

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

THE SOUTHLAND CORPORATION,	)	AB-7020a
BARKIE McHERRON, and CORAZON)	
A. McHERRON	)	File: 20-215158
dba 7-Eleven #13564	)	Reg: 97041826
15 North Euclid Avenue)	
National City, CA 91950	)	Administrative Law Judge
Appellants/Licensees,	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
v.)	
	)	Date and Place of the
	)	Appeals Board Hearing:
DEPARTMENT OF ALCOHOLIC	)	February 3, 2000
BEVERAGE CONTROL,	)	Los Angeles, CA
Respondent.)	
)	

The Southland Corporation, Barkie McHerron, and Corazon A. McHerron, doing business as 7-Eleven #13564 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Janina Lanier, having sold an alcoholic beverage (beer) to Malaya Sap, a minor, 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).

¹The decision of the Department, dated January 7, 1999, is set forth in the appendix.

Appearances on appeal include appellants The Southland Corporation, Barkie McHerron, and Corazon A. McHerron, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging a violation of Business and Professions Code §25658, subdivision (a), resulting from the sale of an alcoholic beverage to an 18-year-old minor.

An administrative hearing was held on September 2 and November 6, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by San Diego police officer Kenneth Brown and Malaya Sap, the minor, who at the time of the transaction was acting as a decoy, and by Barkie A. McHerron, one of the licensees. Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale had occurred as alleged, and rejected various contentions asserted by appellants.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) there was no compliance with Rule 141 (b)(2); (2) the peace officer was without jurisdiction to conduct a decoy operation at this location; (3) appellants' discovery rights were violated; and (4) the Department violated appellants' right to a court reporter for the hearing on their motion for discovery.

DISCUSSION

I

Appellants contend the ALJ improperly limited his consideration of the decoy's appearance to his physical appearance alone.

Rule 141(b)(2) provides:

"The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense; . . ."

In Finding III. 1., the ALJ stated, in pertinent part:

"Malaya Sap (hereinafter the "minor") is a youthful looking female, whose physical appearance is such as to be reasonably considered as being under twenty-one years of age and who would reasonably be asked for identification to verify that she could legally purchase alcoholic beverages."

The Department decision uses the same language this Board has rejected previously, reflecting the ALJ's reliance on physical appearance alone, to the exclusion of all other indicia of age.

The Department argues that any error was harmless, since the clerk did not testify, and there is no evidence the clerk relied upon anything other than the physical appearance of the decoy. Whatever merit there may be to such an argument in the abstract, we are reluctant to find the error harmless here, where the record shows that the decoy was able to purchase an alcoholic beverage in 11 of the 23 premises visited on the night in question.

On the basis of prior Board decisions such as Circle K Stores, Inc. (1998) AB-7080, and Circle K Stores, Inc. (1999) AB-7122, this decision must be reversed.

II

Appellant contends that the police officer, employed by the City of San Diego, lacked any authority to conduct a decoy operation in National City, a separately incorporated municipality immediately adjacent to San Diego.

The Department argues that the police officer derived his authority to conduct the decoy operation in National City from Business and Professions Code §25755, subdivision (b), part of the Alcoholic Beverage Control Act, in combination with Penal Code §830.1.

Business and Professions Code §25755, subdivision (b), provides:

“(b) The director, the persons employed by the department for the administration and enforcement of this division, peace officers listed in Section 830.1 of the Penal Code, and those officers listed in Section 830.6 of the Penal Code while acting in the course and scope of their employment as peace officers may, in enforcing the provisions of this division, visit and inspect the premises of any licensee at any time during which the licensee is exercising the privileges authorized by his or her license at the premises.”

Penal Code §830.1 identifies those who are peace officers and the geographical extent of their authority. The only portion of the statute relevant to the issue in this case is the paragraph defining the category of peace officer:

“(a) Any sheriff, undersheriff, or deputy sheriff, regularly employed and paid as such, of a county, any police officer of a city, any police officer of a district (including police officers of the San Diego Unified Port District Harbor Police) authorized to maintain a police department, any marshal or deputy marshal of a municipal court, any constable or deputy constable, regularly employed and paid as such, of a judicial district, or any inspector or investigator regularly employed and paid as such in the office of a district attorney is a peace officer. The authority of any such peace officer extends to any place in the state: [where conditions defined in subparagraphs (1), (2) and (3) exist, conditions not pertinent].²

² Section 830.1 was amended in 1998, effective January 1, 1999. The text quotes the statute as it read when the decoy operation was conducted. The result

Officer Brown is clearly a peace officer as defined in the first sentence of Penal Code §830.1. As such, he is one of those persons clearly authorized by the Alcoholic Beverage Control Act to enforce its provisions anywhere in the state.

Appellants' argument that Brown lacked any authority to conduct a decoy operation in National City is based on cases which address only the parameters of §830.1, and do not involve the implications of Business and Professions Code §25755. Appellants' argument clearly lacks merit.

III

Appellants claims 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.

By now, the Board has issued a number of decisions directly addressing this issue. (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 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

would be the same under either the current or the prior version of the statute.

determined that the appellants were limited to the discovery provided in Government Code §11506.6, but that “witnesses” in subdivision (a) of that section was not restricted to percipient witnesses. We concluded that:

“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.”

We believe the “discovery issue” in the present appeal should be disposed of in accordance with the cases cited.

IV

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

This issue has also been decided in the cases mentioned in III, above, in which the Board held that a court reporter was not required for the hearing on the discovery motion.

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 appellants' discovery request as limited by this opinion, and for such other and further proceedings as are appropriate and necessary.³

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

³ 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.