ISSUED JANUARY 4, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION, DONNA J. HOUSER and WILLIAM L. HOUSER dba 7-Eleven Store #22894 1030 North Broadway Escondido, CA 92026, Appellants/Licensees,	)	AB-7323
	)	File: 20-215140
	)	Reg: 98044153
	)	Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria
v.	)	
	)	Date and Place of the Appeals Board Hearing: December 3, 1999 Los Angeles, CA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	

The Southland Corporation, Donna J. Houser, and William L. Houser, doing business as 7-Eleven Store #22894 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 30 days for their clerk having sold an alcoholic beverage (beer) to a minor, 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

[1]The decision of the Department, dated December 17, 1998, is set forth in the appendix.

Code §25658, subdivision (a).

Appearances on appeal include appellants The Southland Corporation, Donna J. Houser, and William L. Houser, 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 July 8, 1982. Thereafter, the Department instituted an accusation against appellants charging that, on March 27, 1998, appellants' clerk, Christy L. Shepherd, sold an alcoholic beverage to Jamie E. Lenos, a person who was then approximately 18 years of age.

An administrative hearing was held on October 29, 1998, at which time oral and documentary evidence was received. At that hearing, Escondido police detective Richard Callister and Jamie Lenos, the minor, testified about her purchase of beer at appellants' store while acting in the role of a decoy. Debra Oliver, a clerk employed by appellants, and Christy Shepherd, the clerk who made the sale also testified, both asserting that Lenos appeared to be older than 21 years of age.

Subsequent to the hearing, the Department issued its decision, finding that there was a violation of the statute, and, taking into account three prior sale-to-minor violations,[2] suspended appellants' license for 30 days.

---

[2] Only one of the prior violations was subsequent to the date of enactment of Business and Professions Code §25658.1, the Alcoholic Beverage Control Act "three strikes" addition.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the Department violated Rule 141(b)(2) by omitting all age-indicia other than physical appearance in assessing the apparent age of the decoy; (2) the Department improperly enhanced the penalty; (3) the Department violated appellants' discovery rights; and (4) the Department violated Business and Professions Code § 11512, subdivision (d), by failing to provide a court reporter for the hearing on their discovery motion.

DISCUSSION

I

Appellants contend that the Department failed to comply with Rule 141(b)(2), by its use of an improper standard in its consideration of the appearance of the decoy. Appellants contend that by limiting his assessment to the physical aspects of the decoy's appearance the Administrative Law Judge overlooked all other age-indicative considerations contemplated by the rule.

This is a frequently recurring issue on appeal.

In Circle K Stores, Inc. (1999) AB-7080, the Board stated:

> "Nonetheless, while an argument might be made that when the ALJ uses the term "physical appearance," he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what he did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.
>
> "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.
>
> "Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department's concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).

The Department targets the Board's use of the word "possibility" with respect to the ALJ's assessment of the minor's appearance, and asserts:

> "This Board can not reverse a decision based on a possibility. The Board is mandated to uphold the Department's decision, even when faced with contradictory evidence, where substantial evidence supports the findings."

The problem with the Department's position in this case is its belief that the issue is merely one of evidence. Instead, the issue is whether a correct legal standard was applied, and the Board's belief that, without illuminating findings, and with a qualifying term engrafted upon the rule at issue, it is unable to satisfy itself that there was compliance with the rule.

The Board's position finds its support in the teachings of the California Supreme Court in Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836] that "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.'"

The Department argues that, if appellants wish to judge the decoy using an "apparent age" standard, that is, on criteria in addition to physical appearance, they must be prepared to show that the age of the minor could not be determined under any circumstances, citing United States v. United States District Court, Kantor, McNee, Souter as real parties in interest, (9th Cir. 1988) 858 F.2d 534 ("Kantor"). While it is true that Kantor involved the issue of a person's age - whether a federal statute making it a criminal offense to produce materials depicting a minor engaged in sexually explicit conduct required proof the defendant knew the performer was a minor - it does not support the notion that an appellant who relies on the defense created by Rule 141(b)(2) shoulders the same burden of proof as does a party attempting to prove fraudulent conduct, as the Department seems to contend.

