

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

AB-8556

File: 20-403421 Reg: 05060764

KAYO OIL COMPANY dba Circle K-76 #2705673
5552 West Century Boulevard, Los Angeles, CA 90045,
Appellant/Licensee

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 8, 2007

Kayo Oil Company, doing business as Circle K-76 #2705673 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its off-sale beer and wine license for 15 days, 5 days of which were conditionally stayed for one year, for its clerk, Sarah Aguilar, having sold a six-pack of Bud Light beer to Opal Garibay, an 18-year-old 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, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated April 13, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 20, 2003. On September 22, 2005, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on July 21, 2005.

An administrative hearing was held on February 3, 2006, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Opal Garibay, the decoy, and Robin Richards and Edward Ginter, Los Angeles police officers. Steve Tsu, a district manager for Conoco-Phillips, testified with respect to training and remedial measures taken by appellant.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellant had failed to establish an affirmative defense.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) The Department violated the APA's prohibition against ex parte communications; and (2) appellant's motion to compel discovery was improperly denied. Appellant has 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

Appellant asserts in its brief that its pre-hearing motion seeking discovery of 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 to the seller of alcoholic beverages at the time of the alleged offense,” was improperly denied. Appellant alleges that 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 spends much of its brief arguing that the provisions of the Civil Discovery Act (Code Civ. Proc., §§ 2016-2036) apply to administrative proceedings, a contention this Board rejected in numerous cases in 1999 and 2000 (see, e.g., *The Southland Corporation/Rogers* (2000) AB-7030a), all of which were argued by the same law firm representing the present appellant. Those decisions of the Appeals Board held:

“[T]he exclusive right to and method of discovery as to any proceeding governed by [the APA]” is provided in §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 §11507.6, not in the Civil Discovery Act. . . . [¶] In addition, §11507.7 requires that a motion to compel discovery pursuant to §11507.6 “shall state . . . the reason or reasons why the matter is discoverable *under that section*” [Emphasis added.] [¶] Therefore, we believe that appellants are limited in their discovery request to those items that they can show fall clearly within the provisions of §11507.6.

Appellant’s arguments in the present appeal, repeating, almost verbatim, the arguments made in 1999 and 2000, are no more persuasive today than they were six or seven years ago.

Appellant argues it is entitled to the materials sought because they will help it “prepare its defense by knowing . . . what factors have been considered by the Department in deciding how a decoy’s appearance violated the rule” (App. Br. at p.14) so that it can compare the appearance of the decoy who purchased alcohol at its

premises with the "characteristics, features and factors which have been shown in the past to be inconsistent with the general expectations . . . of the rule." (App. Br. at p. 13.) It asserts "it is more than reasonable" that decisions in which decoys were found not to comply with rule 141(b)(2) "could assist the ALJ in this case by comparison." (*Ibid.*) However, appellant does not explain how an ALJ is expected to make such a comparison.

It is conceivable that each decoy found not to display the appearance required by the rule had some particular indicium, or combination of indicia, of age that warranted his or her disqualification. We have considerable doubt, however, that any such indicia, 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 an administrative hearing.

The most important indicium 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, it is, in every case, an ALJ's overall assessment of a decoy's appearance that matters, not simply a focus on some narrow aspect of a decoy's appearance.

We know from our own experience that appellant's attorneys represent well over half of all appellants before this Board. We would think, therefore, that the vast bulk of the information appellant seeks is already in the possession of its attorneys, a fact of which the Board can take official notice. This, coupled with the questionable assistance the information sought could provide to an ALJ in assessing the appearance of a decoy present at the hearing,² persuades us that ALJ Gruen did not abuse his discretion in

² Unless a minor is deceased or too ill to be present, or unless the minor's presence is waived, he or she must be produced at the hearing by the Department in all

denying appellant's motion.

II

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

cases charging violations of Business and Professions Code sections 25658, 25663, and 25665. (See Bus. & Prof. Code §25666.)

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

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.

⁴This 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.