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

AB-8577
File: 20-349327 Reg: 05060279

7-ELEVEN, INC., BHOOPENDRA K. VIRK, and RAJBIR S. VIRK,
dba 7-Eleven # 2011-21793
850 East Mission Avenue, Escondido, CA 92025,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 3, 2007
Los Angeles, CA

ISSUED AUGUST 2, 2007

7-Eleven, Inc., Bhoopendra K. Virk, and Rajbir S. Virk, doing business as 7-Eleven # 2011-21793 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their 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 appellants 7-Eleven, Inc., Bhoopendra K. Virk, and Rajbir S. Virk, 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 W. Sakamoto.

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[1]The decision of the Department, dated June 8, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 7, 1999. On July 21, 2005, the Department filed an accusation against appellants charging that, on May 6, 2005, their clerk sold an alcoholic beverage to 19-year-old Glenn Williams. Although not noted in the accusation, Williams was working as a minor decoy for the Escondido Police Department at the time.

At the administrative hearing held on March 29, 2006, documentary evidence was received, and testimony concerning the sale was presented by Williams (the decoy), by Escondido police officer Thomas Venable, by Department investigator Peter Tyndall, and by the clerk.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants filed an appeal contending: (1) The decoy's appearance violated rules 141(a)[2] and 141(b)(2); (2) the administrative law judge (ALJ) improperly denied appellants' motion to compel discovery; and (3) the Department engaged in illegal ex parte communication.[3]

DISCUSSION

I

Department rules 141(a) and 141(b)(2) require that law enforcement agencies conduct decoy operations "in a fashion that promotes fairness" and that a decoy display

[2]References 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.

[3]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. Our decision on the ex parte communication issue makes augmenting the record unnecessary, and the motion is denied.

an appearance that could generally be expected of a person under the age of 21. Appellants contend these rules were violated by the decoy in this case. They argue that the decoy's participation in 10 prior decoy operations means he "necessarily comported himself in a manner inconsistent with his actual age." As a result, appellants assert, "the decoy's extensive experience must outweigh" even the "best efforts" of the ALJ to consider the decoy's overall appearance in determining that the decoy complied with the rule. (App. Br. at p. 22.)

Appellants also contend the ALJ could not possibly determine that the decoy complied with the rule because his appearance at the hearing "bore scant resemblance" to his appearance at the time of the illegal sale. They argue the Appeals Board should rely on the photograph of the decoy taken on the day of the decoy operation instead of the ALJ's determinations, and make an independent decision regarding the decoy's appearance. Finally, they assert that the dark shirt and pants the decoy wore resemble the outfit worn by a commando or SWAT officer, the decoy had a receding hairline, and he was tall, all of which must lead to the conclusion that the decoy's appearance violated the rule.

The decision addresses the decoy's appearance in Finding of Fact II.C.:

> The overall appearance of the decoy including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was two inches taller, approximately fifty pounds heavier and he had a "goatee" on the day of the hearing.
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> 1. The decoy is a youthful looking male with a "boyish" looking face. On the day of the sale, he was five feet ten inches in height, he weighed approximately one hundred fifty pounds, he had no facial hair and he wore no jewelry. His clothing consisted of a blue, long sleeve shirt, black jeans and black Nike shoes. The photograph depicted in Exhibit 4 was

taken at the premises and the photographs depicted in Exhibits 3-A and 3-B were taken at the Escondido Police station prior to going out on the decoy operation. These photographs show how the decoy looked and what he was wearing on the day of the sale.

2. The decoy testified that he had participated in approximately ten prior decoy operations, that he was paid forty dollars a night when he acted as a police decoy, that he had completed a six month Border Patrol training program prior to May 6, 2005, that he was comfortable being a decoy but that he was still a little nervous at the premises. The decoy also testified that he visited about twenty-one locations on May 6, 2005 and that two or three stores sold alcohol to him to the best of his recollection.

3. There was nothing remarkable about the decoy's nonphysical appearance. However, he did have a cold and he spoke with a scratchy voice at the hearing.

4. After considering the photographs depicted in Exhibits 3-A, 3-B and 4, the overall appearance of the decoy when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

The experience of the decoy does not "necessarily" make the decoy appear older than his true age, as we have said many times. (See, e.g., *BP West Coast Products, LLC* (2005) AB-8278; *7-Eleven, Inc. & Jain* (2004) AB-8082; *3610 Fifth Avenue, Inc.* (2003) AB-7987.)

