BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-8508
File: 20-214177 Reg: 05059846

7-ELEVEN, INC., TOM LERDSUWANRUT, and SUPANICH LERDSUWANRUT
dba 7-Eleven Store No. 2174-17840
8725 Orangethorpe Avenue, Buena Park, CA 90621,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 7, 2006
Los Angeles, CA

Redeliberation: January 11, 2007; February 1, 2007

ISSUED APRIL 30, 2007

7-Eleven, Inc., Tom Lerdsuwanrut, and Supanich Lerdsuwanrut, doing business as 7-Eleven Store No. 2174-17840 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk, Mohammed Azeem, having sold a six-pack of Budweiser beer to Agustin Pimentel, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Tom Lerdsuwanrut, and Supanich Lerdsuwanrut, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated January 12, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. The Department instituted an accusation against appellants charging an unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on October 14, 2005, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Brandon Young, a Buena Park police officer, and Agustin Pimentel, the minor decoy. The evidence established that the minor was not asked his age or for identification. After leaving the store with his purchase, the decoy returned and identified Azeem as the person who sold him the beer.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellants had failed to establish an affirmative defense under Department Rule 141.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the denial of appellants' request for discovery prevented them from preparing a defense; and (2) the decoy did not display the appearance required by Rule 141(b)(2). In addition, appellants have filed a motion to augment the administrative record with any form 104 (Report of Hearing) included in the Department's file, and have filed a supplemental brief regarding the recent decision of the California Supreme Court in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [50 Cal.Reporter 3d. 585] (*Quintanar*).

DISCUSSION

I

Appellants, in an incorporation of arguments presented in a case presenting the same issue,[2] assert that the denial of their pre-hearing Motion to Compel discovery was improper and denied them the opportunity to defend this action. Their motion was brought in response to the Department's failure to comply with those parts of their discovery request that sought "any findings by the Administrative Law Judge or the Department of ABC that the decoy does not appear to be a person reasonable [*sic*] expected to be under 21 years of age" and all decisions certified by the Department over a four-year period "where there is therein a finding or an effective determination that the decoy at issue therein did not display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented the seller of alcoholic beverages at the time of the alleged offense."

ALJ Gruen, who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellants failed to show that the requested items were relevant or would lead to admissible evidence. Appellants argue that the items requested were expressly included as discoverable matters in the Administrative Procedure Act (Gov. Code, § 11340 et seq.) and the ALJ used erroneous standards in denying the motion.

"[T]he exclusive right to and method of discovery as to any proceeding governed

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[2] Appellants state in their brief that "the arguments in support of this request and the errors committed by the Administrative Law Judge are contained in the case of *7-Eleven, Inc. & Jatinder & Satish Dharni* ... (AB-8497)." That appeal was heard in November of this year and taken under submission. We have once again reviewed those now familiar arguments, and reach the same result as we have in numerous other cases where such arguments were raised.

by [the APA]" is provided in section 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 section 11507.6. Appellants assert that the items requested are discoverable under the provisions of subdivision (b), (d), and (e) of section 11507.6. Those paragraphs provide that a party "is entitled to . . . inspect and make copies of ..."

> ¶...¶
> (b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;
> ¶...¶
> (c) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;
> (e) Any other writing or thing which is relevant and which would be admissible in evidence; ...

Appellants argue they are entitled to the materials sought because previous findings of the Department are "statements" made by a party "pertaining to the subject matter of the proceeding," findings made by an ALJ are relevant "writings" that would be admissible in evidence, and the photographs are "writings" that appellants would offer into evidence so the ALJ could compare them to the decoy present at the hearing.

Appellants argue the material requested would help them prepare a defense under rule 141(b)(2) by knowing what criteria have been considered by ALJ's and the Department when deciding that a decoy's appearance violated the rule. They would then be able, they assert, to compare the appearance of the decoy who purchased alcohol at their premises with the appearance of other decoys who were found not to comply with rule 141(b)(2).

It is conceivable that each decoy who was found not to display the appearance

required by the rule had some particular attribute, or combination of attributes, that warranted his or her disqualification. We have considerable doubt, however, that any such attributes, which an ALJ would only be able to examine from a photograph or written description, would be of any assistance in assessing the appearance of a different decoy who is present at the administrative hearing.[3]

The most important attribute at the time of the sale is probably the decoy's facial countenance, since that is the feature that confronts the clerk more than any other. Yet, in every case it is an ALJ's assessment of a decoy's overall appearance that matters, not simply a focus on some narrow aspect of that appearance.

We know from our own experience that appellants' attorneys represent well over half of all appeals this Board hears. We must assume, therefore, that the vast bulk of the information they seek is already in the possession of their attorneys. This, coupled with the questionable assistance this information could provide to an ALJ in assessing the appearance of a decoy present at the hearing, persuades us that ALJ Gruen did not abuse his discretion in denying appellants' motion.

