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

AB-8539
File: 20-366908 Reg: 05059471

7-ELEVEN, INC., KALA KULASINGAM, and MUTTAIYA KULASINGAM,
dba 7-Eleven # 2171-25970
1854 East Palmdale Boulevard, Palmdale, CA 93550,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: February 1, 2007
Los Angeles, CA

ISSUED APRIL 26, 2007

7-Eleven, Inc., Kala Kulasingam, and Muttaiya Kulasingam, doing business as 7-Eleven # 2171-25970 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 30 days for their failure to respond to a demand to produce records, a violation of Business and Professions Code[2] sections 25616 and 25753.

Appearances on appeal include appellants 7-Eleven, Inc., Kala Kulasingam, and Muttaiya Kulasingam, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated March 9, 2006, is set forth in the appendix.

[2]Unless otherwise indicated, all statutory references are to the Business and Professions Code.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 25, 2000. On April 26, 2005, the Department filed an accusation against appellants charging that their clerk sold an alcoholic beverage to 19-year-old Kristen Gerardi on December 18, 2004. Gerardi was working as a minor decoy for the Department at the time.

At the administrative hearing held on October 27, 2005, documentary evidence was received and testimony concerning the sale was presented by Gerardi (the decoy), by Department investigator Tom Pelligrini, and by the clerk. Following the clerk's testimony, the Department was allowed to amend the accusation to add a second count charging that the sale had taken place before the clerk had signed the acknowledgment required by section 25658.4. The hearing was then continued to allow the licensees an opportunity to present evidence on the new count 2.

On November 17, 2005, the Department served an amendment to the accusation that slightly modified the original wording of count 2 and added an additional count 3. Count 3 charged appellants with failure to permit an inspection of their books or records, in violation of sections 25616 and 25753.

The continued hearing was held on December 20, 2005. Department investigator Pelligrini testified that he sent appellants, by certified mail, a Notice to Produce Records on December 22, 2004, just a few days after the violation originally charged in the accusation. The Notice required appellants to produce their "electronic journal" from December 18, 2004, showing the clerk's sale to the decoy, and any video recording from that day. Pelligrini testified that he had received no response from appellants.

During the December 20 hearing, appellants produced and had entered into evidence a section 25658.4 acknowledgment that had been signed by the clerk prior to the sale to the decoy on December 18, 2004.

The Department's decision dismissed the sale-to-minor count (count 1), finding that, although the sale occurred, the decoy's appearance did not comply with rule 141(b)(2), thus providing a complete defense to the charge. Count 2, charging no signed clerk's acknowledgment existing at the time of the sale, was also dismissed, appellants having provided evidence that a signed acknowledgment did exist at the time. However, the decision found that count 3, charging the failure to produce records, was established, and imposed the 30-day suspension recommended by the Department at the hearing.

Appellants filed an appeal contending: (1) The matter must be remanded because appellant has discovered relevant evidence that could not, with reasonable diligence, have been produced at the hearing; (2) the penalty is excessive; (3) the Department violated appellants' right to discovery; and (4) the Department violated the Administrative Procedure Act (APA) by an ex parte communication with the Department's decision maker. Appellants also filed a motion asking the Board to augment the record with any Report of Hearing in the Department's file for this case.

DISCUSSION

I

Appellants contend that this matter must be remanded for additional hearing because they have discovered "compelling rebuttal evidence . . . tending to establish that" they complied with the Department's Notice to Produce Records and should not have been found to have violated sections 25616 and 25753. The remand is proper, they assert, under section 23085, which states:

> In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department, it may enter an order remanding the matter to the department for reconsideration in the light of such evidence.

Appellants state they now have a certified mail receipt showing that they sent correspondence to the Department on or about December 30, 2004, in response to the Department's Notice to Produce. They could not produce the receipt at the hearing, they aver, because they did not discover its existence until after the Department issued its decision.

Appellants now contend co-licensee Muttaiya Kulasingam spoke on the telephone with investigator Pelligrini around December 28, 2004, and that Pelligrini asked Kulasingam to mail the material to him rather than bringing it in person. Kulasingam instructed a trusted employee to prepare and send the material, and thus they "dutifully and correctly believed" the documents had been provided to the investigator.

It was not until they received the Department's decision, they allege, that they realized the Department believed they had failed to comply with the request. They then questioned the employee responsible for sending the material to the Department. She said she had sent the material and produced the receipt as proof.

Appellants insist they have "adequately demonstrated" that the proof of their compliance with the Department's Notice to Produce "was unavailable at the time of the hearing, and justice and due process rights demand that such information be considered before imposition of a penalty." (App. Br. at 23.)

At the December 20, 2005, hearing, appellants appeared to know that the Department had not received the requested records. They did not assert that the

amended accusation was so vague they did not know what action or inaction they needed to defend. Nor did they deny, or even attempt to excuse, their failure to comply with the investigator's request. Their counsel objected to admitting copies of the Department's notice and the certified mail receipts only because they were not originals. Their closing argument regarding count 3 was that it should be barred because the Department waited so long to include it in the accusation.

Although count 3 was not added to the accusation until November 17, 2005, appellants had until December 20 to prepare their case. If, in fact, Kulasingam spoke with the investigator and directed someone to send the material, it seems that reasonable diligence would have prompted appellants to find out before the hearing if the employee had sent the material as directed. Even if we were to believe appellants' assertion that, until the decision was issued, they did not realize the Department had not received the material, we could not agree that they have shown the requisite due diligence.

II

Appellants contend that their "long-term, discipline-free history" merits mitigation of the penalty.

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].)

Appellants are correct that the Department's penalty guidelines (rule 144 [4 Cal. Code Regs., § 144]), include as a possible mitigating factor the "[l]ength of licensure at subject premises without prior discipline or problems." What they ignore is that the Department has been granted discretion in ordering penalties, and the existence of some circumstance on the list of possible mitigating factors does not mean that the Department *must* reduce the penalty.

The Department penalty guidelines show the "standard" penalty for violation of section 25616 to be a suspension for 30 days *and indefinitely thereafter until the records requested are produced*. The penalty imposed was a 30-day suspension without the subsequent indefinite suspension. The Department recommended this at the hearing, apparently because the records requested would have been disposed of in the regular course of business within a month or two after the violation.

While this penalty may seem to some to be severe, reasonable minds can differ on this, and we cannot say that it is clearly unreasonable. Appellants have failed to show the Department abused its discretion by imposing this penalty.

III

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.”

Administrative law judge (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 APA (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.[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

[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.)

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 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. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*).) 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.[4] In light of our decision on this issue, the motion to augment the record is unnecessary and is denied.

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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.

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

[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.