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

AB-8499
File: 21-366237 Reg: 05059645

GEORGE ALBERRE, et al., dba Open Liquor
351 Railroad Canyon Road, Lake Elsinore, CA 92532,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: September 7, 2006
Los Angeles, CA

Redeliberation: January 11, 2007; February 1, 2007

ISSUED MARCH 15, 2007

George Alberre, Hala Alberre, Izdojar Alberre, and Sami Alberre, doing business as Open Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Barakat George Hesri, having sold a can of Budweiser beer to Stephen Yasinoski, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision ((a).

Appearances on appeal include appellants George Alberre, Hala Alberre, Izdojar Alberre, and Sami Alberre, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Claire C. Weglarz, 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 22, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on December 19, 2000. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on January 21, 2005.

An administrative hearing was held on October 19, 2005, at which time oral and documentary evidence was received. At that hearing, the decoy, Yasinoski, testified that he was sold a 24-ounce can of Budweiser beer after the clerk had examined the decoy's California driver's license. The decoy left the store, and then returned to the store, accompanied by a Riverside sheriff's deputy, and identified Hesri as the person who sold him the beer. On cross-examination, the decoy testified that he used the store's restroom after the transaction. He testified that he did not believe he had used the restroom before making the purchase. Riverside Deputy Sheriff Robert Guerrero testified that he did not recall seeing the decoy use the restroom prior to purchasing the beer and leaving the store.

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 an affirmative defense under Rule 141(a) and 141(b)(2).

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rules 141(a) and (b)(2) were violated; (2) appellants were prejudiced when the ALJ permitted an amendment to the accusation; and (3) appellants were denied discovery. 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 letter brief regarding the recent decision of the California Supreme Court in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*

(November 13,2006) 40 Cal.4th 1 [_ Cal.Reporter 3d. _] (*Quintanar*).

DISCUSSION

I

Throughout the administrative hearing, the person who made the sale was referred to only as "the clerk." The accusation alleged that the seller was George Hestri Barakat. At the close of the evidence, Department counsel proposed a stipulation, and the following colloquy occurred:

> Mr. Lewis: Your Honor, I think we can reach a stipulation or agree on the stipulation that the individual named in Count I of the Accusation - -
>
> The Court: As stated in the Accusation?
>
> Mr. Lewis: Is the same person who's depicted in Exhibit Number 2; is that correct?
>
> Ms. Weglarz: Well, it's not - - I mean, the way the name is written, that's not actually him, his name. It's mixed around.
>
> Mr. Lewis: First name, last name and middle name are somehow confused according to the licensees, Your Honor. But it's the same individual that's depicted in Exhibit 2 who was working at the store that night.
>
> Ms. Weglarz: Yes.
>
> The Court: The Licensee is nodding his head. However, he is not under oath, he's not testifying.
>
> Mr. Lewis: No, but I think we have a stipulation as to that fact.
>
> The Court: Do we?
>
> Ms. Weglarz: The person in that picture is an employee, but the person on the Accusation is not the name of that employee.
>
> The Court: All right. Is there a way to make the record clean? You either have the deputy come in and say who he issued a citation to and you can amend the Accusation so that the employee's name is correct.
>
> Mr. Lewis: We can do that or - -

> The Court: There's not a lot of dispute that a clerk sold to this decoy. I'm not sure that the name of the clerk is that important.

Department counsel accepted the administrative law judge's (ALJ's) suggestion, and recalled Deputy Robert Guerrero. Guerrero confirmed that the clerk's name was actually Barakat George Hesri.

At this point, all parties and the ALJ were in apparent agreement. Department counsel moved to amend the accusation, appellants' counsel stated she had no objection, and the ALJ granted the motion. [RT 42]. As her comments disclosed, appellants' counsel was fully aware of the transposition in the accusation of the three elements of the clerk's name.

Now, devoting three pages of their lengthy brief to an issue which was neither raised or preserved,[2] appellants' claim they were prejudiced by the amendment. They claim that, by permitting the amendment based on the deputy's hearsay testimony, the ALJ lowered the Department's burden of proof. Appellants also claim they were denied due process because they were not given the opportunity to cross-examine the person who wrote the citation. Further, appellants contend that the ALJ disregarded the procedural requirements of Government Code 11507 governing amendments to accusations. Finally, appellants contend the amendment was defective because it was based on an oral rather than written motion, and there was no formal service of an amended accusation.

We would be according undeserved dignity to the argument in this section of appellants' brief by devoting any further time to them. The arguments are devoid of

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[2] By failing to object, appellants have waived any objections they might have to the amendment or any of the procedures by which it was effected. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal §394, p. 444.)

merit, and plainly frivolous.

II

Appellants contend that the use of an experienced decoy violated the "fairness" requirement of Rule 141(a), as well as Rule 141(b)(2), and contend that his use of the restroom at the premises was behavior unlike what might be expected from a minor attempting to purchase alcohol.

