

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

AB-8544

File: 21-176828 Reg: 05060544

MITSUWA CORPORATION, dba Mitsuwa Marketplace
333 South Alameda Street, Suite 100, Los Angeles, CA 90013,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 7, 2006

Los Angeles, CA

Redeliberation: January 11, 2007; February 1, 2007

ISSUED APRIL 5, 2007

Mitsuwa Corporation, doing business as Mitsuwa Marketplace (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all of which were stayed on the condition that appellant operate without a violation for one year, 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 Mitsuwa Corporation, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated March 16, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 30, 1985. On August 25, 2005, the Department filed an accusation against appellant charging that, on June 18, 2005, appellant's clerk sold an alcoholic beverage to 19-year-old Julie Hernandez. Although not noted in the accusation, Hernandez was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on January 10, 2006, documentary evidence was received and testimony concerning the sale was presented by Hernandez (the decoy) and by Los Angeles Police officer Andre Clansy.

The Department's decision determined that the violation charged was proved, and no defense was established. Appellant filed a notice of appeal and the Department filed a motion asking the Board to dismiss the appeal when appellant did not file its opening brief by the date specified in the Board's briefing schedule.² Appellant then filed its opening brief, contending that the decoy's appearance violated Department rule 141(b)(2)³ and that it was prevented from defending the action by the denial of its discovery request. Thereafter, appellant filed a motion to augment the administrative record with any Form 104 (Report of Hearing) included in the Department's file, along with 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 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*).

²While the Department and the Board were inconvenienced by appellant's late brief, we cannot say that the Department suffered prejudice sufficient to justify dismissal of appellant's appeal or refusal to consider the merits of the appeal. The Department's motion is, therefore, denied.

³References 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

Department rule 141(b)(2) requires that decoys used by law enforcement agencies display an appearance that could generally be expected of a person under the age of 21. Appellant contends that decoy Hernandez appeared to be "a beautiful, elegant, and sophisticated runway model," rather than a "typical teenager." "[R]easonable minds," appellant insists, "cannot differ as to this conclusion."

The Department's decision addresses the appearance of the decoy in Finding of Fact VI:

The decoy was 5'5" tall and weighted approximately 108 pounds on June 18, 2005. A photograph (Exhibit 3) of the decoy and a photograph (Exhibit 4) of the decoy with Ms. Tamaki, were taken that day. The decoy wore a T-shirt, blue jeans, earrings, and no make up. Her hair was pulled back. She felt "nervous" while purchasing the beer.

The decoy was 5'5" tall and weighed approximately 108 pounds on the day of the hearing. Her appearance was very similar to her appearance in the photographs. She testified in a soft voice and appeared a little nervous.

The decoy had participated in two decoy operations prior to June 18. There is no evidence that this experience affected her appearance when she purchased the beer at Respondent store.

The Administrative Law Judge observed the decoy's mannerism, maturity, poise, and demeanor while the decoy testified. Based on this observation, the photographs, and the testimony about the decoy's appearance, the Administrative Law Judge finds that the decoy displayed the appearance which can generally be expected of a person under twenty-one years old when she purchased the beer at Respondent store.

Appellant's emphasis on the word "reasonable" in its argument above implies that the ALJ and the Department were unreasonable in concluding that the decoy did not violate the rule, and that this Board would also be unreasonable were it to sustain the Department's decision. However, the mere fact that appellant disagrees with the

assessment of the decoy's appearance does not mean that the assessment is unreasonable. It requires more than appellant's assertion to convince this Board that the Department and the ALJ were acting unreasonably.

Having examined the photographs of the decoy in the record, as appellant urged in its brief, we can come to only one conclusion: it is appellant that is unreasonable in contending that "the photograph shows a young woman with a certain *je ne sais quoi* that suggest [sic] an appearance of 21 years of age or older."

II

Appellant asserts in its brief that the denial of its pre-hearing Motion to Compel discovery was improper and denied it the opportunity to defend this action. Its motion was brought in response to the Department's failure to comply with those parts of its 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 appellant failed to show that the requested items were relevant or would lead to admissible evidence. Appellant argues 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 appellant may have in an administrative proceeding before the Department must fall within the list of specific items found in Government Code section 11507.6. Appellant asserts 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; . . .

Appellant argues it is 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 appellant would offer as evidence so the ALJ could compare them to the decoy present at the hearing.

Appellant argues the material requested would help it 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. It would then be able, it asserts, to compare the appearance of the decoy who purchased alcohol at its 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 appellant's attorneys represent well over half of all appeals this Board hears. We must assume, therefore, that the vast bulk of the information appellant seeks is already in the possession of its 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 appellant's motion.

We are unwilling to agree with appellant's 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

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 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.

Appellant has cited no authority for its contention, and we are unaware of any such authority. Appellant 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.

Appellant also contends 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, it argues, 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.

Appellant's contention is based on the false premise stated in its brief (italicized below):

In the present case, the ALJ denied Appellant's 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, 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.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
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵The 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.

⁶This 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.