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

AB-8518
File: 21-401588 Reg: 05060487

HAN JIUN SUN SHIN, dba Showcase Liquor
1390-92 North Lake Avenue, Pasadena, CA 91104,
Appellant/Licensee

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 29, 2007

Han Jiun Sun Shin, doing business as Showcase Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 15 days for his 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 appellant Han Jiun Sun Shin, appearing through his counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ghazal A. Yashouafar, 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 26, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on September 5, 2003. On August 23, 2005, the Department filed an accusation against appellant charging that, on March 26, 2005, his clerk, Uk Rho Kwang (the clerk), sold an alcoholic beverage to 19-year-old George Engers. Although not noted in the accusation, Engers was working as a minor decoy for the Pasadena Police Department at the time.

At the administrative hearing held on November 30, 2005, documentary evidence was received, and testimony concerning the sale was presented by Engers (the decoy) and by Greg Afsharian, a Pasadena police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense was established. Appellant then filed an appeal contending: (1) Rules 141(a) and 141(b)(2)[2] were violated, and 2) he was prevented from defending the action by the denial of his request for discovery. Thereafter, appellant 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.* (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. Appellant contends that these rules were violated in this case by the use

[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.

of George Engers as a decoy. He relies on a finding in the decision that the decoy had a receding hairline and language in the Appeals Board decision of *Southland/Te and Yuong* (2001) AB-7430 saying that "use of a decoy with a prematurely receding hairline is unacceptable and should not have been condoned."

The Department's decision addresses the decoy's appearance and the argument that his "receding hairline" caused him to violate the rule in Findings of Fact IV and V:

> IV The decoy was 5'10" tall and weighed approximately 150 pounds on March 26, 2005. Three photographs (Exhibits 3, 4, and 5) taken of him that day are in evidence. They show the decoy as a young man with a youthful looking face and wearing a blue checkerboard shirt and blue jeans. His hair was very short and, as Respondent noted, appeared to be receding. The decoy felt nervous while in Respondent's store.
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> The decoy was employed as a cadet by the Pasadena Police Department, performing "office work" in that department's records section. He also had participated as a decoy on one prior decoy operation. There is no evidence that the decoy's experience as a cadet or as a decoy made him appear older, or younger, than his age.
>
> The decoy was 5'10" tall and weighed approximately 150 pounds on the day of the hearing. He wore the same shirt, and either the same or an identical pair of jeans, that he wore at Respondent's store. His hair was very short and appeared to be receding. His physical appearance was similar to his physical appearance in the photographs. He spoke softly when he testified. Although the decoy stated that he was nervous testifying, that nervousness was not obvious.
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> The Administrative Law Judge observed the decoy's mannerism, maturity, poise, 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 Respondent's store.
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> V Respondent argued that using a decoy whose hairline appeared to be receding violated the Department's Rule 141(a) requirement that the decoy operation be conducted in a fashion that promotes fairness. This argument is rejected, as it has also been rejected by the Alcoholic Beverage Control Appeals Board. See *Chevron Stations, Inc.* (2003) Alcoholic Beverage Control Appeals Board Case Number AB-8078, pages 5-6.

In *Chevron Stations, Inc.*, *supra*, the Board said:

> We do not consider *Southland/Te and Yuong* to stand for the proposition attributed to it by appellant, that a decoy with a receding hairline cannot, per se, display the appearance which could generally be expected of a person under the age of 21. In hindsight, we believe the language used was too strong, and to the extent that the language implies a per se rule that decoys with receding hairlines violate rule 141(b)(2), we disavow it. Nor do we believe that a receding hairline on a decoy is a per se violation of the rule 141(a) requirement that the decoy operation be conducted in a fashion that promotes fairness.
>
> The ALJ found that the decoy's appearance complied with the requirement of rule 141(b)(2) and did not violate the fairness requirement of rule 141(a). The ALJ, who saw the decoy in person at the hearing, was in a far better position than is this Board to evaluate whether or not the decoy's appearance violated either rule 141(a) or 141(b)(2). The determination of the trier of fact as to the decoy's appearance will not be disturbed in the absence of a clear abuse of discretion.

As did the ALJ in *Chevron Stations*, *Inc*., *supra*, the ALJ in the present case found that the decoy's appearance complied with the requirements of rule 141, in spite of his "receding hairline." As we did in *Chevron Stations*, *Inc*., we conclude that there is no basis for disturbing the ALJ's determination in the present case.

Appellant asserts in his brief that "This is not a question over which reasonable minds could differ. This is a case where there is only one possible perception of the evidence: the decoy violated the Rule." We agree with what we said about this statement in *Chevron Stations, Inc.*, *supra*:

> Appellant states in its brief that "This is not a question over which reasonable minds could differ. This is a case where there is only one possible perception of the evidence: the decoy violated the Rule." Appellant is obviously wrong, since ALJ [Lo], in this case, found that the decoy did not violate the rule, and appellant has not shown that his determination was unreasonable or an abuse of discretion.

II

Appellant asserts in his brief that the denial of its pre-hearing Motion to Compel discovery was improper and denied him the opportunity to defend this action. His

motion was brought in response to the Department's failure to comply with those parts of his 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 are 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 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; . . .

Appellant argues he is 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 appellant would offer as evidence so the ALJ could compare them to the decoy present at the hearing.

Appellant argues the material requested would help him 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. He would then be able, he asserts, to compare the appearance of the decoy who purchased alcohol at his 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]

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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 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 appellant's attorneys represent well over half of all appeals this Board hears. We must assume, therefore, that the vast bulk of the information appellant seeks is already in the possession of his 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 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.

Appellant has cited no authority for hsi contention, and we are unaware of any such authority. Appellant would have this Board afford him 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, he argues, 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.

Appellant's contention is based on the false premise stated in his brief (italicized below):

> 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.[4]

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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

(continued...)

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](...continued)
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.