emphasis added.]

In addition, §11507.7 requires that a motion to compel discovery pursuant to §11507.6 "shall state . . . the reason or reasons why the matter is discoverable *under that section* . . . ." [Emphasis added.]

Therefore, we believe that appellant is limited in its discovery request to those items that it can show fall clearly within the provisions of §11507.6.

Appellant contends that its request for the names and addresses of licensees who, within 30 days before and after the date of the sale here, sold alcoholic beverages to the decoy in this case falls within §11507.6, subdivision (1),

which entitles a party to "the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, . . ."

The ALJ, in ruling on appellant's Motion to Compel, concluded that the licensees whose names appellant has requested were not "witnesses" because they did not see or hear the transaction alleged in the accusation.

Appellant has argued that §11507.6 does not limit the "witnesses" in this subdivision to percipient witnesses, or those who observed the acts alleged in the accusation. It asserts that it is merely trying to ascertain the names of people who could provide information that would go to testing the credibility of the decoy who will be called as a witness by the Department. We must decide, therefore, whether the term "witnesses" as used in §11507.6 includes only percipient witnesses.

General definitions of the term "witness" are so broad that they are not helpful in determining the meaning of the term in the context of administrative discovery. California Code of Civil Procedure §1878 defines "witness" as "a person whose declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit." This definition obviously refers to anyone who gives testimony in a trial or by affidavit or deposition. It is not limited to those who are percipient witnesses or even to those whose testimony is relevant. Another sense of the word "witness" is that of one who has observed an act and can remember and tell about what he or she has observed. This definition is even broader than the statutory one; it includes anyone who has seen anything and who can communicate to others what he or she has seen. Since discovery, whether the

broader civil discovery or the narrower administrative discovery, is not intended to be a "fishing expedition," these definitions are clearly too broad and not particularly helpful to us in determining what "witness" means in §11507.6.

There is implicit in appellant's argument a basic appeal to fairness in the application of Rule 141. It argues that knowledge of the decoy's experience and actions in other establishments is essential to a meaningful cross-examination, to ensure that the decoy has not confused the transaction in its premises with what occurred in another on the same night or other nights during the period for which such information was requested.

For example, appellant points out (and the transcripts of almost every minor decoy case that has come to this board confirm) that a decoy will almost invariably visit a number of licensed premises on a single evening, and make purchases at several. The decoy's testimony regarding what occurred with the sellers at those locations where he or she was successful in purchasing an alcoholic beverage is, appellant asserts, critical, and the ability to test the veracity and reliability of such testimony crucial. It argues that other clerks who sold to that decoy will be able to offer relevant and admissible evidence of such things as the decoy's physical appearance, mannerisms, demeanor, manner of dress, and as well as other circumstances of the decoy operation, such as timing and sequence, which would assist in its efforts to effect a full and fair cross-examination.

We find appellant's arguments persuasive up to a point. In certain situations we can see some potential value to appellant in the experience of other sellers with the same decoy. The relevance of these experiences,

however, sharply dissipates as they become more removed in time from the transaction in question.

In all other subdivisions of §11507.6, the discoverable items are limited by their pertinence to the acts or omissions which are the subject of the proceeding. "Witnesses" in subdivision (1) must also be limited so that a discovery request does not become a "fishing expedition." It should not be limited, however, as strictly as the Department would have it, nor expanded as broadly as appellant contends.

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.

IV

Appellant contends that the decision of the ALJ to conduct the hearing on its discovery motion without a court reporter present[5] 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.

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[5] *It is our understanding that the hearing on the motion was conducted telephonically. This, in and of itself, has no bearing on the issue.*

We do not find the case law cited by either party particularly helpful. We read most of the authorities cited by appellant as concerned with disputes involving the preparation and certification of a trial transcript in connection with an appeal. We do think, however, that regulations of the Office of Administrative Hearings (OAH), which hears administrative cases under the Administrative Procedure Act for many agencies, provide significant guidance. The Department cites OAH Rule 1022, which deals with motions. Subdivision (h) of that rule leaves it to the discretion of the ALJ whether a motion hearing is recorded, stating that the ALJ "may" order that the proceedings on a motion be reported. (1 Cal. Code Regs., §1022, subd. (h).)

In addition, OAH has promulgated Rule 1038 dealing with "Reporting of Hearings." Subdivision (a) of that rule states that "Reporting of Hearings shall be in accordance with section 11512(d) [of the Government Code]." Subdivision (b) then says, "In the discretion of the ALJ, matters other than the Hearing may be reported." "Hearing" is defined in Rule 1002(a)(4) (1 Cal. Code Regs., §1002, subd. (a)(4)) as "the adjudicative hearing on the merits of the case." Therefore, OAH Rule 1038 also supports the Department's position that the hearing on the motion did not need to be recorded.

An analogous authority, Code of Civil Procedure §269, does not include motions among the components of a trial which must be reported and a transcript thereof prepared for an appeal, when requested by a party or directed by the court.

Appellant asserts that, without a record, the Appeals Board is deprived of the benefit of arguments made to the ALJ during the hearing on the Motion to

Compel. We do not see how those arguments are relevant, and, even if so, why appellant cannot present them to the Board in its brief.

While there is no definitive statement in the APA as to whether motion hearings must be recorded, the regulations of OAH and the analogous provision for civil trials both indicate that recording is not required. This, coupled with the lack of practical disadvantage to appellant, compels us to find that recording was not required for the hearing on appellant's Motion to Compel.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration in light of the comments herein with respect to Rule 141(b)(2), for compliance with appellant's discovery request, as limited herein, and for such other and further proceedings as are appropriate and necessary.[6]

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

[6] 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.