ISSUED MARCH 22, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION and SHOUKAT H. ALI dba 7-Eleven #13846 11007 Ventura Boulevard Studio City, CA 91604, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7481 File: 20-238656 Reg: 99046274 Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen Date and Place of the Appeals Board Hearing: September 7, 2000 Los Angeles, CA

The Southland Corporation and Shoukat H. Ali, doing business as 7-Eleven #13846 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale beer and wine license for 15 days, for their clerk, Abdus Sobur Khan ("Khan"), having sold an alcoholic beverage (a 22-ounce bottle of beer) to Natalie Alvarado ("Alvarado"), a 19-year-old minor, contrary to the universal and generic public welfare and morals provisions of the

[1]The decision of the Department, dated August 12, 1999, is set forth in the appendix.

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 Shoukat H. Ali, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele Wong.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 28, 1989. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor, in violation of Business and Professions Code §25658, subdivision (a).

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 Paul Espinoza and by the minor, Alvarado, who was acting as a police decoy at the time of the sale. Appellants presented no witnesses on their behalf.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and rejected appellants' contentions that the decoy operation violated Rule 141.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(5) was violated; (3) appellants were denied their right to discovery and to a transcript of the hearing on their motion to compel discovery.

DISCUSSION

I

Appellants contend that Rule 141(b)(2) was violated in two ways - by the Administrative Law Judge's use of an improper test in his consideration of the rule, and by conduct engaged in by the decoy to alter her appearance, contrary to instructions given to her in advance of the decoy operation.

In their challenge to the ALJ's assessment of the decoy's appearance, appellants have misread the decision. The decision does not, as appellants assert, conclude that a reasonable person "might" find the appearance of the decoy to be an individual under the age of 21.

The decision states:

> "The evidence does not support the contentions on the part of the Respondents, and they are rejected. At the time of the violation, the minor was 5'5" tall, weighed 135 pounds, wore no jewelry, wore jeans, a sweater and an overcoat. Her demeanor was that of a teenager. Based on the totality of the evidence, it is found that to the average reasonable person, the minor's appearance was that of an individual under 21 years of age at the time of the sale.

Appellants' objection to the ALJ's choice of phraseology is little more than a quibble. We are satisfied that the language in the decision is fully compatible with the standard contained in Rule 141(b)(2).

Appellants' complaint that the decoy wore makeup and had her hair colored professionally simply reiterates arguments made to the ALJ which he obviously found unpersuasive. The makeup consisted of lipstick that was "pretty light," and mascara.

This Board is ill-equipped to second-guess the ALJ, who saw and heard the

decoy testify. We reject appellants' tacit invitation to retry this aspect of the case.

II

Appellants also contend that Rule 141(b)(5) was violated. This rule, of course, requires that the decoy make a face to face identification of the seller of the alcoholic beverage. Appellants cite Kyung Ok Chun (1999) AB-7287, and suggest that the identification may have been made while the police officer and the decoy were moving through the doorway, and not in such proximity to the clerk that he would realize he was being singled out as the person who sold to the decoy.

Officer Espinoza testified [RT 11-12] that he and the decoy were on the patron side of the counter, three or four feet away from the clerk, when the decoy identified him as the seller. Alvarado, the decoy, testified the clerk was two feet away when she identified him. Appellants' suggestion that the two may have still been in the doorway when the identification was made is simply contrary to the record.

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. 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 issues involving Rule 141(b)(2) and 141(b)(5), and the case is remanded to the Department for compliance with appellant's 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.