ISSUED JANUARY 5, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION and BALBIR S. ATWAL dba 7-Eleven Store #17462 17465 Imperial Highway Yorba Linda, CA 92886, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7113a File: 20-214962 Reg: 98042822 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: December 2, 1999 Los Angeles, CA

The Southland Corporation and Balbir S. Atwal, doing business as 7-Eleven Store #17462 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for appellants' employee selling 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 Balbir S. Atwal, appearing through their counsel, Ralph B. Saltsman and Stephen

[1]The decision of the Department, dated November 25, 1998, is set forth in the appendix.

W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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 that, on June 11, 1997, appellants' employee, Narinjan Singh Pannu ("Pannu"), sold an alcoholic beverage, beer, to Timothy Fitzgerald ("Fitzgerald"), a 19-year-old police decoy.

An administrative hearing was held on October 1, 1998, at which time oral and documentary evidence was received. At that hearing, the parties stipulated that the facts alleged in Count 1 of the Accusation are true and correct. Appellants presented evidence regarding mitigation and defenses consisting of the testimony of the decoy, Fitzgerald, who they called as a witness.

Subsequent to the hearing, the Department issued its decision which determined that the illegal sale had occurred, that no defense was established under Business and Professions Code §25660 or Rule 141 (4 Cal. Code Regs. §141), and that a prior violation was an aggravating factor in the imposition of the penalty.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the ALJ did not properly apply Rule 141(b)(2) in evaluating the appearance of the decoy; (2) the penalty was unlawfully aggravated; (3) the Department violated appellants' right to discovery; and (4) 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

I

Appellant contends the ALJ did not properly apply Rule 141(b)(2) in evaluating the appearance of the decoy.

The decoy in this case was about 6'2" and 190 pounds at the time of the sale, with very short hair and, apparently, a very confident manner, having been a decoy at about 100 premises before this one.

Finding IV states:

> "Although the minor was six feet two inches in height and weighed approximately one hundred ninety pounds as of June 11, 1997, the minor is a youthful looking male, whose physical appearance is such as to reasonably be considered as being under twenty-one years of age and who would reasonably be asked for identification to verify that he could legally purchase alcoholic beverages. (The photograph of the minor which was admitted into evidence as Exhibit [4] was taken on June 11, 1997.) Additionally, the clerk asked the minor for identification and was handed a valid California driver's license which contained his correct date of birth (5/17/78), and which also stated 'AGE 21 IN 1999'. Under these circumstances, the clerk was not justified in failing to verify whether or not the minor was in fact over the age of 21. Had the clerk simply looked carefully at the date of birth and/or the statement 'AGE 21 IN 1999', it would have been evident that the minor was under the age of 21."

The problem with this finding is that the ALJ focuses solely on the decoy's physical appearance, a circumstance that this Board has held in a number of prior cases to be an incorrect standard to use in evaluating the decoy's appearance for compliance with Rule 141(b)(2). (See, e.g., Circle K Stores, Inc. (1999) AB-7080; AB-7112; AB-7122; Ralph E. Larson (1999) AB-7200.) The ALJ's characterization of the decoy as "youthful looking" is not helpful, since a 40-year-old could be said to be "youthful looking."

Although the ALJ did acknowledge the decoy's large size, he still concluded that the decoy was "youthful looking." He apparently ignored other important indicia of age, such as demeanor and behavior, limiting his assessment to consideration of only the decoy's physical appearance. Without some indication that the ALJ used the standard required by Rule 141(b)(2), we are forced to conclude that the standard has not been met.

This Board has repeatedly told the Department that, in its consideration of a Rule 141(b)(2) defense asserted by a licensee, the administrative law judge must explain why he is satisfied that the decoy presents the appearance which could generally be expected of a person under the age of 21 years. We made it clear that we did not expect an exhaustive discussion of every possible consideration, but simply enough to satisfy this Board that the correct legal standard had been applied and that sufficient indicia of age or in addition to physical characteristics were considered in order to show that, in reaching a conclusion as to the decoy's appearance, the whole person had been considered. We cited such obvious considerations as poise, demeanor, maturity and mannerisms, but made it clear there were other aspects of appearance that could be relevant as well.

We feel several observations are in order. First, the requirements of Rule 141 are specific. Second, we have been admonished by a court of appeal that the rule's requirements are to be complied with strictly. Third, where a Department decision deviates from the language of the rule, it conveys the idea that the specific requirements of the rule as written have not been, or cannot be, met.

