ISSUED JANUARY 4, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION, TARSEM KAUR POONI, and HARJINDER SINGH POONI dba 7-Eleven Store 11853 Downey Avenue Downey, CA 92041, Appellants/Licensees, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7264 File: 20-214995 Reg: 98043042 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: December 3, 1999 Los Angeles, CA

The Southland Corporation, Tarsem Kaur Pooni, and Harjinder Singh Pooni, doing business as 7-Eleven Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for the sale of an alcoholic beverage to a minor, by Harjinder Pooni and a clerk[2] employed by appellants, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation

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

[2] Although the clerk is not referred to by name in the Department's decision, Downey police officer Jeffrey Calhoun identified him as Normal Singh [RT 8-9].

of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant The Southland Corporation, Tarsem Kaur Pooni, and Harjinder Singh Pooni, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 24, 1987. Thereafter, the Department instituted an accusation against appellants charging the unlawful sale, on December 17, 1997, of an alcoholic beverage to a minor.

An administrative hearing was held on August 27, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the police officer conducting the decoy operation, Jeffrey Calhoun, and by Justin Prentice, the minor decoy, to the effect that Normal Singh, a clerk, and Harjinder Pooni, one of the franchisees, jointly sold a six-pack of Coors beer to Prentice.

Subsequent to the hearing, the Department issued its decision which determined that the sale to the decoy had occurred and no defenses had been established.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) Rule 141(b)(5) was violated, in that the decoy's identification of the seller did not comply with the rule; (2) the Department improperly excluded relevant evidence; (3) appellants' rights to discovery were violated; and (4) the Department violated Government Code §11512, subdivision (d) by failing to provide a court reporter for the hearing on their discovery motion.

DISCUSSION

I

Appellants contend there was a failure by the Department to comply with the requirement of Rule 141 that the minor make a face to face identification of the seller of the alcoholic beverages. They assert that, although citations were issued to Normal Singh and Harjinder Pooni, the accusation alleged that Singh was the seller, and did not mention Pooni. Thus, they contend, when the decoy identified both Singh and Pooni as the sellers, this caused the police officer to issue citations to both, even though Pooni merely checked the identification and placed the alcoholic beverage in the bag. Appellants describe the officer's action as one of the evils the rule was designed to protect against, i.e., the issuance of a citation to an individual who did not engage in the sale of alcoholic beverages to a minor.

We are mindful of the admonition in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr.2d 126] that there be "strict adherence" to the requirements of Rule 141. With that in mind, we nonetheless suggest that, in the unusual circumstances of this case, it was not error, for purposes of Rule 141 and Business and Professions Code §25658, subdivision (a), to treat both Singh and Pooni as sellers for purposes of identification.

Appellants' brief (App.Br., page 7) asserts that "it was Normal Singh who engaged in the sales transaction. Pooni merely placed the sold item in the paper bag." The image this suggests, such as a supermarket transaction, where the cashier rings the sale and collects the money, and a bagger at the end of the counter packages the items which were purchased, does not fairly reflect the record, especially from the point of view of the minor decoy.

The decoy testified, and his testimony was not refuted, that both Singh and Pooni were behind the counter. One of the two, identified by Officer Calhoun as

Normal Singh, asked Prentice for his identification, and was given Prentice's driver's license, which showed that Prentice would be 21 in the year 2000. Singh then passed the license through a card reader and after several apparently unsuccessful attempts to generate a desired response,[3] gave the license to Pooni, who also passed the card through the reader several times, with essentially the same results [see RT 16-20], until a final pass which generated an "okay to purchase" response. Once this happened, Prentice was asked for the purchase price of the beer, produced a $10 bill, gave it to the clerk "working the register at first" - according to Calhoun's testimony, this would have been Singh [RT 10] - got his change, and left the store.

Rule 141 requires a decoy to make a face to face identification of "the alleged seller." When identifying both Singh and Pooni as the sellers, Prentice was doing exactly what the rule requires. Prentice, 18 years of age, could not reasonably be expected to make the fine legal distinction that only one of the two clerks could have been the seller. When he identified both men, he was doing all he possibly could have done to conform to the requirements of the rule.

For all practical purposes, there was only one seller - the two clerks as a team sold the beer to Prentice. They shared the transaction in all material ways - both checked Prentice's identification; Pooni ultimately instructed Singh to take Prentice's money; Singh accepted the money pursuant to Pooni's authorization; Pooni concluded the transaction by delivering the beer to Prentice. As noted in the preceding paragraph, when Prentice identified Singh and Pooni as the sellers, he effected the face to face

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[3] Prentice testified that he could read the display on the device, and that on each of the passes by Singh except the last, it displayed a message that the sale should be declined. On the last pass, according to Prentice, the response was that the machine would not accept the card. It was at this point that the license was handed to Pooni.

identification required by Rule 141(b)(5).

Appellants also contend that the Department should have alleged the dual seller effort in the accusation. We fail to see how appellants have suffered any prejudice, especially since the accusation correctly identified Singh as a seller. The fact that the evidence showed the existence of another person who, in the somewhat unique circumstances of this case, could also be considered a seller, does not invalidate the accusation.

II

Appellants contend that the ALJ improperly excluded the expert testimony of Dr. Edward Ritvo, a professor of psychiatry at UCLA. According to appellants, the expert testimony would have assisted the trier of fact on the issue whether the decoy presented the appearance which could reasonably be expected of a person under the age of 21 years.

Evidence Code §352 provides:

> "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."

Under §801 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 "sufficiently 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. 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.

We note, for what it is worth, that appellants have not challenged the ALJ's conclusion that the evidence did not support a finding that the decoy did not present the appearance which could generally be expected of a person under the age of 21. They have not claimed the expert testimony would have led the AlLJ to conclude otherwise than he did.

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.[4] 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.

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

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[5] 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

[5] 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.)

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[6] also constituted error, citing

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

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).)

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 compliance with appellants' discovery request, as limited herein, and for such other and further proceedings as are appropriate and necessary.[7]

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

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[7] 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.