

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

THE SOUTHLAND CORPORATION	)	AB-7259
and HARNEK S. and TALWINDER K.)	
THIARA	)	File: 20-215277
dba 7-11 Food Store	)	Reg: 98042990
10834 Santa Monica Blvd.)	
West Los Angeles, CA 90025,	)	Administrative Law Judge
Appellants/Licensees,	)	at the Dept. Hearing:
	)	John P. McCarthy
v.)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	November 5, 1999
Respondent.	)	Los Angeles, CA
)	

The Southland Corporation and Harnek S. Thiara and Talwinder K. Thiara, doing business as 7-11 Food Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 15 days for selling an alcoholic beverage to a person under the age of 21 years and who was acting as a police decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution,

¹The decision of the Department, dated October 22, 1998, is set forth in the appendix.

article XX, §22, and Business and Professions Code §24200, subdivision (a), arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants The Southland Corporation and Harnek S. Thiara and Talwinder K. Thiara, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathan E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued under another number about March 7, 1985, with the present license issued about July 1, 1998. Thereafter, the Department instituted an accusation against appellants charging that appellants' clerk had sold an alcoholic beverage to a person under the age of 21 years. That person was working for and under the surveillance of members of the Los Angeles Police Department.

An administrative hearing was held on August 14, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the sale had been made as charged.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Department violated its own rule 141(b)(2); (2) expert testimony was improperly excluded, (3) the Department violated appellants' rights of discovery, and (4) the Department violated

Government code § 11512, subdivision (d), by not providing a stenographic or other record of the motion for discovery proceedings.

DISCUSSION

I

Appellants contend the Department violated its own rule 141(b)(2), which reads as follows:

“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”

Appellants argue that the rule calls for a comparison of the general population pool of persons under 21 years of age, and does not call for the criteria of a reasonable licensee component.

The Appeals Board has been faced with Rule 141 for some time. The rule is an extremely flawed and ill-drafted guide for the police community and this tribunal. The Board attempted to bring some reasonable basis to the question of appearance, in the case Circle K Stores, Inc. (1999) AB-7112, when faced with the words “physical appearance” by the decision. The Board was concerned that the Administrative Law Judge had placed too much emphasis on the phrase concerning physical aspects of appearance and thereby, attempted to reword the language of the rule on a more restrictive basis than called for in the rule. Therein, we cautioned:

“It is not the Appeals Board’s expectation that the Department, and the ALJ’s, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ’s are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he

or she could generally be expected to convey the appearance of a person under the age of 21 years.”

Unfortunately, from the subsequent series of cases, some affirmed but most reversed, it appears the confusion still exists within the Department, its judges, and the beverage industry.

We reject appellants’ argument that the rule calls for a comparison of the general population pool of persons under the age of 21 years, as such would open each case to a myriad of experts, statistics, and other related conjecture, making the matter more confusing than now present, without any real benefit to a reasonable dispatch of the case. We also reject the argument that the phrase “... such that a reasonably prudent licensee would request his age or identification before selling him an alcoholic beverage” tries to augment or amend the rule. It appears as only excessive rhetoric which while doing no harm to the decision, appears to be merely “chiding,” in face of the fact that such legal defenses are now available to a seller.

The Administrative Law Judge made the following finding:

“... [the decoy’s] appearance at the hearing, that is, his physical appearance and his demeanor,² was that of a youthful person under the age of 21 years, such that a reasonably prudent licensee would request his age or identification before selling him an alcoholic beverage.” [Finding III.]

The Administrative Law Judge (ALJ) has attempted to reasonably conform to the teaching of the Board’s previous reversals in other cases, and included the word “demeanor” with the restrictive wording “physical appearance.” But with such attempts,

²Webster’s Third New International Dictionary, 1986, page 599, defines the word “demeanor” as: “... behavior toward others ... outward manner ... conduct ... bearing ... facial appearance”

the decision lends little to permitting a knowledgeable insight into the process of thought of the ALJ.

The case of Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836], discussed the question of administrative findings which are supported by the agency's analysis based on its investigative 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 W.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.

"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 or 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.]

The wording in a decision should state just what the law demands, that the decoy had the appearance of a person under the age of 21 years. The findings should

³In 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."

not contain modifying words which would appear to dilute the intent and wording of the rule.

The ALJ needs to explain in some detail the basis of the conclusion formed that the decoy looked under the age of 21 years. While it is a reasonable presumption that the decoy if appearing under the age of 21 years at the hearing, most likely looked under the age of 21 years, at the time of the sale.

This present case is something akin to the case of Southland & R.A.N., Inc. (1998) AB 6967, where the Board found that there was no substantial evidence as to the decoy's appearance at the time of the sale, but for the same makeup, clothes, and hair style. The Board said: "the ALJ should have made a definitive finding that the decoy looked under 21 at the time of the sale, based on his observations at the time of the hearing and the other evidence of her appearance at the time of the transaction. Absent this, adequate support for the ALJ's equivocal finding is lacking."

II

Appellant contends expert testimony was improperly excluded. Appellants proposed to have Dr. Graus, a psychiatrist, as an expert witness.

Evidence Code §801 states that an expert may testify as to his or her opinion if the opinion is on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."

The ALJ's finding that an expert's determination of a person's apparent reasons for concluding the age of the decoy, is not contemplated by the rule. The ALJ appropriately denied appellants' request.

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 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

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

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 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 term⁵ 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

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.)

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.

We disagree 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, 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 "witnesses" 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 "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 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 licensee 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 asset, 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 form 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 present⁶ 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 appeal. We do think, however, that regulations of the Office of Administrative

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

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 its 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 compliance with appellants' discovery request as limited in 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

⁷This 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.