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

AB-8496
File: 20-235384 Reg: 05059646

CHEVRON STATIONS, INC. dba Chevron Service Station
2270 West Frontage Road, Corona, CA 92882,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED APRIL 24, 2007

Chevron Stations, Inc., doing business as Chevron Service Station (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for its clerk, Ramon Vega, having sold a 24-ounce can of Bud Light beer to Rafael Flores, 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. ("Chevron"), 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 B. Wainstein.

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[1]The decision of the Department, dated December 1, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 18, 1989. The Department instituted an accusation against appellant May 16, 2005, charging the sale of an alcoholic beverage (beer) to a minor on March 11, 2005.

An administrative hearing was held on August 26, 2005, at which time oral and documentary evidence was received. At that hearing, testimony about the sale of the alcoholic beverage was presented by Rafael Flores, the minor decoy, and Corona police officer Jesus Jurado. Rodne D. Boles-Muse, an area trainer for appellant Chevron, testified about the training provided to appellant's clerks with respect to the sale of alcoholic beverages.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and which rejected appellant's claim of a defense under Department Rule 141(b)(2).

Appellant has filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the decoy did not display the appearance required by Rule 141(b)(2); and (2) its motion to compel discovery should have been granted. Appellant has also filed a request that the Appeals Board take official notice of a passport photo of one of its attorneys,[2] as well as copies of two proposed decisions where an ALJ determined that this same decoy's appearance did not comply with the rule, one of which was adopted by the Department (*Chevron Stations, Inc.*, Registration No. 05060889), and one of which was rejected pursuant to Government Code section 11517, subdivision (c) (*7-Eleven, Inc./Shah*, Registration No. 06061560), but then

[2] The passport appears to have issued in the year 2000. Presumably it is offered only to show Mr. Kroll's age, and not as he presently appears.

ordered dismissed. In addition, appellant also filed a motion to augment the administrative record with any form 104 (Report of Hearing) included in the Department's file, and has 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 the decoy did not display the appearance required by Rule 141(b)(2). That rule provides that a decoy "shall 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." (Title 4, Cal. Code Regs., §141(b)(2).)

The Appeals Board is urged by appellant to compare the appearance of appellant's 27-year-old attorney with the appearance of the decoy, and conclude, contrary to the decision of the Department, that the decoy appears older than appellants' attorney, and, therefore, his use as a decoy violates the rule. Appellant also sought, unsuccessfully, to have the Department produce the decoy at the Board hearing so this comparison could be made. Appellant also tells the Board that other administrative law judges, in unrelated sale-to-minor disciplinary proceedings, have concluded that the decoy in question did not display the appearance required by the rule.

Appellant, with its argument and its attempt to compel the Department to produce the decoy at the hearing, is seeking to have this Board sit as a trier of fact, something it is neither equipped nor authorized to do. The scope of the Appeals

Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.[3]

By asking the Appeals Board to view the decoy and make its own determination with respect to whether his appearance is that of a person under 21 years of age, appellant is simply asking this Board to reweigh the evidence, an inappropriate appellate function.

Appellants also suggest there is inconsistency in the evaluations of the decoy's appearance reflected in the proposed decisions brought to the Board's attention. Even if true, this would not require, in and of itself, automatic reversal. (See *Askar and Mbarkeh* (2004) AB-8182; *Star & Crescent Boat Company* (2002) AB-7637a.) In any event, it cannot be said that the three decisions reflect any inconsistency. Indeed, these decisions instead reflect what would seem a normal change in the decoy's appearance with the passage of time, and seen as that by the ALJ's.

The case now before the Board began with a sale to a minor decoy on March 11, 2005. The administrative hearing took place on August 26, 2005, following which ALJ Echeverria determined, with extensive findings, that the decoy's appearance complied with Rule 141(b)(2).

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[3]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

In *Chevron Stations, Inc.*, Registration No. 05060889, the sale to the decoy was made on August 4, 2005, approximately five months after the first sale, and the administrative hearing was held on February 8, 2006. In what he saw as a "borderline" case, ALJ McCarthy concluded the decoy would not have displayed the appearance required by the rule. The Department adopted this decision.

The third sale to the decoy was made on November 15, 2005, eight months after the first of the three sales. The administrative hearing took place on July 13, 2006. ALJ Echeverria this time found that the decoy did not display the appearance which could generally be expected of a person under 21 years of age, and explained in his findings why he did so.

A tabulation of the respective dates of events in the three cases offers a ready explanation why results differed -

Reg. No.	Date of sale	Administrative hearing date	Proposed decision signed
05059646 (Case on appeal)	March 11, 2005	August 26, 2005	September 15, 2005
05060889	August 4, 2005	February 8, 2006	February 24, 2006
06061560	November 15, 2005	July 13, 2006	August 1, 2006

Once again, an appellant has asked this Board to sit as a trier of fact and substitute its judgment for that of the Department. The arguments may have a new twist, but the same lack of substance. In this case, they have no merit.

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 subdivision (2)(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.[4]

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.

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[4] 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.)

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 term "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 term 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 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 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. (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 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.[5]

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[5] 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 Administrative Hearing Office. 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.[6]

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

[6]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.