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

AB-8617
File: 21-428894 Reg: 06061780

ABEDALLA TOUMA and FAISAL YOUSSEF TOUMA, dba Joe's Liquor
1748 Lugonia Avenue, # 115, Redlands, CA 92374,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 7, 2007
Los Angeles, CA

ISSUED DECEMBER 13, 2007

Abedalla Touma and Faisal Youssef Touma, doing business as Joe's Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 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 Abedalla Touma and Faisal Youssef Touma, 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 September 21, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on September 7, 2005. Thereafter, the Department filed an accusation against appellants charging the sale of an alcoholic beverage to 19-year-old Catherine Grant by appellants' clerk. Grant was working as a minor decoy for the Redlands Police Department at the time.

At the administrative hearing held on July 7, 2006, documentary evidence was received and testimony concerning the sale was presented. The Department's decision which followed determined that the violation charged was proved and no affirmative defense was established. Appellants then filed an appeal contending: (1) the decoy's appearance violated rules 141(a)[2] and 141(b)(2); (2) the ALJ improperly denied appellants' motion to compel discovery; and (3) the Department violated due process and prohibitions in the Administrative Procedure Act (APA)[3] against ex parte communications.[4]

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 decoys display an appearance that could generally be expected of a person under the age of 21, respectively. Appellants contend these rules were violated by the decoy's appearance

[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]Government Code sections 11340-11529.

[4]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.

in this case. They argue that the decoy's participation in five prior decoy operations and five shoulder tap operations means she "necessarily comported herself in a manner inconsistent with her actual age." As a result, appellants assert, "the decoy's extensive experience must outweigh" even the "best efforts" of the administrative law judge (ALJ) to consider the decoy's overall appearance in determining that the decoy complied with the rule. (App. Br. at p. 25.)

The experience of the decoy does not "necessarily" make the decoy appear older than her 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 the 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 copies of any findings or decisions which determined that the present decoy's appearance was not that which could be generally expected of a person under the age of 21 and all decisions certified by the Department over a four-year period which determined that any decoy failed to comply with rule 141(b)(2). For all of the decisions specified, appellants also requested all photographs of the decoys in those decisions.

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 APA 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 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; . . .

The Board has discussed and rejected, many times, almost all the arguments made here by appellants. We reject them again in this case, and refer appellants to this Board's prior decisions for our reasons. (See, e.g., *7-Eleven, Inc./Virk* (2007) AB-8577; *7-Eleven, Inc./Wang* (2007) AB-8573; *7-Eleven, Inc./Shaw* (2007); *To & Wang* (2007) AB-8513; *7-Eleven, Inc./Kamboj* (2006) AB-8501.)

Besides the issues that have been previously addressed in the cases cited above (and many others), appellants also contend that their motion was improperly denied because the items they requested are "relevant" and "admissible in evidence." (Gov. Code, § 11507.6, subd. (e).) They argue that "relevant evidence" is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Cal. Evid. Code, § 210.) The apparent age of the decoy in a case is clearly a matter of consequence in the action. However, findings in other cases regarding the apparent age of the same decoy, or such findings with regard to other decoys, are not relevant to the determination of apparent age of this decoy in this case. We have rejected this contention in previous cases, such as *Askar & Mbarkeh* (2004) AB-8182, where the Board said:

> In every 141(b)(2) case, the ALJ is being asked, on the basis of his own life experience, whether, based upon the evidence he has seen and heard, he believes the decoy could generally be thought to have displayed the appearance of a person under 21 years of age. Every case is different, even when it is the same decoy in more than one case. It is a

> subjective determination on the part of the ALJ, just as it is a subjective determination on the part of the seller of alcoholic beverages.

(See also *O'Brien* (2001) AB-7751 and *7-Eleven, Inc./Amroli* (2002) AB-7784.)

Appellants also contend that the discovery provisions of the APA must be construed liberally to promote fairness at trial. Because Government Code section 11507.6 provides "the exclusive right to and method of discovery" in the APA, they argue, "it is incumbent upon the Board to construe [section 11507.6] liberally." (App. Br. at p. 6.) They quote language from *County of San Diego v. Superior Court* (1986) 176 Cal.App.3d 1009, 1021 [222 Cal.Rptr.484], in support of their position. The court in that case used "the principle of statutory construction in discovery matters which requires a presumption in favor of the most liberal rights of discovery, absent compelling countervailing considerations or explicit statutory language." Appellants, naturally, emphasize the part about favoring liberal construction of discovery rights.

Appellants' contention is rejected. In the first place, the cases cited by appellants all deal with the Civil Discovery Act (Code Civ. Proc., § 2016.010 et seq.), while Government Code section 11507.6 provides the exclusive right to discovery in administrative proceedings conducted under the APA. Secondly, the language quoted above clearly states that "explicit statutory language" can create an exception to liberal construction of discovery provisions. We find the language of section 11507.5 – "The provisions of Section 11507.6 provide the *exclusive* right to and method of discovery as to any proceeding governed by this chapter [italics added]" – to be explicit statutory language that signals a restrictive, rather than a liberal, construction of the discovery rights provided in section 11507.6.

Appellants' arguments are unavailing. We see no reason to conclude that the denial of appellants' motion to compel was error.

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.[5]

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.)

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[5]In *Quintanar*, *supra*, on page 17, footnote 13, the Court stated:

> 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 also decline to address appellants' due process contention.

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.[6]

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.[7]

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

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[6]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.

[7]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.