ISSUED SEPTEMBER 25, 1997

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION and NOORJEHAN and SHOUKAT ALI dba 7-Eleven Food Store 6610 West Foothill Boulevard Tujunga, CA 91042, Appellants/Licensees,	)	AB-6800
	)	File: 20-214340
	)	Reg: 96035947
	)	Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen
v.	)	
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Date and Place of the Appeals Board Hearing: August 6, 1997 Los Angeles, CA

The Southland Corporation, Noorjehan Ali and Shoukat Ali, doing business as 7-Eleven Food Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which ordered their off-sale beer and wine license suspended for 10 days for their clerk having sold an alcoholic beverage (Bartles and James wine cooler) to an 18-year-old police decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX,

[1] The decision of the Department dated December 26, 1996, is set forth in the appendix.

§22, arising from a violation of Business and Professions Code §25685, subdivision (a).[2]

Appearances on appeal include appellants The Southland Corporation, Noorjehan Ali and Shoukat Ali, appearing through their counsel, Ralph B. Saltsman; 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 December 11, 1979. Thereafter, the Department instituted an accusation alleging that on February 16, 1996, appellants, by their agent and/or employee, Kabir Newaz, sold an alcoholic beverage (wine) to an 18-year-old police decoy.

An administrative hearing was held on November 19, 1996, at which time oral and documentary evidence was received. At that hearing, testimony was introduced which established that, on February 16, 1996, appellants' clerk sold a four-pack of Bartles and James coolers to an 18-year-old police decoy.

Subsequent to the hearing, the Department issued its decision which determined that the sale violated Business and Professions Code §25658, subdivision (a), and ordered appellants' license suspended for 10 days. Thereafter, appellants filed their timely notice of appeal. Appellants contend in their appeal that the Department failed to prove that the product which was purchased was an alcoholic beverage, namely, a beverage containing in excess of one-half of one percent alcohol by volume.

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[2] All references to Code provisions will be to the Business and Professions Code unless otherwise indicated.

DISCUSSION

Appellants contend there was a failure of proof, in that the Department did not establish that the Bartles and James coolers[3] contained sufficient alcohol by volume for them to be an alcoholic beverage within the meaning of the Alcoholic Beverage Control Act.

Section 23003 of the Act defines "alcohol" as meaning "ethyl alcohol, hydrated oxide of ethyl, or spirits of wine, from whatever source or by whatever process produced." Section 23004 defines "alcoholic beverage" as including "alcohol, spirits, liquor, wine, beer, and every liquid or solid containing alcohol, spirits, wine or beer, and which contains one-half of 1 percent or more of alcohol by volume and which is fit for beverage purposes either alone or when diluted, mixed, or combined with other substances."

Appellants assert that the term "alcohol beverage" on the bottle label has no precise or defined meaning, and that it is not interchangeable with the term "alcoholic beverage," which is defined in the Act. Thus, appellants argue, in the absence of any chemical analysis or other evidence of the alcoholic content of the product in question, to demonstrate that its contents consist of more than one-half of one percent by

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[3] We note that it was apparently well into the hearing before it became evident to all concerned that the product in question was not a "wine cooler," but instead, according to its label, a "malt beverage." We note further that, in a case which was before this Board, but which did not involve the precise issue raised by appellants here, the record revealed with respect to at least a few Department representatives that the product reformulation (from a wine base to a malt beverage base) came to their attention as early as the Spring of 1995. (Gardy (1997) AB-6665.)

volume of alcohol, the product has not been shown to be an alcoholic beverage within the meaning of the Act.

Consequently, they conclude, there is nothing in the record to permit the Administrative Law Judge to draw the inference the product purchased by the minor was an alcoholic beverage.

Appellants do not exaggerate the Department's difficulty in dealing with the alcoholic content issue. The Department had made no chemical analysis to determine the alcoholic content of the coolers, and, instead, relied upon a number of factors which, in combination, would support the inference the bottles contained an alcohol beverage. The Department's position, in essence, is that the term "alcohol beverage" on the label was the equivalent of the term "alcoholic beverage." Indeed, this does not seem to be an unreasonable interpretation of the term, given the context and other relevant considerations.

The Department cites the fact that the bottles bore the Surgeon General's warning regarding health hazards associated with consuming alcoholic beverages, and argues that this warning would not have been placed on the container were it not an alcoholic beverage. The phraseology of this warning is not in the record, but it is common knowledge that it addresses health risks from the consumption of alcoholic beverages. The Department argues that the combination of the term "alcohol beverage" and the Surgeon General's warning about the health consequences of alcoholic beverages would lead the reasonable consumer to believe it was an alcoholic beverage, with an alcohol content in excess of the legal minimum of one-half of one

percent by volume. If less, the Department asserts, the label of the product would be misleading.

The Department also cites the testimony of detective Chris Pitcher, a police officer assigned to the Los Angeles Police Department Alcohol Beverage Control Enforcement Coordinator, that he had been informed orally, as well as in a letter,[4] by a representative of the manufacturer of the Bartles & James coolers, that the coolers were a malt beverage with an alcoholic content of 3.9 percent. Counsel for appellant objected to this evidence as hearsay. The ALJ indicated that he was considering it in the nature of administrative hearsay to clarify the information contained on the bottle and the carton [RT 68]. Under Government Code §11513, subdivision (c), this evidence, although incapable by itself of supporting a finding, may be considered for the purpose of supplementing or explaining other evidence, in this case, the bottle, its label and its contents.

The Department also sought to prove the contents to be an alcoholic beverage by testimony from witnesses familiar with the product by having tasted or consumed it. Only police officer McElroy could claim to have tasted it, and he agreed with counsel that it tasted and smelled like an alcoholic beverage. Appellant attempts to diminish this testimony by arguing that the product formulation could have changed between the time he tasted the beverage and the time of the sale in question.

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[4] The letter, the witness testified, had been given to ALJ Sonny Lo in another proceeding, so was not produced in the present case.

Finally, the Department relies on the presumption that the container contains what its label states it contains (Mercurio v. Department of Alcoholic Beverage Control (1956) 144 Cal.App.2d 626 [301 P.2d 474, 481]). We are inclined to agree with the Department's arguments that, for purpose of putting the public on notice of the fact that a product is an alcoholic beverage, there is no difference in common usage between the terms "alcohol beverage" and "alcoholic beverage," despite the fact that "alcoholic beverage" has been defined by statute.

All things considered, the Department, in our view, presented enough evidence, albeit marginal, to prove that the coolers, whether wine-based or a malt beverage, are an alcoholic beverage within the meaning of the Act, and may not be sold to minors. Therefore, we must affirm the decision of the Department.

CONCLUSION

The decision of the Department is affirmed.[5]

BEN DAVIDIAN, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5] 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 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.