ISSUED JANUARY 4, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION,	)	AB-7263
SURESH JAIN and USHA JAIN	)	
dba 7-Eleven Store #2132	)	File: 20-280092
5962 West Pico Boulevard	)	Reg: 98042549
Los Angeles, CA 90035,	)	
Appellants/Licensees,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	John P. McCarthy
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	December 3, 1999
	)	Los Angeles, CA

The Southland Corporation, Suresh Jain, and Usha Jain, doing business as 7-Eleven Store #2132 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, for their clerk, Bagh Singh, having sold an alcoholic beverage (a 16-ounce can of Budweiser beer) to Ignacio Roman, a minor decoy, 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 appellants The Southland Corporation, Suresh Jain, and Usha Jain, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control,

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

appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 3, 1993. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor. 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 charge of the accusation had been proven.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) The Department misinterpreted and misapplied Rule 141(b)(2); (2) relevant expert testimony was improperly excluded; (3) appellants were denied full discovery; and (4) Rule 141(b)(4) was violated because the decoy did not answer truthfully a question about his age. Appellants also contend that the Administrative Law Judge committed error by denying their request that the hearing on their motion to compel discovery be recorded by a court reporter and a transcript thereof prepared.

DISCUSSION

I

Appellants' challenge to the Administrative Law Judge's (ALJ) determination that Rule 141(b)(2) was satisfied is premised largely upon the ALJ's statement that the decoy's appearance was such that a reasonably prudent licensee would request his age or identification before making a sale. It is appellant's contention that the rule requires a comparison to the general population pool of those persons under 21, and

there is no “reasonable licensee” component to the rule.

The ALJ's assessment of the decoy's appearance appears in two places in his proposed decision. In Finding of Fact III, the decoy is described thusly:

> 'Ignacio Roman was wearing jeans and an oversized shirt. At the time of the sale Roman stood about 5 feet 8 inches tall and weighed about 160 pounds. He appeared at the hearing and, although he was then 20 years, 2 months old and he wore a crew cut, a little longer than his hair was on November 5, 1997, his appearance at the hearing, that is, his physical appearance, his bearing and demeanor, 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. Roman testified that he lifts weights, but his physique did not appear to be the physique of a body-builder. Roman's arms, neck, chest and shoulders appeared normal, and not overly developed."

In Determination of Issues I, the ALJ added the following:

> "Respondents' contention that the accusation should be dismissed because the decoy failed to present the appearance required by Rule 141(b)(2) is overruled for the reasons set forth in Findings of fact, paragraph III. The appearance, carriage, and/or demeanor of decoy Roman simply were not out of the ordinary for one under the age of 21 years. ”

It is clear from the foregoing that the ALJ was focusing carefully on the decoy's appearance in relation to what Rule 141(b)(2) required. We do not read his reference to what a reasonable clerk might be expected to think as an attempt to rewrite Rule 141(b)(2) or a misinterpretation of the rule. It seems to us the ALJ was making a reasonable attempt to supply the very information this Board has suggested be furnished about a decoy's appearance. While a significant portion of the ALJ's description of the decoy consisted of references to physical aspects of his appearance, the ALJ also looked at other indicia of appearance, making specific reference to the decoy's bearing and demeanor. Thus, this case appears to be clearly distinguishable from those cases in which the Board found the Department had placed too much emphasis on a single criterion.

II

Appellants claim that the Administrative Law Judge (ALJ) improperly excluded a medical expert's opinion concerning the age of the decoy and what it was about the decoy that led the clerk to believe the decoy was 23 years of age (rather than his actual age of 19).

The ALJ rejected appellants' offer of proof regarding such testimony, stating [RT 49]:

> “All right. We argued this and I ruled in the earlier case that the offered expert testimony would not be permitted.
>
> 'The rationale was a combination of Evidence Code 352, as well as I didn't think that expertise is necessary to make a determination in respect to [141(b)(2)]."
>
> Evidence Code §352 provides:
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> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

The ALJ undoubtedly believed the proffered evidence would only necessitate undue consumption of time, since the other considerations in §352 do not appear pertinent. Cases too numerous to require citation hold that a court has "broad discretion" in assessing whether the probative value of testimony will be outweighed by the delay it engenders In this case, the ALJ was confronted with the additional consideration that the proffered testimony was in the form of an expert opinion.