The issues in Kantor were whether the prosecution was required to prove scienter, that is, that the defendants knew the true age of the performer, or, alternatively, whether a reasonable mistake as to her age was a defense to a charge that the statute was violated. The court rejected the contention that the prosecution was required to prove the defendants knew the performer was a minor, but concluded that, to preserve the constitutionality of the statute, an affirmative defense must be engrafted upon it, under which a defendant could avoid conviction by proving, to the satisfaction of a jury, that he did not know, and could not reasonably have known, that the actor or actress was under 18 years of age.

The Department's brief (at page 5) also suggests, at least by implication, that if the true age of the decoy could have been determined by simply asking the

decoy, who, under Rule 141(b)(4), must answer truthfully, his or her age, or by observing the age warnings on a valid identification which would have to be produced upon request, pursuant to Rule 141(b)(3), then the appearance of the decoy is irrelevant. But, if that were the case, then there would be no reason for Rule 141(b)(2) to be part of the rule.[3]

The Department also argues that "it is not the observations of the ALJ that matter, but, the observations of the seller of alcoholic beverages." (Dept.Br., page 3.) If that were true, the testimony of the clerk that the decoy appeared to be over 21 years of age would be conclusive. Of course, that is not the case. It is the ALJ, and the Department, who must determine whether the peace officers conducting the decoy operation complied with Rule 141, the appearance of the decoy being one of the considerations in that determination.

We only need to remind the Department of the court's reminder, in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr. 126], that "if the rules are inadequate, the Department has the right and the ability to seek changes. It does not have the right to ignore a duly adopted rule."

In sum, we believe this case is no different than the earlier Rule 141(b)(2) cases in which the Board reversed the Department, and deserves no

[3] Of course, the safest policy a licensee can pursue is to ask everyone for identification. Even then, as we well know, a seller can ignore or be mistaken about what his or her eyes have seen, and violate the Act.

different treatment.[4]

II

Appellants contend the Department should not have imposed an enhanced penalty. They point out that the accusation which is part of Exhibit 2 lacks a filing stamp to evidence when it was filed. Therefore, appellants contend, the statement in the decision that an accusation was filed on March 18, 1997, is without evidentiary support, and cannot support a finding of a prior violation within the 36-month period set forth in Business and Professions Code §25658.1

The decision makes no reference to Business and Professions Code §25658.1. It simply finds that appellants committed three violations of Business and Professions Code §25658, subdivision (a), since being licensed.

Appellants do not dispute this. Instead, they assume, mistakenly, in our opinion, that the ALJ treated the violation evidenced in Exhibit 2 as a strike under 25658.1. Since he did not say that he did, and since it was unnecessary for him to do so in order to impose an enhanced penalty for repetitive violations, we do not read the decision as having done so.

In Kim (September 1, 1999) AB-7103, the issue, whether three violations occurred within a 36-month period subsequent to the date §25658.1 was enacted was critical, because the license had been ordered revoked.

---

[4] We are aware that the decoy in question was 18 years of age at the time of the transaction. However, without more explicit findings, the failure to address other aspects of age-indicia than physical appearance leaves the decision flawed.

Here, whether or not the accusation which led to the violation established by Exhibit 2 was filed on March 18, 1998, or some other date was not critical. The existence of three violations, two of which were fairly recent in time, was enough to support an enhanced penalty.

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 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.[5] 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

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

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[6] in a statute providing that certain hospital peer review records were "not subject to discovery," and affirmed lower court orders enforcing subpoenas directed

[6] 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.)

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, 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.

IV

Appellants contend that the decision of the ALJ to conduct the hearing on their discovery motion without a court reporter present[7] 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 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).)

---

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

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. [8]

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

[8] 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.