

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

THE SOUTHLAND CORPORATION	)	AB-7320
and JAGTAR SINGH SAMRA)	
dba 7-Eleven Store #13868	)	File: 20-243771
21618 Roscoe Blvd	)	Reg: 98044398
Canoga Park, CA 91304,)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Sonny Lo
)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	December 3, 1999
Respondent.	)	Los Angeles, CA
_____)	

The Southland Corporation and Jagtar Singh Samra, doing business as 7-Eleven Store #13868 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for appellants' clerk having sold 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 appellant The Southland Corporation and Jagtar Singh Samra, appearing through their counsel, Ralph B. Saltsman and

¹The decision of the Department, dated December 17, 1998, is set forth in the appendix.

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 March 7, 1990. Thereafter, the Department instituted an accusation against appellants charging that, on April 16, 1998, appellants' clerk, Carnal Singh ("Singh") sold a six-pack of Budweiser beer to Steven Montgomery ("Montgomery"), a 19-year-old police decoy working with the Los Angeles Police Department.

An administrative hearing was held on November 16, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by police officer Joseph Kalyn, Montgomery, Singh, and appellant Samra.

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 pursuant to Business and Professions Code §25660 or Department Rule 141.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) Rule 141(b)(2) was violated; (2) the Department violated appellants' right to discovery; and (3) the Department violated Government Code §11512, subdivision (d), when a court reporter was not provided to record the hearing on appellants' Motion to Compel.

DISCUSSION

Appellant contends that the decoy, who was 6'1" in height and wearing a goatee at the time of the sale, did not display the appearance generally to be expected of a person under the age of 21, thereby violating Rule 141(b)(2).

This case, at the very least, presses the limits of what is acceptable in the appearance of a decoy. The Board has looked with disfavor on those operations using decoys who had "five o'clock shadow," especially when the decoy was also large and/or tall. The only appeal we have discovered where the decoy had distinct, intentional, facial hair was Saif Assaedi (April 15, 1999) AB-7144. The Board reversed the Department's decision based on violation of Rule 141. With regard to the decoy's appearance, the Board said:

"The decoy was a male, 6 feet, one and one-half inches in height, weighing 185-190 pounds, and had a mustache. The mustache was shorter at the time of the violation than at the time of the administrative hearing [RT 34-35].

"The Department's Decoy Program Guidelines states [sic]: "Male decoys should not be large in stature or have a beard or mustache." While the Department has over the years, ignored deviations by police departments' decoy activities from the guidelines, arguing that the guidelines are merely that, guidelines -- apparently with no legal impact -- this decoy operation crossed over the line of a fair test of a willingness to sell to a minor, almost to a "trick" played upon the seller.

"While the guidelines in the view of the Department are "suggestions only," they are widely promulgated to police departments and licensees. It seems reasonable to assume that licensees may be less vigilant where a person like the present matter's decoy appears -- essentially lulled, so to speak, into a false sense of security and a lack of alertness, directly because of the guidelines promulgated are official views of the Department, taught and explained to licensees in Department programs.

"Additionally, the police owe a duty to so conduct their decoy operations in a reasonable fairness mode, so that sellers are not tricked by decoys who are so close to the line of looking over the age of 21 years, that the test of whether a licensee is lax, or does not care, or sells to whoever is in front of that seller, is fairly tested."

The "goatee" worn by the decoy, while it did not extend all the way to his sideburns, was very obvious, as shown in the photograph taken of him immediately

following the sale. We would be inclined to call it a beard that simply is not very dense on the sides as it goes up towards the sideburns. This is surely as egregious as a mustache, especially when combined with the decoy's 6'1" height.

Beyond the fact that the decoy's appearance is, we believe, violative of Rule 141, the ALJ's treatment of this issue is also disturbing. Finding IV states: "On April 16, 1998, the decoy was 6'1" tall, weighed approximately 150 pounds, and had hair on his chin. The decoy was not nervous when he bought the beer." The ALJ made no affirmative finding that the decoy's appearance complied with Rule 141(b)(2).