We are unwilling to agree with appellants' contention that the language of Government Code section 11507.6 is broad enough to reach findings and decisions of the Department in past cases. The terms "statements" and "writings" as used in that section cannot reasonably be interpreted to reach any and every finding and decision of the Department. A more reasonable understanding of the terms is that they refer to statements or writings made by a party with respect to the particular subject matter of the proceeding in which the discovery is sought. To interpret the terms to include any

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[3] In all cases charging sale-to-minor violations the Department must produce the minor involved unless the minor is deceased or too ill to be present, or the minor's presence is waived by the respondent. (Bus. & Prof. Code, § 25666.)

finding or decision by the Department in previous cases over a period of years which contained an issue similar to the one in the case being litigated would countenance the worst kind of fishing expedition and would unnecessarily and unduly complicate and protract any proceeding.

Appellants have cited no authority for their contention, and we are unaware of any such authority. Appellants would have this Board afford them the broad discovery that is available in civil cases, well beyond what is authorized by section 11507.6. We are not permitted to do so.

Appellants also contend that the APA allows denial of a motion to compel discovery only in the cases of privileged communications or when the respondent party lacks possession, custody, or control over the material. Therefore, they argue, the denial of the motion because the discovery request was burdensome, would require an undue consumption of time, was not relevant, and would not lead to admissible evidence, was clearly in contravention of the APA discovery provisions.

Appellants' contention is based on the false premise stated in their brief (italicized below):

> In the present case, the ALJ denied Appellant's [*sic*] request for discovery on grounds not contemplated by Gov. Code §§ 11507.6 and 11507.7. Those two Government Code Sections provide the "exclusive right to and method of discovery," Govt. Code § 11507.5, *and similarly state the objections upon which the Department may argue and an ALJ may rely upon in deciding a Motion to Compel. See* Govt. Code §§11507.6 & 11507.7.

This premise is false because it assumes, without any authority, that the two statutes state the sole bases on which a motion to compel may be denied. No such restriction appears in the statutes. The reasons given by the ALJ for denying the motion were well within his authority. Those reasons also provided a reasonable basis

for the outright denial of the motion instead of simply limiting the scope of the discovery.

II

In what can only be described as a "do it yourself" argument, appellants cite, without specificity, the pages of the transcript comprising the entirety of the direct and cross-examination of the decoy, and assert that such testimony together with photographs of the decoy establishes "as a matter of law that the decoy violated Rule 141 (b)." Appellants argue that the Board should itself view the decoy and make such a determination.

The ALJ, who observed the decoy as he testified, concluded that the decoy displayed the appearance required by the rule, i.e., that he displayed 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. He wrote, in his proposed decision (Findings of Fact II-C ¶1-5):

> C. The overall appearance of the decoy including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty-one. The decoy's appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was about ten pounds heavier at the time of the hearing. The decoy also had a mustache and some facial hair on his chin resembling a "goatee" at the time of the hearing which he did not have on the day of the sale.
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> 1. On the day of the sale, the decoy was five feet eight inches in height, he weighed one hundred sixty pounds, his hair was short and he was clean-shaven.
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> 2. The decoy testified that he had participated in one prior decoy operation, that he had been an Explorer with the Buena Park Police Department for about four months prior to the sale, that he visited about ten locations on November 20, 2004 and that he was able to purchase an alcoholic beverage at four locations.
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> 3. The photographs depicted in Exhibits 2-A through 2-D were taken on

> the day of the sale and they accurately depict how the decoy was dressed and how he looked on that day. Although the decoy had a mustache and a "goatee" at the time of the hearing, he still had the appearance of a person under the age of twenty-one.
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> 4. The decoy provided straight forward answers and he appeared a little nervous when testifying at the hearing.
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> 5. After considering the photographs depicted in Exhibits 2-A through 2-D, the overall appearance of the decoy including his demeanor, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

We have reviewed the testimony of the decoy, and Exhibits 2-A through 2-D, and have found nothing that could be said to be error as a matter of law.

Appellants' counsel urge the Board not to be a rubber stamp for the Department, citing one of Bob Dylan's classic lines:"You don't need a weatherman to know which way the wind blows." They argue that Business and Professions Code sections 23084 and 25666, read together, empower the Board to order the Department to produce the decoy in the underlying matter.

Section 23084 spells out the questions to be considered by the Board, one of which is whether the findings are supported by substantial evidence in light of the whole record. Section 25666, requires the Department to produce the decoy at the administrative hearing. Appellants assert that the decoy is, therefore, part of the record and must be produced before the Board so that it can consider the entire record.

We find appellants' argument entertaining, but unsound. The logic of the argument would require the decoy to appear before the Appeals Board looking exactly as he did before the ALJ more than a year ago, or as he did before the clerk more than two years ago. Worse, it would require the Board to act as a finder of fact, and reweigh evidence - the appearance of the decoy - considered by the ALJ. We reject it as

without merit.

III

On November 13, 2006, the California Supreme Court held that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. (*Quintanar*, *supra*, 40 Cal.4th 1.) In *Quintanar*, the Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access to the report of hearing, establishing, the court held, "that the reports of hearing were provided to the agency's decision maker." *(Id.* at pp. 15-16.)

In the present case, appellant contends a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar* has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the

manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.[4]

ORDER

The decision of the Department is affirmed as to all issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

[5] This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.