ISSUED MARCH 22, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION, RAMESH K. MADAN, and SUDESH R. MADAN dba 7-Eleven Store #2066 401 Atlantic Avenue Long Beach, CA 90805, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7417 File: 20-215033 Reg: 98044951 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: July 6, 2000 Los Angeles, CA

The Southland Corporation, Ramesh K. Madan and Sudesh R. Madan, doing business as 7-Eleven Store #2066, appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk, Pargat Singh Dhaliwal, having sold an alcoholic beverage to James M. Newman, a 19-year-old minor acting as a decoy for the Long Beach Police Department, the sale being contrary to the universal and generic public welfare and

[1]The decision of the Department, dated May 13, 1999, is set forth in the appendix.

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 appellants The Southland Corporation, Ramesh K. Madan, and Sudesh R. Madan, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, 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 August 4, 1980. On October 30, 1998, the Department instituted an accusation against appellants charging an unlawful sale to a minor.

An administrative hearing was held on February 2, 1999, and March 19, 1999, at which time oral and documentary evidence was received. At that hearing, testimony with respect to the transaction at issue was presented by Kurt Sine, a Long Beach police officer; by James Newman, the minor decoy; and by Pargat Singh Dhaliwal, appellants' clerk.

Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale had occurred as alleged.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) Rule 141(b)(2) was violated; (2) the decoy operation was not conducted in a manner that promotes fairness; (3) Rule 141(b)(5) was violated; and (4) appellants' discovery rights and right to a transcript of the hearing on their motion to compel discovery were violated.

DISCUSSION

I

Appellant contends that the decision departs from the standard required by Rule 141(b)(2), in that it found that the decoy was a youthful looking male "whose appearance is such as to reasonably be considered as being under twenty-one years of age." Appellant contends this is a material departure from the language of the rule, which requires that a decoy display the appearance "which could generally be expected of a person under 21 years of age."

We do not believe there is any substantive difference between the language of the rule and that in the decision. In each case, the determination called for is that the decoy appear younger than 21 years of age.

This case does not suffer from the defect the Board has seen in numerous other cases, i.e., that the Administrative Law Judge's (ALJ's) assessment of the decoy's appearance was confined only to physical characteristics. There was evidence in the record, from the fact that the decoy was present and testified, of other age indicia characteristics, and there is nothing in the decision to suggest the ALJ did not take them into consideration in his general assessment of the decoy's appearance.

II

Appellant contends that the decoy operation was conducted in such a manner as to be unfair. Specifically, appellant contends that the clerk, in assessing the apparent age of the decoy, would have been misled by materials to which he was exposed at a L.E.A.D. program he attended almost two years earlier. The

material in question (Exhibit B) was a generalized list of "some clues" regarding physical characteristics, behavior, mannerisms, dress style and accessories, none of which, appellant contends, were displayed by the decoy.

Appellant cites the Board's decision in The Southland Corporation/R.A.N., Inc. (1998) AB-6967, in which the Board, in what could well be characterized as dicta, was critical of the Department's creation of a "document that appears to 'divert' the mind of licensees and their employees, away from the more numerous real-life characteristics of non-neophyte underage purchasers." [2]

In the present case, the clerk testified that he attended a Department L.E.A.D. training program and that his employer, who accompanied him, explained to him the material which was distributed, including the excerpt marked Exhibit B. In response to plainly leading questions, to which no objection was made, the clerk testified that the characteristics listed in Exhibit B were what he looked for in identifying minors.

This may be the first case where a clerk actually claimed to be familiar with the characteristics set forth in L.E.A.D. materials. Does this mean that the decoy program was conducted in an unfair manner?

An affirmative answer to that question necessarily assumes that the clerk was actually misled by the Department's list of "some clues" to detecting a minor. However, the clerk never specifically claimed to have been misled. He claimed to have been influenced by the decoy's "light beard," while the decoy testified he had

[2] There was no evidence that the clerk in that case had been exposed to the document in question.

shaved that afternoon [RT 55]. In the absence of an express claim of reliance, we are reluctant to base a reversal upon only a speculative possibility.

Although the ALJ considered the clerk's attendance at the L.E.A.D. program a factor in mitigation, there is no indication in the decision that the ALJ believed the clerk had been misled by the content of Exhibit B. It is common for the Department to consider a licensee's attendance at a L.E.A.D. program a mitigating factor.

III

Appellant contends there was no compliance with Rule 141(b)(5), which requires that before a citation issues, the decoy make a face to face identification of the seller of the alcoholic beverage. Appellant claims the rule was violated because the identification by the decoy occurred simultaneously with the police officer's identification of himself as a police officer, and while the clerk was not facing the decoy, who was 15-20 feet from the clerk.

Appellant's version of the facts is less than accurate. The clerk testified as follows:

> Q. And when they [the officers] came in and said that you had sold to someone who was not old enough to buy beer, did they point out who that person was?
>
> A. They did not point out.
>
> Q. Did you see them - - did they indicate they had the person there?
>
> A. He was standing by the gate.
>
> Q. By the door or the gate?
>
> A. The door.
>
> Q. So he was inside the store?

A. Inside by the door, gate. Next to the door.

Q. And did they point him out to you as he was – he was the underage one?

A. Yes. They brought the beer and they said, 'he is underage,' and then he left.

Q. How far was the door from the counter where you were?

A. Little far.

Q. How far?

A. Where I am from the lady who's sitting there.

…

THE COURT: 12 to 15 feet.

Q. You could see him, though?

A. Yes, I could see him.

…

Q. When you saw the young man just inside the door, when he came back in, could you see his face?

A. He came inside, he looked and then he left after he had the beer.

Q. And could you see his face then?

A. Yes, I did.

Q. And when - - during that time when he was inside for the short amount of time, is that when the - - one of the policeman said - - pointed him out to you as the underage person?

A. Yes.

The clerk's testimony demonstrates that he was well aware that he was being informed that he had sold to a minor, that he was told who that minor was, and was able to see his face when that was said to him.

The finding that the decoy identified the seller (Finding III-3) is supported by substantial evidence. There was full compliance with Rule 141(b)(5).

IV

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. They also claim error in the Department's failure to provide a court reporter for the hearing on their motion to compel discovery. Appellants cite 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 an evidentiary hearing and not to a hearing on a motion where no evidence is taken.

The Board has issued a number of decisions directly addressing these issues. (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 has 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 determined that the appellants were limited to the discovery provided in

Government Code §11506.6, but that "witnesses," as used in subdivision (a) of that section was not restricted to percipient witnesses. We concluded 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."

The Board also held in the cases mentioned above that a court reporter was not required for the hearing on the discovery motion. We continue to adhere to that position.

The Department has also claimed that the forced disclosure of the identity of licensees of establishments where sales have been made to minors constitutes a violation of their right of privacy. This argument overlooks the fact that the persons who might make that claim are not the persons whose identity is being disclosed. In the vast majority of cases where this issue arises, the person making the sale, and who has been cited, is someone other than the licensee whose identity is to be disclosed.

ORDER

The decision of the Department is affirmed in all respects except for the issue involving discovery, and the case is remanded to the Department for such further proceedings as may be appropriate and/or necessary.[3]

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[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.

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

Board Member Ray T. Blair, Jr., did not participate in the deliberation of this appeal.

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.