Determination II. A. states:

"[Licensees] have not shown that the decoy's height, the facial hair on the decoy's chin, and/or the decoy's appearance were such that they could not generally be expected of a person under 21 years of age. Actually, the decoy's height, hair, and appearance are nonissues. They obviously made no difference to the clerk, since he thought that the decoy was only 21 or 22 years old."

The ALJ seems to assume that the Department has made a *prima facie* showing that the decoy *did* display the appearance generally to be expected of a person under the age of 21. Then, he shifts the burden to the licensees to show that the aspects of the decoy's appearance alleged to make him look older were *not* generally to be expected in a person under the age of 21. Perhaps if an affirmative finding had been made that the decoy did meet the Rule 141(b)(2) criteria, this determination might have been acceptable. However, without such a finding, this seems to turn the burden of proof around.

Even stranger, the ALJ says that the height and goatee are "nonissues" because "[t]hey obviously made no difference to the clerk, since he thought that the decoy was only 21 or 22 old." On the contrary, the height and goatee *did* make a difference to the clerk, because they made him think the decoy was old enough to purchase alcohol.

The ALJ appears to have taken this statement from the closing argument of the Department's counsel. There, however, counsel seemed to be arguing that, since the clerk asked for ID, he must have thought that the decoy was under 21, and therefore, the beard made no difference in the decoy's apparent age.

To make matters worse, the decoy had shaved off his goatee by the time of the hearing, so his appearance at the hearing could not be found to be substantially the same as it was at the time of the sale.

We find the use of this decoy completely unacceptable and violative of both the general fairness requirement of Rule 141(a) and the specific requirements Rule 141(b)(2). In addition, the ALJ's treatment of this issue makes it clear that he was not using the required legal standard for determining whether Rule 141(b)(2) had been complied with. The Department's decision unquestionably requires reversal.

II

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 where appeals of interlocutory discovery rulings are presented together with the appeal of the Department's

suspension or revocation order.² 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 appellants' request for the names of other licensees who had sold to the decoy in question, appellants followed the procedure set out in §11507.7. A hearing was held before the ALJ on appellants' 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.

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."

² Prior to 1995, review of an administrative law judge's ruling on discovery issues was by petition to the superior court.

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 appellants in support of their 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 appellants rely heavily, held that an investigative subpoena issued by the Medical Board of California was not “discovery” within the specific legal meaning of that term³ 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 appellants’ 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.”

The Court actually held to the contrary in Arnett when it discussed adjudicatory administrative disciplinary proceedings under the APA. The APA, the

³ 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.)

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.

Appellants also cite 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 appellants 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 appellants are limited in their discovery request to those items that they can show fall clearly within the provisions of §11507.6.

Appellants contend that their 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 appellants’ Motion to Compel, concluded that the licensees whose names appellants have requested were not “witnesses” because they did not see or hear the transaction alleged in the accusation.

Appellants have 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. They assert that they are 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 appellants' argument a basic appeal to fairness in the application of Rule 141. They argue 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 their premises with what occurred in another on the same night or other nights during the period for which such information was requested.

For example, appellants point 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, appellants assert, critical, and the ability to test the veracity and reliability of such testimony crucial. They argue 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 their efforts to effect a full and fair cross-examination.

We find appellants' arguments persuasive up to a point. In certain situations we can see some potential value to appellants 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 appellants contend.

We believe that a reasonable interpretation of the term "witnesses" in §11507.6 would entitle appellants 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.⁴

⁴ Had we not determined that the Rule 141(b)(2) issue (see II., ante) requires reversal of the Department decision, our determination regarding the discovery issue by itself would be an alternative basis for reversing the decision.

III

Appellants contend that the decision of the ALJ to conduct the hearing on their discovery motion without a court reporter present⁵ 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.

We do not find the case law cited by either party particularly helpful. We read most of the authorities cited by appellants 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)

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.

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.

Appellants assert 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 appellants cannot present them to the Board in their 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 appellants, compels us to find that recording was not required for the hearing on appellants' Motion to Compel.

ORDER

While ordinarily we would remand to the Department for reconsideration of the Rule 141(b)(2) issue and for compliance with appellants' discovery request, the lack of compliance with Rule 141, subdivisions (a) and (b)(2), cannot be cured, and

no purpose would be served in a remand. The decision of the Department is reversed.⁶

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

⁶This 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.