ISSUED MARCH 23, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION, HARVINDER SIDHU and SURJIT SIDHU dba 7-Eleven Store #22666 13700 Vanowen Street Van Nuys, CA 91405, Appellants/Licensees,	)	AB-7461
	)	File: 20-263899
	)	Reg: 98045156
	)	Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria
v.	)	
	)	Date and Place of the Appeals Board Hearing: September 7, 2000 Los Angeles, CA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	

The Southland Corporation, Harvinder Sidhu, and Surjit Sidhu, doing business as 7-Eleven Store #22666 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, for their clerk, Sema Singh, having sold an alcoholic beverage (a 22-ounce bottle of Corona beer) to Maria DeLosAngeles Diaz, a 19-year-old minor, contrary to the universal and generic public welfare and morals provisions of the California Constitution,

[1]The decision of the Department, dated July 22, 1999, is set forth in the appendix.

article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants The Southland Corporation, Harvinder Sidhu, and Surjit Sidhu, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 27, 1991. Thereafter, the Department instituted an accusation against appellants charging the sale-to-minor violation ultimately found by the Administrative Law Judge, at the administrative hearing which was held on March 25 and June 2, 1999, to have occurred.

Appellants have filed a timely notice of appeal, and now raise the following issues: (1) there was no compliance with Rule 141(b)(5); and (2) appellants' rights to discovery, and to a transcript of the hearing on their motion to compel discovery, were improperly denied.

DISCUSSION

I

Appellants contend there was no compliance with Rule 141(b)(5)'s requirement that the decoy make a face to face identification of the seller of the alcoholic beverage prior to the issuance of a citation. Appellants contend that a comparison of what they describe as "conflicting and controverted and self-contradictory" evidence of the identification process as told by the Department's witnesses, to what was recorded on a video tape by a surveillance camera in the

premises, compels the conclusion that the findings regarding Rule 141(b)(5) are not supported by substantial evidence.

Finding of Fact II-B of the decision addresses the Rule 141(b)(5) identification issue:

> "The evidence established that a face to face identification of the seller of the beer did in fact take place. After exiting the premises, the two decoys were met by one of the police officers and the two decoys subsequently reentered the premises. While decoy #1[2] was standing in front of the clerk facing him and about three feet from him, one of the officers asked her to identify the clerk who had sold her the beer. Although decoy #1 was uncertain as to whether she responded to this question verbally or by pointing to the clerk, decoy #1 testified that she did identify the clerk who sold her the beer when asked to do so by one of the officers, Officer Ruiz also testified that decoy #1 identified the clerk while decoy #1 was standing in close proximity to the clerk."

Finding of Fact II-D also relates to this issue. It states:

> "The parties stipulated that if the clerk, Sema Singh, had been called to testify at the hearing, that he would have testified that he recalls that both decoys returned to the premises after the sale had taken place, that he recalls that a photograph was taken showing him and the two decoys, but that he does not recall either decoy identifying him."[3]

Although not reflected in the decision, the parties further stipulated to the introduction of the surveillance videotape, and to the following, as recited by the ALJ:

> "The parties have stipulated that the videotape shows the counter in front of the register and the area slightly to the side of the register; that the two decoys and the officer came back into the store; that you can see the decoys in front of the counter;

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[2] The Administrative Law Judge, for purposes of convenience, labeled Maria DeLosAngeles Diaz as "decoy #1", and Yessenia Galvez as "decoy #2."

[3] When the ALJ recited the terms of the stipulation at the resumed hearing, the latter part of the clerk's "testimony" was that "he does not recall either decoy identifying himself."

> "That the two decoys made no gesture of any kind toward the clerk; that the two decoys stay in front of the counter briefly, then take a few steps back and sit down; that thereafter, the decoys interact with each other until they are asked to get up and take a photograph; that the actual photograph taking is depicted on the videotape."

The stipulation further recited that, before the decoys sit down, the officer can be seen to move his hand toward the direction of the clerk, and then back toward the decoys.

Appellant argues that of the four witnesses, one of whom testified via stipulation, no two of them gave the same statement with respect to the identification of the seller.

Conceding that to be true, there is little doubt that an identification occurred. All witnesses, either expressly or by inference appear to agree to at least that, even though they may not agree on minor details. (See RT 18-19; 45-46; 68-69.) It must also be remembered that the witnesses were testifying about an event which occurred nearly nine months earlier. This is comparable to an intersection collision where several eye witnesses give different and conflicting accounts of which vehicle ran the red light, yet there is no denying the two damaged vehicles in the middle of the intersection.

It was the task of the Administrative Law Judge to sort through the testimony to determine what happened. His findings are supported by the record, and are sufficient to support the determination that the identification requirement was met.

For what reason would the decoys have been taken back into the store if not to identify the seller? It is of less importance that they could not remember

whether they spoke or pointed than that they distinctly remembered having gone back into the store for that purpose, and having made the requisite identification.

Admittedly, the witnesses, and particularly the decoys, wavered in the face of Mr. Saltsman's cross-examination. And while one of the two decoys conceded on cross-examination that she could not remember identifying the clerk, that is not evidence the identification was not made.

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. They also claim error in the Department's failure to provide a court reporter for the hearing on their motion to compel discovery. Appellants cite 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 §11506.6, 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 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 issue involving the identification of the seller, and the case is remanded to the

Department for such further proceedings as may be appropriate in light of the ruling on the discovery issue.[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.