The ALJ made the following finding with respect to the decoy's appearance (Finding of Fact V):

> The decoy was six feet tall and weighed 150 pounds on January 21, 2005. He wore a gray T shirt, a sweat shirt with a Fox racing-jacket logo, and blue jeans. A photograph of the decoy, and a photograph of the decoy with Mr. Hesri, both taken that day, show that the decoy displayed the appearance of a person under twenty-one years old.
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> Prior to January 21, 2005, the decoy had been an explorer with the Riverside Sheriff's Department for approximately five years, rising to the rank of captain, and had participated in approximately ten decoy operations. Despite this experience, the decoy was "a little nervous" while purchasing the beer at Respondents' store.
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> The decoy was six feet tall and weighed approximately 150 pounds on the day of the hearing. His appearance at the hearing was similar to his appearance in the photographs. The decoy spoke softly, giving brief answers to the questions asked of him. There was nothing noteworthy about the decoy's non-physical appearance, as confirmed by his statement that he felt "fine" testifying.
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> The Administrative Law Judge observed the decoy's mannerism, poise, maturity and demeanor while the decoy testified. Based on this observation, the photographs, and the testimony about the decoy's appearance, the Administrative Law Judge finds that the decoy displayed the appearance which can generally be expected of a person under twenty-one years old when he purchased the beer at Respondents' store.

The ALJ rejected appellants' claim that the decoy operation was not conducted in a manner which promoted fairness, as required by Rule 141(a). He found not supported by the evidence appellants' claim that the decoy, by using the premises'

restroom prior to making his purchase, exhibited behavior of a kind not to be expected of a minor attempting to purchase an alcoholic beverage. He thus found it unnecessary to reach the question whether such use by the decoy prior to making his purchase would have contravened Rule 141(a)

The restroom issue arose when the decoy, asked if he had spoken to the clerk, volunteered that he had used the restroom after the transaction had occurred. We have reviewed the dialogue between appellants' counsel and the decoy [at RT 21-22], and are satisfied that the ALJ's assessment of the evidence relating to that issue was correct.

> Attorney Weglarz: When you entered the store, did you say anything to the clerk?
>
> A. Actually, I used – I did use the rest room at some point, I believe it was afterwards.
>
> Q. Okay. Do you – so you used the rest room at this location?
>
> A. Yes, ma' am.
>
> Q. And can you be sure that it was not - - strike that. Is it possible that you could have used the rest room before walking over to the alcohol section when you first entered the store?
>
> A. I don't believe so.
>
> Q. How certain are you that you didn't use the bathroom before you walked to the alcohol section when you first entered the store?
>
> A. I don't know.
>
> Q. How did you know where the bathroom was?
>
> A. I think – I believe it was the clerk that told me.
>
> Q. When did the clerk –
>
> A. Somebody in the store.

Q. I'm sorry. Did the clerk tell you where the bathroom was or did somebody else tell you where it was?

A. I don't remember. It was somebody working in the store though.

Q. Did they tell you where the bathroom was before you purchased the alcohol or after you purchased the alcohol?

A. I don't recall.

III

Appellants assert in their brief that their pre-hearing motion seeking discovery of 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 to the seller of alcoholic beverages at the time of the alleged offense," was improperly denied.

Appellants argue they are entitled to the materials sought because they will help them "prepare its [sic] defense by knowing . . . what factors have been considered by the Department in deciding how a decoy's appearance violated the rule" (App. Br. at p.14) so that they can compare the appearance of the decoy who purchased alcohol at their premises with the "characteristics, features and factors which have been shown in the past to be inconsistent with the general expectations . . . of the rule." (App. Br. at p. 13.) They assert "it is more than reasonable" that decisions in which decoys were found not to comply with rule 141(b)(2) "could assist the ALJ in this case by comparison." (*Ibid*.) However, appellants do not explain how an ALJ is expected to make such a comparison.

It is conceivable that each decoy found not to display the appearance required by the rule had some particular indicium, or combination of indicia, of age that

warranted his or her disqualification. We have considerable doubt, however, that any such indicia, 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 an administrative hearing.

The most important indicium 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, it is, in every case, an ALJ's overall assessment of a decoy's appearance that matters, not simply a focus on some narrow aspect of a decoy's appearance.

We know from our own experience that appellants' attorneys represent well over half of all appellants before this Board. We would think, therefore, that the vast bulk of the information appellants seek is already in the possession of their attorneys, a fact of which the Board can take official notice. This, coupled with the questionable assistance the information sought could provide to an ALJ in assessing the appearance of a decoy present at the hearing,[3] 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 Government Code section 11507.6 is broad enough to reach findings and decision of the Department in past cases. The terms "statements" or "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 writingsmade by a party with respect to the general subject matter of the

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[3] Unless a minor is deceased or too ill to be present, or unless the minor's presence is waived, he or she must be produced at the hearing by the Department in all cases charging violations of Business and Professions Code sections 25658, 25663, and 25665. (See Bus. & Prof. Code, §25666.)

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.

Appellants have cited no authority for their contention, and we are unaware of any such authority. Appellants 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.

IV

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.[4]

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

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[4] 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.

accordance with the foregoing opinion.[5]

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

[5] 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.