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

AB-8512
File: 20-403507 Reg: 05059895

KAYO OIL COMPANY, dba Circle K 76 # 2705430
828 Willow Avenue, Hercules, CA 94547,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: October 5, 2006
San Francisco, CA
Redeliberation: January 11, 2007; February 1, 2007

ISSUED MARCH 20, 2007

Kayo Oil Company, doing business as Circle K 76 # 2705430 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for appellant's clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Kayo Oil Company, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated January 19, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 15, 2003. On June 13, 2005, the Department filed an accusation against appellant charging that, on April 28, 2005, appellant's clerk, Joselito Francisco (the clerk), sold an alcoholic beverage to 17-year-old Jessica Guzman. Although not noted in the accusation, Guzman was working as a minor decoy for a law enforcement agency at the time.

At the administrative hearing held on November 1, 2005, documentary evidence was received, and testimony concerning the sale was presented by Guzman (the decoy). She testified that she entered the store, picked out a six-pack of Corona beer, and took it to the counter. The clerk did not ask her for her age or identification before selling the beer to her. Guzman left the store with the beer, but then returned with an investigator and identified the clerk as the seller of the beer. The clerk was standing about three feet from her and looking at her as she identified him. The store manager testified about the store's policies and training regarding sales of alcoholic beverages.

The Department's decision determined that the violation charged was proved, and no defense was established. Appellant filed an appeal contending: (1) It was error to admit the decoy's affidavit and rely on it to determine compliance with rule 141(b)(5)[2]; (2) the decoy's appearance violated rule 141(b)(2); and (3) the penalty is excessive. Thereafter, appellant filed a supplemental letter 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 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*).

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[2]References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

DISCUSSION

I

Appellant contends that the affidavit prepared by the decoy after the sale was made to her should not have been admitted into evidence because it is a hearsay statement and no hearsay exception applies to it. The ALJ must have relied on this improperly admitted document, appellant argues, in order to find that a face-to-face identification was properly made, since the finding refers to the decoy pointing at the clerk and the only evidence that the decoy pointed at the clerk is found in the affidavit. Appellant also contends that the Department did not comply with the notice requirements of Government Code section 11514 before offering the affidavit.

Appellant is wrong in contending that the affidavit was improperly admitted. Although an affidavit is hearsay, hearsay is admissible in administrative hearings. The hearsay evidence by itself, is not sufficient to support a finding, but may be used to supplement or explain other evidence. (Gov. Code, § 11513, subd. (d).) The ALJ clearly accepted it as such, saying: "It's hearsay, and it's received solely as hearsay, administrative hearsay." [RT 9.] No exception to the hearsay rule was required to allow the admission of the affidavit.

As for Government Code section 11514, that section is applicable to affidavits submitted in lieu of the oral testimony of a witness. The section safeguards the right of a party to cross-examine witnesses. In this case, the decoy testified and appellant had the opportunity to cross-examine her, so there was no prejudice to appellant. Section 11514 did not make the affidavit inadmissible.

Appellant asserts that the ALJ must have relied, improperly, on the affidavit for the finding that Guzman identified the clerk by pointing at him, because that fact is not

found in any of the decoy's testimony. While that is true, exhibit 2 is a copy of a photograph depicting the decoy pointing at the clerk. The exhibit, entitled "FACE to FACE IDENTIFICATION," was admitted without objection. The ALJ did not have to rely on the affidavit for his finding.

II

Appellant contends that the decoy's appearance violated rule 141(b)(2), which requires that the decoy's appearance be that which could generally be expected of a person under the age of 21. The decoy's demeanor would have been confident and mature, appellant asserts, because of her prior experience as a decoy.

The ALJ dismissed this argument in Finding of Fact 4, saying that "Respondent's contention is completely devoid of merit." This Board has said it will defer to the ALJ's determination of the decoy's apparent age in the absence of evidence of an abuse of discretion. No abuse was shown here.

III

Appellant contends the 10-day suspension imposed is excessive in light of the mitigation evidence presented.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department

acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

The Department recommended a 15-day suspension at the hearing. The ALJ proposed a 10-day suspension in his proposed decision, obviously taking into consideration the evidence appellant presented in mitigation. There was no abuse of discretion in imposing the penalty.

IV

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.[3]

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.[4]

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

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[3]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.

[4]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.