ISSUED MAY 4, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION dba 7-Eleven Store #13894 18514 Plummer Street Northridge, CA 91324, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7237 File: 20-247119 Reg: 98043411 Administrative Law Judge at the Dept. Hearing: Arnold Greenberg Date and Place of the Appeals Board Hearing: March 2, 2000 Los Angeles, CA

The Southland Corporation, doing business as 7-Eleven Store #13894 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked the off-sale beer and wine license it held jointly with its franchisees, for the franchisees' clerk, Binder Singh, having sold an alcoholic beverage (beer) to Jonathan Higginson, a minor participating in a decoy program conducted by the Los Angeles Police Department, said sale 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,

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

appearing through its counsel, Lyn Skinner Foster and Jeffrey A. Vinnick, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 29, 1990. Thereafter, the Department instituted an accusation charging the sale described above.

An administrative hearing was held on July 28, 1998, at which Victor Renzelman, a Los Angeles police officer, and Jonathan Higginson, the minor decoy, testified regarding the circumstances of the transaction. Appellant's franchisees, Pardeep K. and Sukhsagar Pannu were represented by counsel, and Sukhsagar Pannu testified on his own behalf. Southland was not represented, and as to it the matter proceeded as a default hearing.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the license revoked. Southland thereafter petitioned for reconsideration, alleging that it had not been served with the accusation nor any notice of the hearing. Its petition was denied, and this appeal followed.[2]

Appellant Southland thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Whether the Department erred by ordering

[2] The franchisees, Pardeep K. and Sukhsagar Pannu, also appealed, but their appeal has since been withdrawn.

revocation in view of the fact it had not provided Southland notice of the accusation or of the administrative hearing; (2) whether the failure to provide Southland notice deprived it of due process; and (3) whether the Department erred in denying Southland's petition for reconsideration.

DISCUSSION

Appellant contends that the Department failed to provide it any notice of the proceeding by which it now seeks to revoke appellant's license. Specifically, appellant contends that, "prior to the administrative hearing [it] did not receive, via the United States mail (or any other written or oral mode of notification) notice of the Pre-Accusation Conference ('309 hearing'), the Accusation package or Notice of Hearing." (App.Br., page 1.) Appellant states that it first learned that a hearing had taken place in the course of a telephone conference between its counsel and a department attorney concerning an unrelated matter.[3]

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[3] Southland's absence from the hearing did not go unnoticed, as the following colloquy [RT 31], immediately preceding the commencement of Sukhsagar Pannu's testimony, illustrates:

> THE COURT: Okay, Mr. Blake [counsel for the franchisees], you said that Mr. Pannu is here. Is there anything [sic] else here for the respondent?
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> MR. BLAKE: Actually, I do not at this time represent the Southland Corporation. I have not had any communication from Southland.
>
> THE COURT: That's what I want to make clear, and I will also indicate I don't believe, other than by way of the franchise agreement, that Mr. Pannu actually is authorized to represent Southland.

There is no franchise agreement in the record. We do not know whether the Administrative Law Judge believed that the franchise agreement in fact

The Department disputes only part of appellant's contention, claiming that "Southland received notice of the 309 meeting and the hearing, but not the accusation." (Dept.Br., page 2.) The Department argues that Southland's attendance at the "309 meeting" and its receipt of notice of the scheduled hearing date suffice to support the order of revocation.[4]

The Board stated in The Southland Corporation/Tolentino (1998) AB-7035:

> "If the Department intends to deprive a co-licensee of its interest in a license, it must comply with traditional notions of fair notice and due process. Southland, and any other co-licensee, is entitled to timely notice of Departmental action which will be relied upon by the Department in a later invocation of the "three strikes" law against their license."

Government Code §11503 states that "a hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation." The accusation must be in writing, must set forth the acts or omissions with which the respondent is charged, "to the end that the respondent will be able to prepare its defense."

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authorized the franchisee to act on Southland's behalf in the administrative hearing. The Department states that the franchisee "did not act, and was not treated, as a representative of Southland." (Dept.Br., page 5.)

[4] The Department disputes Southland's contention that it was not informed of the 309 meeting and the hearing, citing in support of its position a letter written by Matthew Ainley to Jeffrey Vinnick, dated September 21, 1998. The letter, a copy of which was made part of Southland's petition for reconsideration, purports to set forth what could be described as the equivalent of docket entries in all disciplinary matters involving the three licenses issued to Southland and the Pannus as co-licensees. According to Ainley's letter, Southland representative Jeff Glaser attended the "309 meeting," held on April 20, 1998, and the hearing notice was mailed to Southland on June 15, 1998. The letter also acknowledges that the accusation package was mailed only to the franchisees, and not mailed to Southland.

Government Code §11505, subdivision (a), mandates that an agency serve a copy of the accusation upon the respondent. Subdivision (c) of §11505 provides that "no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent shall have been served personally or by registered mail ... or shall have filed a notice of defenses or otherwise appeared." None of that occurred here.

The "309 meeting" or pre-accusation conference, is not a matter of record. The Board has no way of knowing what may have transpired in the course of that meeting. We do not believe such a meeting can be considered an acceptable substitute for the personal service or service by registered mail required by §11505.

Mere attendance at a pre-accusation meeting, where no definitive action has as yet been taken, or the later receipt of notice that a hearing is to be held on charges in an accusation that has never been served on a party is hardly enough to support the entry of a default order of revocation. Similarly, a notice of hearing is not an adequate substitute for an accusation. It does not set forth the charges against which the licensee must defend.[5]

The Department stresses that the licensees' "egregious record" was the basis for the order of revocation. (Dept.Br., page 2). We do not suggest that, assuming normal procedures are followed, such a record deserves some more lenient treatment. That

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[5] Service of the accusation also triggers the running of the time within which a licensee may file a Notice of Defense, as well as the time within which discovery must be requested.

decision, in ordinary circumstances, belongs to the Department.

But where the Department omits such a basic, and critical, step in the administrative process, by failing to serve the very document containing the charges against which a licensee must defend, the proceeding is inherently flawed, and any order of discipline is inappropriate. (See Government Code §11505, supra.)

The Department has not cited any authority that holds it may omit serving an accusation upon a licensee whom it believes must be disciplined.

By failing to serve Southland with the accusation, the Department has failed to comply with Government Code §11505, and its order is perforce of no effect as to Southland.

ORDER

The decision of the Department is reversed as to The Southland Corporation, and the matter is remanded to the Department for such further proceedings as may be appropriate in light of the Board's comments herein.[6]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER

ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6] 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.