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

AB-8559
File: 20-376960 Reg: 05060750

CHEVRON STATIONS, INC. dba Chevron Station
791 North Milliken Avenue, Ontario, CA 91764,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED MAY 7, 2007

Chevron Stations, Inc., doing business as Chevron Station (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Ivonne Martinez, having sold a six-pack of Corona Light beer to Luana Landaeta, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated April 20, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 27, 2001. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on August 31, 2005.

An administrative hearing was held on February 9, 2006, at which time oral and documentary evidence was received. The evidence established that a six-pack of beer was sold to the decoy without any request for her age or identification having been made. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and rejected appellant's claim of an affirmative defense under Rule 141.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was no compliance with Rules 141(b)(2) and 141(a); (2) the Department violated the APA's prohibition of ex parte communications; and (3) appellant's motion to compel discovery was improperly denied. Appellants have also filed a motion to augment the administrative record with any form 104 (Report of Hearing) included in the Department's file, and have filed 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 [50 Cal.Rptr 3d. 585] (*Quintanar*).

DISCUSSION

I

Appellant contends that because the decoy was wearing a watch, she violated the Department's standard procedure of prohibiting a decoy from wearing jewelry, and, therefore, the decoy operation did not promote fairness.

Appellant relies on the testimony, which it describes out of context, of Department investigator Steven Geertman. Appellant asserts (App. Br., page 1) that Geertman "testified that the Department's *standard practice* is to not permit decoys to wear jewelry." (Emphasis in original.)

Geertman's testimony [RT 24-25], viewed in context, does not support appellant's position:

> Q. Okay. And for what reason did you request the decoy not wear any jewelry?
>
> A. I believe that is pretty much standard practice not to have *excessive jewelry*. [Emphasis supplied.]
>
> Q. And in your four and one-half years working as an investigator at ABC, do you know why that is standard practice?
>
> A. I don't know the reason for it.
>
> Q. Through your experience and training, do you have any belief as to why that is the reason.
>
> A. I do.
>
> Q. What would that be?
>
> A. My belief would be it could lead one to believe the decoy is older that he or she actually is.

Appellant misstates the investigator's opinion -- that it is the wearing of *excessive jewelry* that might affect a decoy's appearance -- and assumes that his testimony is sufficient to establish the existence of a policy that considers a wristwatch excessive jewelry.

The administrative law judge was not impressed with appellant's argument, nor are we. "The wrist watch she wore at the hearing had no bearing on her apparent age." (Finding of Fact 5.) We might speculate that a decoy who flashes a gold Rolex when at the counter might lead a clerk to think he or she is over 21, but to consider a

wristwatch as excessive jewelry per se is too much of a stretch. The ALJ considered all aspects of the decoy's appearance and concluded that she appeared physically even younger than she appears in the photographs taken at the time of the decoy operation (Finding of Fact 11).

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 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 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 of the Department are statements of a party "pertaining to the subject matter of the proceeding," an ALJ's findings are relevant writings that would be admissible in evidence; and the photographs requested are "writings" that appellant would offer into 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.[2]

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 it 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 subdivision 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 made by any of the parties 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 all previous cases over a period of years which contained an issue similar to the one in the case being litigated would

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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 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, 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.

Appellant's contention is based on the false premise stated in its brief:

> 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. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Board (2006)* 40 Cal.4th 1 [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, 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 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 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.

[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.