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

AB-8503
File: 20-215004 Reg: 05059662

7-ELEVEN, INC., HERBERT D. DOMENO, and PEARL MARIE DOMENO
dba 7-Eleven 2173 18820
11143 Venice Boulevard, Los Angeles, CA 90034,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: November 2, 2006
Los Angeles, CA

Redeliberation: January 11, 2007; February 1, 2007

ISSUED MARCH 27, 2007

7-Eleven, Inc., Herbert D. Domeno, and Pearl Marie Domeno, doing business as 7-Eleven 2173 18820 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk, Lilian Herrera, having sold a six-pack of Corona beer to Marisol Salas, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Herbert D. Domeno, and Pearl Marie Domeno, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Kevin Snyder, 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 January 5, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. The Department instituted an accusation against appellants on May 17, 2005, charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on November 2, 2005, at which time oral and documentary evidence was received. At that hearing, the Department presented its case through Los Angeles police officer Marie Fellhauer and the decoy, Marisol Salas. That the sale occurred was not disputed. Salas testified that when she was asked for identification, she gave Herrera her California driver's license. Herrera examined the license, and then asked Salas if she were 18. Salas replied, "No, I'm 19." The clerk returned the license to Salas, punched something into the cash register, then asked for the license again, again punched something into the cash register, then said "Just take it," returned the license and rang up the sale. Salas left the store, and returned with Officer Fellhauer and identified Herrera as the person who sold her the beer. Appellant/ co-licensee Herbert Domeno described the training given to clerks employed at the store, and described a secret shopping program to which he subscribes as part of his store's vigilance against sales to minors. The clerk did not testify.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established. Appellants thereafter filed a timely appeal and raise the following issues: (1) the decoy lacked the appearance required by Rule 141(b)(2); and (2) appellants were prevented from defending the action by the denial of their request for discovery.

DISCUSSION

I

Appellants argue that, because the decoy wore braces on her teeth at the time of the transaction, but no longer was wearing them at the time of the hearing, the administrative law judge (ALJ) could not properly decide whether she displayed the appearance required by Rule 141(b)(2).[2]

Appellants' argue that the absence of braces would have effected a change in the decoy's smile. While the wearing of braces on one's teeth is no longer the exclusive domain of teenagers and sub-teenagers, it is difficult to see how their presence would make the wearer appear older. Indeed, the opposite would appear to be true. And appellants do not explain how a difference in her smile would have made her appear younger at the time of the hearing. Indeed, there is not even any evidence that the decoy smiled while in the presence of the clerk, or, assuming, *arguendo*, that she did, whether the clerk observed it.

We know from the record that the clerk asked the decoy if she were 18. That does not strike us as a question that would be asked by one who thought the decoy was older than 21. Nor would the decoy's reply, that she was 19, be anything to mislead the clerk into believing the decoy was older than 21.

The ALJ took into account the fact that the decoy was no longer wearing braces on her teeth, and found that, but for that fact, the decoy's physical appearance at the

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[2] Rule 141(b)(2) states:

> The 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.

hearing was similar to her appearance on photographs taken the night of the transaction. His assessment of her appearance took into account the decoy's mannerism, maturity, poise, and demeanor, the photographs, and the testimony about her appearance. There is no basis for the Board to question his judgment.

II

Appellants assert in their brief that the denial of their pre-hearing Motion to Compel discovery was improper and denied them the opportunity to defend this action. 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 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 appellants failed to show that the requested items were relevant or would lead to admissible evidence. Appellants argue 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 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), (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;
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> (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 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 appellants would offer into 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 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.[3]

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 they 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 Government Code section 11507.6 is broad enough to reach findings and decisions of the Department in past 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

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[3] 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.)

the proceeding in which the discovery is sought. To interpret the term 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.

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, 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.

Appellants' contention is based on the false premise stated in their brief:

> In the present case, the ALJ denied Appellant's [*sic*] 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

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 [50 Cal.Rprtr 3d. 585] (*Quintanar*).

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 accordance with the foregoing opinion.[5]

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

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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 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.

[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.