It follows that, to allow a reviewing tribunal to conclude that the law enforcement agency complied with the requirements of the rule as to the apparent age of the minor decoy, the Department and its ALJ's must set forth the reasons (read "findings") they believe justify the conclusion that the decoy presented an appearance, at the time of the transaction, which could generally be expected of a person under the age of 21 years.[2] It is these findings which provide the Board the necessary bridge between the evidence presented and the conclusions reached by the trier of fact, and permit this Board, and the courts, to ascertain whether there actually was adherence to the terms of the rule.

The Department has sometimes argued that we are "stretching" the rule to include not only how law enforcement does its job, but how the ALJ must word his opinion. The Department is correct in its assertion that we are telling the ALJ's they need to consider certain things and to include necessary elements in their decisions. What the Department does not seem to understand is that we cannot justifiably conclude that the ALJ's determination that subdivision (b)(2) was

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[2] We are well aware that the rule requires the ALJ to undertake the difficult task of assessing that appearance many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date. A specific finding by the ALJ to the effect that the minor's appearance was substantially the same at both times shows that the ALJ was aware of, and took into consideration, the rule's requirement that the minor's apparent age must be judged as of the time, and under the actual circumstances, of the alleged sale.

complied with was sound unless we know that the right standard was used and it was applied properly. When the ALJ indicates by the words he uses that he applied the wrong standard, we cannot sustain the decision. It is the same as if the ALJ had used the standard of "beyond a reasonable doubt" to judge whether a party had met its burden of proof, instead of using the proper "preponderance of the evidence" standard. We also need to know what facts caused the ALJ to reach his or her conclusion that the rule was complied with. Without that, we are left to guess at what evidence led to the conclusion and, therefore, cannot know whether substantial evidence supports the finding.

The court in Topanga Assn. For a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836], discussed the importance of administrative findings which are supported by the agency's analysis of the relevant facts:

"Our ruling in this regard finds support in persuasive policy considerations. ... [T]he requirement that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-made law, and is 'remarkably uniform in both federal and state courts.' As stated by the United States Supreme Court, the 'accepted ideal . . . is that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." (S.E.C. v. Chenery Corp. (1943 318 U.S. 80, 94.)'

"Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. In addition,[3] findings enable the reviewing court to trace and examine the agency's mode of analysis.

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[3]In footnote 14 of the Topanga decision, the court cited the words of Mr. Justice Cardozo: "We must know what [an administrative] decision means ... before the duty becomes ours to say whether it is right or wrong."

"Absent such road signs, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable."

[Internal citations and footnotes have been omitted.]

It is disingenuous of the Department to contend that Rule 141 "was never intended to serve as guidance on how an Administrative opinion is worded." ***Every*** relevant statute and regulation is intended to serve as guidance on how an adjudicatory opinion is worded. The particular words used in a statute or regulation are assumed to be chosen to convey a certain meaning. Other words cannot be indiscriminately substituted for the statutory terms without the great risk of meaning something other than what the statute was designed to mean.

The ALJ apparently considered that the clerk's failure to carefully check the decoy's ID made the decoy's appearance, and Rule 141(b)(2), irrelevant. The ALJ had it backwards. If Rule 141 is violated by law enforcement's use of a mature-looking decoy, the clerk's failure to request identification, or to look at it carefully when shown, is irrelevant and cannot somehow "correct" the use of an inappropriate decoy. The defense provided by Rule 141 is "a defense to any action brought pursuant to Business and Professions Code Section 25658," regardless of the actions of the licensee or his agents.

II

Appellants contend the penalty was unlawfully aggravated because the date of the prior violation in question was September 9, 1994, before the January 1, 1995, effective date of Business and Professions Code §25658.1 (the "three strikes" law). Therefore, appellants argue, this pre-1995 violation should not be treated as a "second strike" with an aggravated penalty.

Section 25658.1 is not really relevant to this issue, since that statute really only comes into play when there have been three violations within 36 months. It appears that the ALJ did not use §25658.1, that is, he did not treat this violation as a “second strike,” in imposing the penalty.

While the Department may not have routinely ordered 25-day suspensions for a second sale-to-minor violation before §25658.1, it was always within its discretion to do so. After §25658.1 became effective, it appears that 25-day suspensions became the norm when there were two violations within the 36-month period specified by the statute, undoubtedly so that there would be a more logical progression in the discipline if a third violation occurred in the 36-month period and revocation were ordered.

The 25-day suspension is clearly within the Department's discretion.

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.

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.[4] 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

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

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."

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 term[5] 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.

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[5] 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.)

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 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.

IV

Appellants contend that the decision of the ALJ to conduct the hearing on their discovery motion without a court reporter present[6] 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

[6] It is our understanding that the hearing on the motion was conducted telephonically. This, in and of itself, has no bearing on the issue.

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) 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

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 appellant's discovery request as limited by this opinion, and for such other and further proceedings as are appropriate and necessary.[7]

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

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[7]This 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.