ISSUED APRIL 11, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION and GLENN T. CUNNINGHAM dba 7-Eleven Store #26190 1749 South Coast Highway Oceanside, CA 92054, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7505 File: 20-335569 Reg: 99046341 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: September 7, 2000 Los Angeles, CA

The Southland Corporation and Glenn T. Cunningham, doing business as 7-Eleven Store #26190 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Robert Lee Johnson, having sold an alcoholic beverage (a six-pack of Budweiser beer) to George O. Flint, a minor, contrary to the universal and generic

[1]The decision of the Department, dated September 16, 1999, is set forth in the appendix.

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 appellants The Southland Corporation and Glenn T. Cunningham, 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 December 3, 1997. On April 26, 1999, the Department instituted an accusation against appellant charging a violation of Business and Professions Code §25658, subdivision (a). A proposed decision, rendered after an administrative hearing held on July 29, 1999, sustained the charge of the accusation, and ordered a 15-day suspension. The Department adopted the proposed decision, and this timely appeal followed.

Appellants now contend: (1) there was a violation of Rule 141(b)(2); and (2) appellants were denied their right to discovery and to a transcript of the hearing on their motion to compel discovery.

DISCUSSION

I

Appellants challenge the decision's findings and determination that the decoy presented the appearance required by Rule 141(b)(2). In what can only be described as a strident attack on the competency of the Administrative Law Judge, appellants assert at the outset (pages 1-2) of their brief:

> "In an astonishingly vivid demonstration of an inability to adjudicate facts fairly and impartially, the Administrative Law Judge in this case found compliance with Rule 141(b)(2) when faced with a decoy whose appearance was drastically changed from the time of the decoy operation to the time of the administrative hearing. At the hearing and in the licensed premises, the decoy was so palpably and obviously unqualified to act as a decoy, that for an Administrative Law Judge to determine compliance with Rule 141(b)(2) is much more a manifestation of the inability of the Administrative Law Judge to judge than the apparent age of the minor decoy."

There is a photograph of the decoy in the record, taken with the clerk who made the sale. We are of the opinion that there is nothing in the appearance of the decoy on the day of the sale, as depicted in the photograph, which could be said to so strongly contradict the judgment of the Administrative Law Judge ("ALJ"), that the decoy presented an appearance which could generally be expected of a person under the age of 21, as to warrant this Board substituting its judgment for that of the ALJ. We are of the further opinion that appellants' attack on the ALJ borders on the personal, and certainly is not helpful to the Board.

The Board need not be reminded that the scope of its review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary

hearing.[2]

This principle has particular application when the issue, as here, involves a factual determination whether a person appears to be of a certain age group. As the Board has said in other cases, this is the responsibility of the trier of fact, the ALJ and, ultimately, the Department, to determine whether the decoy selected by the law enforcement agency possesses the requisite appearance under Rule 141(b)(2).

The ALJ sees the decoy as he testifies, is able to observe his physical appearance, his demeanor, his poise as a witness, and, to a limited extent his personal mannerisms. The Board, on the other hand, sees only a photograph, if that. While it is true that, in some cases, there is some characteristic of the decoy's appearance that causes the Board to question the fairness of the use of that decoy, this is not such a case.

At the time of the transaction, the decoy's head had been shaved, and his hair was less than 1/4' long. The goatee about which appellants complain was, according to the decoy, less than an eighth of an inch long. "Barely anything. Just rough look, that's all."

At the time of the hearing, almost seven months later,[3] the decoy's hair, sideburns and goatee had all grown considerably longer.

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[2] California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

[3] The hearing was held July 29, 1999. The sale took place January 2, 1999.

Parenthetically, it should be noted that this sale took place in Oceanside, California, the home of Camp Pendleton, a Marine Corps training base. The sight of a tall, slim male with a shaven head is not uncommon in Oceanside, and often that person will be an 18- or19-year-old Marine Corp recruit.

All of this means, in our view, that this Board is not persuaded by appellants' attack on the findings or on the ALJ who made those findings. We have not been reluctant to grant relief in Rule 141(b)(2) cases where, in a strong showing by the appellants in such cases, relief is justified. This is not such a case.

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 affirmed with respect to the Rule 141(b)(2) issue, and the case is remanded to the Department for such further proceedings as may be appropriate in light of our ruling on the discovery issue.[4]

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[4] 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

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
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review of this final decision in accordance with Business and Professions Code §23090 et seq.