ISSUED MARCH 22, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION and SHU J. and SHUN L. WANG dba 7-Eleven Food Store 4647 Wilson Road Bakersfield, CA 93309, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7482 File: 20-274553 Reg: 99046152 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: October 5, 2000 Los Angeles, CA

The Southland Corporation and Shu J. and Shun L. Wang, doing business as 7-Eleven Food Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Joseph Kirk, having sold an alcoholic beverage (a six-pack of Bud Light beer) to Todd Pace, an 18-year-old minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22,

[1]The decision of the Department, dated August 12, 1999, is set forth in the appendix.

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

Appearances on appeal include appellant The Southland Corporation and Shu J. and Shun L. Wang, 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 August 3, 1992. Thereafter, on April 8, 1999, the Department instituted an accusation charging that appellants' clerk sold an alcoholic beverage to a minor, in violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on July 20, 1999, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven, that no defenses had been established, and which ordered a 15-day suspension.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Department violated Rule 141(b)(5); (2) there was no compliance with Rule 141(b)(2); and (3) appellants were denied their right to discovery and to a transcript of the hearing on their motion to compel discovery.

DISCUSSION

I

Appellants contend that there was no compliance with the requirement of Rule 141(b)(5) that the decoy make a face-to-face identification of the seller of the alcoholic beverage. They contend that the Administrative Law Judge failed to make legally sufficient findings whether such identification took place, asserting he should have made findings regarding the relative positions of the decoy and the clerk during the identification process; that he should have made a finding that the clerk acknowledged the decoy's presence; that he should have made findings regarding what the clerk was doing and where he was looking at the time; and whether the decoy and the clerk had an unobstructed view of each other during the identification process. Further appellants urge, the ALJ erroneously included a finding that an affirmative answer to a police officer's question regarding the seller's identity complied with the face-to-face identification requirement, and that it was unreasonable for the ALJ to find lacking in credibility the clerk's denial of the decoy's identification solely because of his finding that the decoy answered in the affirmative when asked if the clerk was in fact the clerk who sold the beer to him. Finally, appellants contend that the identification process was flawed because the ALJ failed to find that the police officer who asked the decoy to identify the clerk was the peace officer directing the decoy.

Government Code §11425.50, subdivision (a), requires that the decision be in writing and include a statement of the factual and legal basis for the decision. Subdivision (b) of that same section permits that statement to be in the language of, or in reference to the pleadings, but if no more than a mere repetition or

paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. These statutory requirements trace their origin to the California Supreme Court's decision in Topanga Assn. v. County of Los Angeles (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836], and its requirement that the decision of an administrative agency "must set forth findings that bridge the gap between the raw evidence and ultimate decision or order."

We do not believe the ALJ was required to recite all of the evidentiary considerations which led him to the findings and conclusions set forth in his proposed decision. It is enough that he identified the evidence upon which he based his finding that the requisite identification was made; the testimony of the decoy, that of a Department investigator, and the store's videotape. While it is always helpful to the Board in the review process to know the thinking of the ALJ en route to his decision, we cannot say that his failure to elucidate the evidentiary facts in the detail appellants urge invalidates the decision.

We find little merit in appellants' contention that the decision was flawed by a failure to find that the police officer who asked the decoy to identify the seller was the officer directing the decoy. The Board has said on other occasions that, in its view, there can be more than one police officer directing the decoy during a decoy operation, and that an identification process conducted by one of the officers involved will comply with the rule.

II

Appellants contend that the ALJ failed to make a finding whether the decoy displayed the appearance which could generally be expected of a person under 21 years of age. Rule 141(b)(2) requires that the decoy display such an appearance.

The Department argues that the ALJ's findings show that he considered both the physical appearance and demeanor of the decoy - "the decoy was 5' 10" tall and weighed approximately 170 pounds ... [and] was nervous when he bought the beer."

The ALJ also considered the decoy's facial stubble and razor burn, and rejected appellants' argument that the facial stubble and razor burn made the decoy appear older than 21.

We think the finding (Finding V) complied with Rule 141(b)(2).

III

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 issues involving identification of the seller (Rule 141(b)(5)) and appearance of the decoy (Rule 141(b)(2)), but reversed as to the discovery issue, and remanded to the

Department for such further proceedings as may be appropriate.[2]

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

[2] 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.