

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

AB-9141

File: 20-419498 Reg: 10072854

7-ELEVEN, INC. and FRANKAR, INC., dba 7-Eleven Store #21804
555 West Country Club Lane, Escondido, CA 92026,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 4, 2011
Los Angeles, CA

ISSUED AUGUST 29, 2011

7-Eleven, Inc. and Frankar, Inc., doing business as 7-Eleven Store #21804 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 12 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. and Frankar, Inc., appearing through their counsel, Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated October 25, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 29, 2004. On April 19, 2010, the Department filed an accusation against appellants charging that, on December 10, 2009, appellants' clerk, Brian Barth, sold an alcoholic beverage to 19-year-old Danielle Tulimero. Although not noted in the accusation, Tulimero was working as a minor decoy for the Escondido Police Department at the time.

At the administrative hearing held on August 26, 2010, documentary evidence was received and testimony concerning the sale was presented by Tulimero (the decoy) and by Ross Umstot, a detective with the Escondido Police Department.

The evidence at the hearing established the following facts, which are not disputed on appeal: The decoy entered appellants' licensed premises, selected a 6-pack of Budweiser beer and took it to the counter. Appellants' clerk requested, and was given, the decoy's valid California driver's license bearing a red stripe indicating "AGE 21 in 2011." The clerk looked at the ID, but did not ask the decoy for her age or her date of birth; he then sold her the beer. Following the sale, the decoy identified the clerk as the seller of the beer. A citation was issued to the clerk for selling an alcoholic beverage to a person under the age of 21.

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

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants contend that their Motion to Compel Discovery should have been granted, and that the Department violated the Administrative Procedure Act (APA) proscription against ex parte communications.

DISCUSSION

I

Appellants contend that the Department impermissibly mingled prosecutorial and adjudicatory functions, by permitting ex parte contacts between the Department's prosecutor and its ultimate decision maker about the substance of the case, prior to the ultimate decision maker rendering a final decision, in violation of *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal. 4th 1, 8 [145 P.3d 462] (*Quintanar*). This allegation is based on a form letter, known as ABC-166-A, which was attached to the accusation and which bore the signature stamp of Matthew Botting, General Counsel.

Prior to the administrative hearing, appellants sought a Motion to Compel Discovery under Government Code section 11507.7. Briefs were submitted in support of, and in opposition to, that motion, and administrative law judge (ALJ) Matthew G. Ainley issued an Order denying it on August 25, 2010. (Exh. 3.) In his Order, ALJ Ainley states:

. . . The Respondents argued that, since Mr. Botting's signature appears on a letter sent out by the Department with the accusation package, it necessarily follows that he was provided with information about the case on an ex parte basis. This argument assumes that Mr. Botting signed the letter in question, that he was provided with ex parte information, and that he will be the decision-maker or an advisor thereto in this case.

The first assumption has been disproved. The declarations submitted by the Department clearly establish that a clerk in Hearing and Legal signed the letter using a stamp of Mr. Botting's signature.

The other two assumptions are purely speculative. First, while Mr. Botting may have advised the decision-maker in the past, it does not necessarily follow that he will do so in the case at hand. Second, since Mr. Botting did not sign the letter in question, there is no indication that he received any information about this case (ex parte or otherwise). . . .

Similarly, in Findings of Fact II-G-1, ALJ Echeverria found:

1. The basis for this argument is the contention by Respondents that the Department's general counsel, Matthew Botting, is the Department's ultimate decision maker, that Botting signed a form letter sent to the Respondents' counsel and that the Department provided information to Botting on an ex parte basis. The letter allegedly signed by Botting is part of the Respondents' Motion to Compel Discovery (Exhibit 3). As indicated in the affidavits provided by the Department in its Opposition to the Respondents' Motion to Compel Discovery, the Department's Hearing and Legal Unit used a signature stamp to affix Botting's signature to certain form letters during a period of time when the Hearing and Legal Unit had no supervisor.

Judges Ainley and Echeverria both reached the same conclusion: that Botting did not personally sign the form letter in question. Rather, the form letter was stamped with a signature stamp by a clerical person in the Hearing and Legal Unit.

The inferences appellants draw from the purported signature cannot be sustained. Appellants' assertion (AOB at p. 5) that the signature "reasonably implies" that Botting had access to documents that he should not have, is totally unsupported by any evidence or reasoning beyond appellants' say-so. Clearly, both ALJ's drew different inferences from the evidence, which the Appeals Board is bound to accept so long as they are not unreasonable.

Since this issue is a question of fact, the standard of review is as follows:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).)

(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.

(Masani) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The Board must decline to reweigh the evidence on this issue.

II

Appellants contend secondly that it was an abuse of the ALJ's discretion to deny their Motion to Compel.

" 'Abuse of discretion' in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered [Citations]." (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].)

In the instant case, appellants sought to discover four basic categories of documents, which ALJ Ainley summarizes in his Order (Exh. 3 at p.1.):

(1) documents relating to one of the Department's general orders; (2) documents (including witness statements, police reports, investigation reports, 309 forms, and factual summaries) in the possession, custody or control of Hearing and Legal; (3) documents (including witness statements, police reports, investigation reports, 309 forms, and factual summaries) in the possession, custody or control of, Matthew Botting; and (4) documents (including witness statements, police reports, investigation reports, 309 forms, and factual summaries) in the possession, custody or control of, the Director of the Department or an advisor thereto.

In his ruling, ALJ Ainley found that the information sought to be discovered by appellants was either not covered by Government Code section 11507.6, or had already been received by appellants. In particular, the ALJ found that 11507.6 does not cover general orders issued by the Department, where the documents are physically located, and what information, if any, was reviewed by Matthew Botting, the Director, or the Director's advisors.

Discovery is much more limited in administrative proceedings than in civil cases. Each has its own discovery provisions, and they are very different.

Discovery in civil cases is governed by the Civil Discovery Act, found in the Code of Civil Procedure, sections 2016 through 2036. Discovery in administrative proceedings is controlled by the APA, in Government Code sections 11507.5 through 11507.7. Section 11507.5 states specifically that the provisions of section 11507.6 provide the exclusive right to, and method of, discovery.

Appellants argue that section 11507.6, subdivision (e) allows discovery of: “Any other writing or thing which is relevant and which would be admissible in evidence” thereby making these documents discoverable. (AOB at pp. 8-12.) The ALJ, however, found that section 11507.6 did not include this broad swath of documents after consideration of the Motion to Compel, briefs in support of and opposition to the motion, and oral argument.

We agree with the ALJ’s reasoning and conclusion that the physical location and identification of documents reviewed by the decision maker are not discoverable under section 11507.6. Appellants have not carried their burden of showing that the denial of their Motion to Compel was an abuse of discretion.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.