This Board is not charged with the duty of evaluating the decoy's appearance; that is the job of the ALJ. The ALJ noted and considered the same physical and non-physical features of the decoy that appellants urge require a finding that the decoy's appearance violated rule 141(b)(2), yet the ALJ found that the rule was not violated. As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies. We are not in a position to second-guess the trier of fact, especially where the only

basis for doing so is a partisan assertion that the decoy lacked the appearance required by the rule.

The fact that appellants' assessment of the decoy's appearance differs from the ALJ's is neither surprising nor a sufficient basis for overturning the ALJ's finding. That being the case, and there being no indication that the ALJ used an improper standard in applying the rule, appellants' contention is rejected.

II

Appellants assert in their brief that the ALJ improperly denied their pre-hearing motion to compel discovery. 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 [presumably, the decoy in the present matter] 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." For all of the decisions specified, appellants also requested "all photographs of the decoy at issue therein."

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 Administrative Procedure Act (APA) (Gov. Code, §§ 11340-11529)[4] 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 section 11507.6. Appellants assert that the items requested are discoverable under the provisions of subdivisions (b) through (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;
> (c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;
> (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 as 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

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[4]Unless otherwise noted, statutory references hereafter refer to provisions of the Government Code.

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.[5]

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 the information appellants 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 section 11507.6 is broad enough to reach findings and decisions of the Department in past

[5] 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.)

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.

They also contend that their motion was improperly denied because the items they requested might allow them to assert a collateral estoppel defense. We presume they mean that if they had the material requested from the Department, they might find that a prior Department decision sustained a rule 141 defense with respect to this particular decoy, allowing them to assert collateral estoppel as a defense.[6] They insist

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[6]They rely in large part on the case of *People v. Garcia* (2006) 39 Cal.4th 1070 [141 P.3d 197, 48 Cal.Rptr.3d 75] (*Garcia*). We must admit we fail to see the relevance of *Garcia* to the issue of whether appellants' motion to compel discovery was properly denied. Appellants' argument in their brief, quoted here exactly as written, left us even more confused:

> *Garcia*, *supra* now resolves important issues not correctly decided by this Board in previous decisions that preclude *Garcia*, *supra* may Collateral Estoppel preclude a second or subsequent proceeding over the Department in a Certified Decision finds a Rule 141(b)(2) violation as to a certain decoy and if so, can the Department then withhold the information concerning its own decisions from Appellant acting under Government Code Section 11507.6?

(App. Br. at p. 19.)

We do not find in this a compelling argument.

that, even if they found no evidence to support a collateral estoppel defense in a particular case, they are "entitled to seek and obtain what evidence does exist at the discovery stage." (App. Br. at p. 20.)

Whatever merit this argument might have, or lack, when considered in isolation, it fails immediately when put in context. No matter what the justification, appellants are not entitled to the items requested unless those items come within the language of section 11507.6. We concluded in our discussion above that the items did not come within the statutory language. Therefore, this entire argument is moot.

Appellants' argument that the Department is violating the separation of powers doctrine by narrowing the items discoverable under section 11507.6 is meritless. The Department is not acting "in excess of, or in violation of, the powers conferred upon it," as appellants charge in their brief. Denial of appellants' motion to compel discovery was not in any way a legislative act. The ALJ simply evaluated the items requested and concluded appellants were not entitled to obtain these items through discovery. We are convinced he was right.

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 Govt. Code Sections 11507.6 and 11507.7. Those two Sections provide the "exclusive right to and

> method of discovery," (Gov't. Code § 11507.5,) *and similarly state the objections upon which the Department may argue and an ALJ may rely in deciding a Motion to Compel Discovery* in an administrative hearing. *(See* Gov't. 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

Appellants contend the Department violated due process and the APA by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision, citing the California Supreme Court's holding in *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*). Appellants argue that this violation of the APA is ipso facto a violation of due process. Due process was also violated, appellants assert, because the Department's attorney assumed the roles of both advocate and advisor to the decision maker.[7]

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[7]As for appellants' due process argument, it is not necessary to reach that question to decide this appeal. As did the Supreme Court in *Quintanar*, this Board declines to address this contention. In footnote 13 (*Quintanar*, *supra*, 40 Cal.4th at p. 17), the court said:

> Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

We agree with appellants that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar*, *supra*.

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.[8]

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[8]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.[9]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[9]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.