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

AB-8550
File: 20-388250 Reg: 05060860

7-ELEVEN, INC., and AAA MANAGEMENT CORPORATION
dba 7-Eleven Store #2111-13606
768 Midway Avenue, Escondido, CA 92027,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED MAY 7, 2007

7-Eleven, Inc., and AAA Management Corporation, doing business as 7-Eleven Store #2111-13606 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk, Trinidad Rivas (the clerk), having sold a six-pack of Coors Light beer to Gregory Black, a 17-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and AAA Management Corporation, 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, David B. Wainstein.

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[1]The decision of the Department, dated March 30, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 3, 2002. Thereafter, in September or October, 2005, the Department instituted an accusation against appellants charging the sale on August 12, 2005, of an alcoholic beverage to a minor.

An administrative hearing was held on January 19, 2006, at which time oral and documentary evidence was received. At that hearing, Gregory Black, the decoy, and Roy F. Huston, Jr., an Escondido police officer, testified in support of the charge of the accusation, and Gurinder Singh Walia, the corporate secretary of appellant AAA Management Corporation, testified on behalf of appellants. 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.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) their motion to compel discovery was improperly denied; (2) the administrative law judge (ALJ) failed to adequately evaluate the decoy's appearance under Rule 141(b)(2); and (3) an ex parte communication was submitted to the Department decision maker. Appellants have also moved to augment the record by the inclusion of any form 104 report of hearing or other document containing comments of ABC counsel available for review by the Department decision maker.

DISCUSSION

I

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 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 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;

> [¶]...[¶]
> (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 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.[2]

The most important attribute at the time of the sale is probably the decoy’s facial

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[2] 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.)

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 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

Appellants contend that the ALJ “failed to analyze” the basis for his conclusions that the decoy’s appearance complied with Rule 141(b)(2). They contend that the decision does not provide the analytical bridge between the evidence of the decoy’s appearance and the conclusions reached regarding it, citing the decision of the California Supreme Court in *Topanga Ass’n for a Scenic Community v. Los Angeles County* (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836].

There is no dispute with respect to the circumstances of the sale. The clerk asked the decoy for his identification, and was provided his California driver's license. The license (Exhibit 2) set forth the decoy's true date of birth, and stated in bold white letters on a red stripe "AGE 21 IN 2008," and in smaller letters on a blue background "PROVISIONAL UNTIL AGE 18 IN 2005."

Other than attempting to cast their challenge to the ALJ's decision as a procedural one that would give the Board a theoretical basis for disagreeing with him, appellant's contention is little different than that in the many other cases where their counsel has disagreed with the ALJ's assessment of the decoy's appearance.

In this case, according to appellants' argument, the decoy, 17 years of age when the decoy operation took place, would have appeared 21 years of age or older because of the level of maturity he gained from three to four weeks in a police Explorer program. Thus, goes the argument, the ALJ based his decision on the decoy's physical appearance, and failed to consider factors which might have made the decoy appear older than his true age.

The ALJ was not impressed with appellants' arguments, nor are we. His proposed decision (Findings of Fact 5, 10, and 11, and Conclusion of Law 5) makes that clear:

> FF 5. Black appeared at the hearing. He stood between 5 feet 5 inches and 5 feet 6 inches tall and weighed approximately 150 pounds. His hair was blond and was cut short all over in a burr cut. (*See* Exhibit 3.) He dressed at the hearing identically to the way he was dressed at Respondents' store, beige shorts, with a light blue T-shirt. (*Id*.) He wore no jewelry. On August 12, 2005, at Respondents' Licensed Premises, decoy Black looked substantially the same as he did at the hearing. Decoy Black wore spectacles both on August 12 at Respondents' store and at the hearing. (*Id*.) At the time of the hearing, decoy Black was 18 years of age.
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> FF 10. August 12, 2005, was the first date that decoy Black worked as a police

> decoy trying to buy alcoholic beverages. Respondents' store was the first store visited that night. All together, he visited 17 licensed businesses and was sold an alcoholic beverage at 3 of them, including Respondents' store. Of the 14 stores that did not sell an alcoholic beverage to decoy Black that night, all of them asked him to produce ID. Black came to be a decoy after a presentation made by an EPD Detective to the police cadet group which Black had joined just 2-3 weeks before August 12, 2005.
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> FF 11. Decoy Black is a male adult who appears his age, 18 years of age at the hearing. Based on his overall appearance, *i.e*., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of clerk Rivas at the Licensed Premises on August 12, 2005, Black displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Rivas. Black appeared his true age. He said that he was nervous when he visited Respondents' store on August 12, 2005, but that he was not nervous while testifying at the hearing. No nerves were obvious at the hearing.
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> CL 5. Respondents argued there was a failure to comply with section 141(b)(2) of Chapter 1, title 4, California Code of Regulations [Rule 141]. Therefore, Rule 141(c) applies and the Accusation should be dismissed. Respondents argued that decoy Black, despite being small in stature, wearing spectacles and having really short hair, "ha[d] an air of maturity to him" which, coupled with his couple weeks as a police cadet made him appear mature beyond his actual years. Therefore, he looked older than 21 years. The apparent age of decoy Black was treated in Findings of Fact, paragraphs 5 and 11. After carefully observing the decoy, the court finds no support for Respondents' contention that decoy Black appears older than the rule requires. The Rule 141(b)(2) defense asserted by Respondents is rejected.

In our view, the analytical bridge between the facts considered by the ALJ and the conclusions he reached from the evidence is apparent to anyone reading the decision, and completely consonant with the Supreme Court's decision in *Topanga*.

We find it beyond our capacity to imagine how two or three weeks in a police cadet program might have so affected this decoy as to age him, as appellants would have it, four or more years beyond his true age.

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.[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 Administrative Hearing Office. 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.