Under §601 of the Evidence Code, 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."

We agree with the Department that the determination of a person's age is not a

matter "beyond common experience." On each occasion where an ALJ is called upon to determine the apparent age of a decoy, he must exercise a judgment that necessarily is based upon his own experience. We do not see how he would have been assisted in the exercise of that judgment by the opinion of appellants' expert, who, in turn, would be asked to speculate what the clerk may have thought about the decoy's age when he made the sale.[2] Instead, we see only the real likelihood that these disciplinary proceedings would be prolonged while expert countered expert on a subject the ALJ deals with on a regular basis.

III

Appellants claim that Rule 141(b)(4) was violated when, they assert, the decoy said "'I'm 21" in response to a question from the clerk about his age. They argue that the clerk was not cross-examined, that the Department offered no rebuttal evidence, and that the decision "is absolutely and completely silent as to the subject matter altogether." (App.Br., page 10.)

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[2] Appellants' brief (at page 7) contains the statement "As the Administrative Law Judge stated correctly in the Department's decision, it is the clerk's perception that is important." Aside from the fact that this statement appears nowhere in the decision, we find it a clear misstatement of the law. The decoy must only present an appearance which could generally be expected of a person under the age of 21 years. If the clerk, observing a decoy who presents such appearance generally, perceives the decoy to be older than 21, he does so at his peril. A licensee cannot escape liability by employing clerks unable to make a reasonable judgment as to a buyer's age.

Similarly, appellants' brief again misquotes the Department's decision on page 9 of their brief, asserting that the Department identified the clerk's perception as the "important perception in the case."

We do not find this helpful to our consideration of the issues.

Appellants are correct that the clerk was not cross-examined, and no rebuttal testimony was presented. However, it is somewhat disingenuous, if not outright false, to assert that the decision is “absolutely and completely silent as to the subject matter altogether,” assuming, as we do, that the subject matter was the interaction between the decoy and the clerk. The decision directly addresses the clerk's testimony on this subject, stating, in Determination of Issues I:

> "Clerk Singh's testimony that he asked Roman how old he was is not credible. Singh appeared confused on the witness stand at the hearing and his conduct at the time of the sale showed the same confusion."

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

We have reviewed the transcript of the clerk's testimony, and are satisfied that there is no reason to depart from the normal rule that we must defer to the ALJ, who saw and heard the clerk testify, and did not believe him. That the Department offered no rebuttal to the clerk's testimony is of no significance.

During the Department's case in chief, the decoy was asked if the clerk had ever asked how old he was, to which the decoy relied "no" [RT 33]. This was after the decoy had earlier been asked whether the clerk said anything to him after having examined the decoy's identification card [RT 31].

The clerk's claim that the decoy lied about his age and the decoy's earlier

testimony that the clerk never asked him about his age reduce to a simple conflict in testimony, and, the ALJ chose to believe the decoy.

The clerk's testimony also clashed with that of the decoy, and of the officer, on a different subject. Both the police officer [RT 14] and the decoy [RT 32-33] testified they exited the store, and then reentered, at which time the decoy identified the clerk as the seller of the alcoholic beverage. The clerk, on the other hand, denied that the decoy ever reentered [55]. Interestingly, there has been no claim that the identification requirement of Rule 141(b)(5) was violated.

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.

This is but 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.[3] 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

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

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 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 term[4] 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 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 vehemently 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,

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[4] 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.)

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, supra, 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 "witness" 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 word "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 night 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 licensed 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 assert, 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 from 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.

V

Appellants contend that the decision of the ALJ to conduct the hearing on their discovery motion without a court reporter present[5] 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

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

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 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 their 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 reconsideration in light of the comments herein with respect to Rule 141(b)(2), for compliance with appellants' discovery request, as limited herein, and for such other and further proceedings as are appropriate and necessary.[6]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., 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.