

ISSUED APRIL 11, 2001

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

THE SOUTHLAND CORPORATION,	)	AB-7477
ARMANDO FRANCISCO, and)	
TERESITA FRANCISCO	)	File: 20-215131
dba 7-Eleven Store #19670	)	Reg: 99046196
11351 Moorpark Street)	
North Hollywood, CA, 91601	)	Administrative Law Judge
Appellant s/Licensees,	)	at the Dept. Hearing:
	)	Sonny Lo
v.)	
	)	Date and Place of the
	)	Appeals Board Hearing:
DEPARTMENT OF ALCOHOLIC	)	September 7, 2000
BEVERAGE CONTROL,	)	Los Angeles, CA
Respondent.)	
)	

The Southland Corporation, Armando Francisco, and Teresita Francisco, doing business as 7-Eleven Store #19670 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale beer and wine license for 15 days, the suspension stayed for a one-year probationary period, for their having violated Business and Professions Code §25658, subdivision (a).

¹The decision of the Department, dated August 5, 1999, is set forth in the appendix.

Appearances on appeal include appellant The Southland Corporation, Armando Francisco, and Teresita Francisco, 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 October 21, 1980. Thereafter, the Department instituted an accusation charging that on January 29, 1999, appellants' clerk, Edgar Isaguirre ("the clerk"), sold an alcoholic beverage (beer) to Natalie Alvarado, a minor.

An administrative hearing was held on July 14, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Los Angeles police officer Pablo Monterrosa ("the police officer") and by Natalie Alvarado, the minor, who was participating in a police decoy operation. Appellants presented no witnesses.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation.

Appellants thereafter filed a timely notice of appeal, and now raise the following issues: (1) the decoy operation violated Rule 141(b)(2); (2) appellants were denied their discovery rights and their right to a transcript of the hearing on their motion to compel discovery.

DISCUSSION

I

Appellants contend that there was no compliance with Rule 141(b)(2), in

that the minor did not present the appearance which could generally be expected of a person under 21 years of age. Appellants argue that the decoy wore makeup (mascara and lipstick) which would have made her look older than her true age.

No one testified on behalf of appellants, and the decoy denied that her use of makeup was to make her appear older.

The Administrative Law Judge rejected appellants' contention, stating, in Determination of Issues B and C:

"B. Respondents argue that because the decoy wore mascara and lipstick, and that her hair had been colored, she did not comply with the requirement of the Department's Rule 141 (b)(2). The argument is rejected.

"C. The decoy's height, weight, and appearance were such that they could generally be expected of a person under 21 years of age. In fact, Exhibit 2 clearly shows that the decoy appeared to be under 21 years of age, despite her mascara, lipstick, and the coloring of her hair. There was no violation of the Department's Rule 141 (b)(2)."

We have no problem with Determination B. The rule does not prohibit a decoy's use of makeup. There is no mention of makeup in the rule. While the Department's guidelines discourage the use of makeup, it does not follow that, because a guideline may have been ignored or violated, Rule 141 has necessarily been violated.

Determination C presents a more difficult question. The Board has frequently reversed decisions of the Department where the ALJ appeared to have restricted his or her assessment of the decoy's appearance to the decoy's physical characteristics, to the exclusion of other aspects of appearance such as poise, demeanor, bearing, and maturity. The Board has also reversed decisions where the assessment of the decoy's appearance is premised exclusively on a photograph of

the decoy. On the other hand, the Board has affirmed decisions of the Department where the decision follows the literal wording of the rule, there being no basis for concluding that any improper limitations or interpretations have been superimposed upon the rule.

In this case, the ALJ unquestionably placed a great emphasis upon the physical aspects of the decoy's appearance. Yet, his use of the unmodified term "appearance" suggests that he was considering other aspects of appearance than simply height and weight. Similarly, the reference to the photo's depiction of the decoy's appearance was not the ALJ's sole basis for decision, unlike the cases the Board found in disfavor.

In addition, the record reveals that Department counsel emphasized the decoy's demeanor while testifying as typical of one in her 19-year-old age group.

We believe the decision complies with the rule.

II

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.

ORDER

The decision of the Department is be affirmed with respect to the issue under Rule 141(b)(2), but reversed and remanded to the Department for compliance

with appellants' discovery request as limited by the Board's prior decisions.²

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

² 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.