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

AB-8509
File: 20-363465 Reg: 05060263

7-ELEVEN, INC., NUHA TANNOUS AKKAWI, and KAMAL AZIZ BITAR,
dba 7-Eleven # 2131-15944
9365 Jamacha Boulevard, Spring Valley, CA 91977,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 2, 2006
Los Angeles, CA
Redeliberation: January 11, 2007; February 1, 2007

ISSUED APRIL 25, 2007

7-Eleven, Inc., Nuha Tannous Akkawi, and Kamal Aziz Bitar, doing business as 7-Eleven # 2131-15944 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 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., Nuha Tannous Akkawi, and Kamal Aziz Bitar, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Kevin Snyder, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated January 12, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 31, 2000. Thereafter, the Department instituted an accusation against appellants charging that, on April 22, 2005, their clerk, Jerome Collins (the clerk), sold an alcoholic beverage to 18-year-old Joslyn McCluney. Although not noted in the accusation, McCluney was working as a minor decoy for the San Diego County Sheriff's Department at the time.

An administrative hearing was held on November 1, 2005, at which time documentary evidence was received, and testimony concerning the sale was presented by McCluney (the decoy) and by Joe L. Sherman, Jr., a San Diego County Sheriff's deputy.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense was established.

Appellants filed an appeal contending: (1) The decoy's appearance violated Department rules 141(a) and 141(b)(2),[2] and (2) the Department violated appellants' discovery rights.[3] Appellants also filed a motion to augment the administrative record with any Form 104 (Report of Hearing) included in the Department's file, and a

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[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]At oral argument before the Appeals Board, appellants' counsel argued, for the first time, that the evidence showed a violation of rule 141(b)(5), which requires a face-to-face identification of the seller by the decoy. This issue was not raised at the administrative hearing or in appellants' opening brief, and this Board may consider the issue waived. *(Paulus v. Bob Lynch Ford, Inc*. (2006) 139 Cal.App.4th 659, 685 [43 Cal.Rptr.3d 148]; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 763-766 [60 Cal.Rptr.2d 770]; see 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 444 & § 616, pp. 647- 648.)

Raising a new issue at such a late date, with no opportunity for the Department to prepare a response, is unfair to both the Department and this Board. The unfairness is not mitigated simply because counsel for the Department was able to extemporize a response. We refuse to consider the new issue raised so belatedly by appellants.

supplemental letter brief regarding the recent decision of the California Supreme Court 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*).

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 that these rules were violated in this case by the use of Joslyn McCluney as a decoy. They assert that her "towering height, substantial weight," "perfectly plucked and shaped eyebrows," and "long, highlighted hair extensions are characteristics attributed to older individuals," and "would lull any reasonable clerk into a false sense of security." (App. Br. at p. 4.)

The administrative law judge (ALJ) discussed the decoy's appearance in Finding of Fact D.:

> D. The overall appearance of the decoy including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that her hair was a different color and combed differently. Although the decoy was wearing hair extensions both at the hearing and at the premises, her hair was in a ponytail and her hair color was "plum-purple" on the day of the hearing.
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> 1. The decoy is a youthful looking young lady who is five feet nine inches in height. On the day of the sale, the decoy's hair was in pigtails and it was blond and brown in color. Her clothing consisted of blue jeans, a T-shirt and a hooded jacket. She was not wearing any makeup and the only jewelry she was wearing was a chain/necklace with a shiny cross. The photograph depicted in Exhibit A was taken at the police station on the day of he sale before going out on the decoy operation and the photograph depicted in Exhibit 3 was taken at the premises. Both of these photographs show how the decoy looked and what she was wearing on the day of the sale. The cross mentioned above is not visible in either of these photographs.

2. The decoy had not participated in any prior decoy operations. However, she had participated in one prior shoulder tap operation wherein she would stand outside a licensed premises and ask customers to buy her alcohol.

3. The decoy was soft-spoken, she was constantly fidgeting in her chair while testifying and she appeared nervous. She looked like and sounded like a typical teenager.

4. After considering the photographs depicted in Exhibit 3 and Exhibit A, the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellants are asking this Board to evaluate the decoy's appearance. Absent a clear error or abuse of discretion on the part of the ALJ or the Department, this Board will ordinarily defer to the ALJ's assessment of the decoy. Neither appellants' disparaging remarks nor their self-interested descriptions of the decoy cause us to believe there was gross error or an abuse of discretion in the ALJ's assessment of the decoy's appearance.

The ALJ, who saw and heard the decoy in person at the hearing, and whose responsibility it was to assess the decoy's appearance and apparent age, determined that the decoy's appearance complied with rule 141(b)(2). This Board is in no position to second-guess the ALJ's evaluation.

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 are expressly included as discoverable matters in the Administrative Procedure Act (APA)(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;

> (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 by the Department are "statements" made by a party "pertaining to the subject matter of the proceeding," findings made by an ALJ are relevant "writings" that would be admissible as evidence, and the photographs 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.[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.

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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.)

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

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, denying the motion because the 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 (italicized below):

> 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

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, appellants contend 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

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

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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.

[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.