ISSUED JULY 11, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

THE SOUTHLAND CORPORATION, MARGARITA GONZALEZ, and RODOLFO GONZALEZ dba 7-Eleven 16800 Lakewood Boulevard Bellflower, CA 90706, Appellants/Licensees,	)	AB-7392
	)	File: 20-215016
	)	Reg: 98043896
	)	Administrative Law Judge at the Dept. Hearing: John P. McCarthy
v.	)	
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	Date and Place of the Appeals Board Hearing: May 4, 2000 Los Angeles, CA

The Southland Corporation, Margarita Gonzalez, and Rodolfo Gonzalez, doing business as 7-Eleven (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended appellants' off-sale beer and wine license for 15 days, for permitting their clerk to sell an alcoholic beverage to a person under the age of 21 years, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, and

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

Business and Professions Code §24200, subdivisions (a) and (b), arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants The Southland Corporation, Margarita Gonzalez, and Rodolfo Gonzalez, appearing through counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John Lewis.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging that a sale of an alcoholic beverage was made to a person under the age of 21 years, such minor acting as a decoy under the supervision of the Los Angeles County Sheriff's Department.

An administrative hearing was held on December 15, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) the apparent age of the minor was not properly analyzed, (2) there was no face to face identification of the seller, (3) expert testimony as to the apparent age of the minor was improperly disallowed, (4) full and fair discovery was not provided, and (5) the discovery proceeding was not recorded. Issues 4 and 5 will be considered together.

DISCUSSION

I

Appellants contend that the apparent age of the minor was not properly analyzed, arguing that the wrong standard was used.

Rule 141(b)(2)[2] states in pertinent part:

> "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense."

The Administrative Law Judge (ALJ) stated in Finding III-A, after describing the decoy's clothing, hair style, height, and weight:

> "Stepp [the decoy] appeared at the hearing and her appearance there, that is, her physical appearance and her demeanor, was that of a person her age, 20 years at the time of the hearing, such that a reasonably prudent licensee would request her age or identification before selling her an alcoholic beverage. (See also Exhibit 5(2).)"[3]

The Board has examined and found adequate similar language used in AB-7330:

> "Although most of this finding describes the decoy's physical characteristics, the ALJ clearly considered more than that in his evaluation of the decoy's apparent age. He specifically refers to the decoy's ' appearance ... that is, his physical appearance and his demeanor ....' The ALJ described the decoy as a 'youthful person,' which is not a particularly helpful description, but then continues, saying that the decoy's appearance was that of a person 'well under the age of 21 years ....' He goes on to say that the decoy's appearance was 'such that a reasonably prudent licensee would request his age or identification before selling him an alcoholic beverage.'"

In the present case, the ALJ evaluated the decoy from observations at the

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[2]California Code of Regulations, title 4, §141(b)(2).

[3]Exhibit 5(2), is a photo of the decoy at the time of the purchase [RT 16].

hearing, some six to seven months after the violation date. The problem with the ALJ's language is that the wording of the finding speaks only to the appearance of the decoy at the time of the hearing, but the Rule calls for an appearance of under 21 years at the time of the violation.

While it could reasonably be assumed the decoy did not look over 21 at the violation and under 21 at the hearing, that assumption is not necessarily true.

We determine that the problem is cured by a reference by the ALJ to Exhibit 4 which is a photo of the decoy taken at the time of the violation – the decoy looks very young in the photo. The viewing of the decoy at the time of the hearing with the comparison of the photo, makes a sufficiently strong argument that the Rule was followed.

II

Appellants contend that there was not an adequate face to face identification of the seller as demanded by the Rule,[4] arguing that contrary to the Rule, the Deputy who was with the decoy at the time of the identification of the seller was not the deputy "directing" the decoy.

The Rule states:

> "Following any completed sale ... the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages to make a fact to face identification of the alleged seller of the alcoholic beverages."

The record shows that the decoy identified the clerk while the clerk was

[4]California Code of Regulations, title 4, §141(b)(5).

across the counter from the decoy [RT 14]. We conclude that the record adequately shows conformity to the Rule.

The argument by appellant that the deputy who was with the decoy was not the one "directing" the decoy as called for by the Rule, is a "play on words" and is rejected. The following dialogue between deputy sheriff Conner and counsel for appellant is as follows:

> "Q [Appellant's Counsel] Was one of the two, Sergeant Cain or Whisner, directing the decoy in this operation?
>
> "A [Deputy Conner] I'm sorry?
>
> "Q Did one of your supervisors, I don't know if it was Sergeant Cain or Sergeant Whisner, but were one or two of them directing the decoy operation?
>
> "A I'm not sure if I understand your question.
>
> "Q Right. Was your sergeant also your decoy supervisor?
>
> "A I don't know that he would be their supervisor, no. I don't understand your question.
>
> "Q I want to know who's directing the decoy. Who's giving guidance, instructions?
>
> "A It was – there was a briefing prior to the operation commencing, which I was not present. I started a little later, so the briefing was between both ABC and the sheriff department. So who specifically was supervising or directing Ms. Stepp [the decoy], I could not tell you their names.
>
> "Q But it was somebody other than you?
>
> "A Correct." [RT 42.][5]

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[5]Webster's Third New International Dictionary, 1986, page 640, states in part as to a definition of the word "direct": "set straight, guide ... to cause to turn,

The record shows that deputy Conner entered the premises, with the decoy going in first [RT 12, 31]; the reentry into the premises after the sale was with the decoy and deputy Conner and other deputies [RT 14, 33]; deputy Conner observed the sale while the deputy was in the premises [RT 31, 44]; the deputy retrieved the "buy" money [RT 34]; and the deputy drove the decoy to the premises with no one in the auto other than the deputy and the decoy [RT 40].

We conclude that deputy Conner "directed" the decoy in her duties sufficiently to come within the Rule.

III

Appellants contend that expert testimony as to the apparent age of the minor was improperly disallowed.

Appellants presented as a witness, Dr. Ritvo, a psychiatrist, who would testify that the decoy did not present the appearance of someone generally expected to be under the age of 21 years. The ALJ rejected the testimony [RT 7-10].

This issue has been dealt with by the Board in numerous cases, resulting in consistent holdings that Dr. Ritvo's testimony was not improperly excluded. (See, e.g., The Southland Corporation & Bhatia, AB-7325; Kim, AB-7330.) We so hold now.

IV

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move, or point undeviatingly or to follow straight course with a particular destination or object in view ...."

Appellants contend that full and fair discovery was not provided. Appellants claim prejudice 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 the following the sale of 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 (2000) AB-7031a; The Southland Corporation & Mouannes (2000) AB-7077a; Circle K Stores, Inc. (2000) AB-7091a; Prestige Stations, Inc. (2000) AB-7248; and The Southland Corporation & Pooni (2000) AB-7264.)

In these cases, and many others, the Board reviewed the discovery provision 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 appellants were limited to the discovery provided in Government

code §11506.6, but that "witnesses" in subdivision (a) of that section was not restricted to percipient witnesses. The Board concluded:

> "... 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 has also held in the cases mentioned above that a court reporter was not required for the hearing on the discovery motion. The Board now so rules.

ORDER

The decision of the Department is affirmed in all particulars, except that the issue of discovery be reversed, and remanded for disposition in accordance with the views expressed herein.[6]

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

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[6]This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.