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

AB-8513
File: 21-367265 Reg: 05060093

LE NGUYET TO and KENNY WANG, dba Price's Liquor
7371 Florence Avenue, Downey, CA 90240,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: August 3, 2006
Los Angeles, CA
Redeliberation: January 11, 2007; February 1, 2007

ISSUED MARCH 15, 2007

Le Nguyet To and Kenny Wang, doing business as Price's Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license, with revocation stayed on the conditions that appellants operate discipline free for two years and serve a 40-day suspension, for their store manager, Tom Oo, selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Le Nguyet To and Kenny Wang, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its

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

counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on August 21, 2000. On June 30, 2005, the Department filed an accusation against appellants charging that, on February 24, 2005, appellants' agent or employee sold an alcoholic beverage (beer) to 18-year-old Jason Estrada. Estrada was working as a minor decoy for the Downey Police Department at the time.

At the administrative hearing held on October 26, 2005, documentary evidence was received and testimony concerning the violations charged was presented by Estrada (the decoy); by Downey police officer Scott Loughner; and by the store manager, Oo.

On February 24, 2005, the decoy entered the store while two officers waited outside. He went to the cooler, picked up a six-pack of Bud Light beer in bottles, and took it to the counter. Oo was at the cash register and the decoy said he wanted to buy the beer. Oo rang up the beer on the register, took the $10 bill the decoy tendered, and gave the decoy some change. Oo did not ask the decoy for his age or identification. The decoy walked out of the store with the beer in a black plastic bag, re-entered with one of the officers, and identified Oo as the seller of the beer.

Oo did not deny selling the beer and admitted that he had not asked the decoy for his age or identification. He stated, however, that he believed the decoy to be between 27 and 35 years of age, and for that reason did not ask for identification.

All three witnesses testified that, at the time of the decoy operation, there were signs in the store that stated: "If you don't look 40 or older, show your ID or no beer." The decoy testified that before purchasing the beer, he saw one such sign above the

doors to the beer cooler and another above the cashier counter.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as alleged in the accusation, that the violation occurred within 36 months of a prior sale-to-minor violation, and that appellants did not establish a defense to the charge under rule 141.[2] Appellants filed an appeal contending the decoy violated rules 141(b)(3) and 141(b)(4) by failing to provide his identification and a truthful answer to a question concerning age, and the Department violated their right to discovery.[3] Appellants also filed a motion to augment the administrative record with any Form 104 (Report of Hearing) included in the Department's file, and 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*).

DISCUSSION

I

Rule 141(b)(3) requires a decoy to present his or her own identification upon request. Appellants contend that a request may be either verbal or non-verbal, and that the signs posted in appellants' premises constituted such a request. The signs stated: "If you don't look 40 or older, show your ID or no beer." Appellants argue that the decoy saw the signs and believed that he did not appear to be 40 years old; therefore, they conclude, he was required to "automatically" show his identification to the clerk,

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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.

[3] Appellants have filed a motion to augment the record to include documents which may have been transmitted to the Department's decision maker, but have not raised any issue in their brief concerning the possibility that there were such documents. In a separate memorandum they set forth due process arguments that the Board has previously considered and rejected. We reject them here as well.

and his failure to do so was a violation of rule 141(b)(3).

Rule 141(b)(4) states that "A decoy shall answer truthfully any question about his or her age." Appellants contend this rule requires the decoy to answer the question and to answer it truthfully. They interpret the decoy's failure to tell the clerk he was not old enough to legally purchase alcohol as a failure to answer the implicit question about age on the signs and, thus, a violation of rule 141(b)(4).

Appellants made this argument during the hearing and the ALJ rejected it in Conclusion of Law 6:

> Respondent[s] argued there was failure to comply with the requirements of Rule 141(b)(3) and/or 141(b)(4) because decoy Estrada took no action in response to the signs Respondents had posted all over their store. Respondents contend that those signs are their request for him to both produce identification and to answer about his age. Since he did not, he violated the decoy rules. Respondents are due credit for their ingenuity, but their argument is rejected. The court is unwilling to conclude that the rules governing decoy operations require a decoy to respond to generalized non-verbal inquiries.

We agree with the ALJ's conclusion that the signs posted in appellants' store cannot be considered a request for identification under the rule. This sign was simply a general statement of the store's purported policy, not a request or inquiry directed specifically to the decoy.

Appellants contend that the Department's decision says that, as a matter of law, the request must be verbal, which they point out, is not required by the rule. They are correct that the rule does not require a request to be verbal, but they are in error about the import of the Department's decision. The decision merely says that it is untenable to read the rule as requiring a response to a "generalized non-verbal inquir[y]." The plain meaning of the rule's language indicates that the request must be specific to the

decoy.

We heartily agree with the statement of counsel for the Department during closing argument: "Just because you put up a sign does not necessarily insulate you from the conduct that goes on at your store." [RT 76.] A general statement of store policy posted in the premises, even when as conspicuous as it was in this case, does not obligate a decoy to show his or her identification or state his or her age without some specific request to do so.

The fact is, no request was made for the decoy's identification, nor was any inquiry made by the clerk regarding the decoy's age. Neither rule 141(b)(3) nor rule 141(b)(4) was violated.

II

Appellants assert in their brief 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 are 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 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 subdivisions (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;
> [¶] . . .[¶]
> (d) 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 by 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 as 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.[4]

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

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[4] 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.)

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 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 it 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, denying the motion because the 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.

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, appellants contend 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.[5]

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.[6]

FRED ARMENDARIZ, CHAIRMAN

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[5]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.

[6]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.

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