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

AB-8523
File: 20-387313 Reg: 05060262

7-ELEVEN, INC., JAGVEER SINGH MAHAL, and PARMJIT KAUR MAHAL
dba 7-Eleven Store No. 2131-21798
1498 Jamacha Road 101, El Cajon, CA 92019,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 1, 2007
Redeliberated: April 5, 2007
Los Angeles, CA

ISSUED APRIL 26, 2007

7-Eleven, Inc., Jagveer Singh Mahal, and Parmjit Kaur Mahal, doing business as 7-Eleven Store No. 2131-21798 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk, Aali Farooqi, having sold a six-pack of Budweiser beer to Christopher Blair, a 17-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Jagveer Singh Mahal, and Parmjit Kaur Mahal, appearing through their counsel, Ralph B. Saltsman, Stephen

---

[1]The decision of the Department, dated February 2, 2006, is set forth in the appendix.

W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 2002. On July 20, 2005, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on April 22, 2005.

An administrative hearing was held on November 15, 2005, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and no affirmative defense had been proved.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(b)(2) was violated; (2) the decoy operation was not conducted in a manner which promoted fairness, in violation of Rule 141(a); (3) the Department violated the APA's prohibition against ex parte communications; and (4) appellants were denied proper discovery. Issues 1 and 2 are interrelated and will be discussed together.[2] Appellants have also moved to augment the record by the addition of any form 104 (Report of Hearing) or similar document submitted to the Department decision

[2] Rule 141(a) requires that a decoy operation be conducted in a manner which promotes fairness. Rule 141(b)(2) requires that a decoy 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.

maker.

The issue, both in general and with respect to this particular decoy, is not new to this Board. The same decoy and the same ALJ were involved in 7-*Eleven, Inc./Hiebing* (AB-8506), a case heard by the Board in September, 2006. The sale occurred on the same date as in this case. In both cases, the Department rejected arguments that, by reason of his size, weight, and wearing of an "ACCES-PUB" badge, police use of the decoy violated Rule 141(a) and 141(b)(2).

Not surprisingly, the ALJ's description of the decoy closely paralleled what he wrote in *7-Eleven/Hiebing*.

DISCUSSION

I

Appellants contend that the decoy lacked the appearance required by Rule 141(b)(2), and that his use as a decoy violated the requirement of Rule 141(a) that a decoy operation be conducted in a manner which promotes fairness. Appellants stress his size, weight, and his wearing of a badge that contained, among other things, the words "ACCES-PUB." They argue that the badge would have led the clerk to believe the badge identified the decoy as a person old enough to patronize a pub, i.e., a bar.

The administrative law judge (ALJ), who observed the decoy as he testified (an opportunity not enjoyed by this Board), described his appearance this way (Findings of Fact II-D, paragraphs 1 through 5):

D. The overall appearance of the decoy including his demeanor, his poise, his

size, his mannerisms and his physical appearance were consistent with that of [a] person under the age of twenty-one and his appearance at the time of the hearing and on the day of the decoy operation was similar except that he was wearing stud earrings on the day of the hearing.

1. The decoy is five feet eight inches in height and he weighs two hundred forty pounds. Although the decoy has a corpulent build, he also has a chubby and "boyish" looking face. The decoy has no facial hair and he testified that he has never shaved. On the day of the sale, his hair was short and his clothing consisted of black pants, a black short sleeve shirt and black shoes. The decoy was not wearing any jewelry. However he was wearing a plastic wrist band that is a cancer foundation bracelet. He was also wearing an identification badge that was attached to a string that was worn around his neck. The badge contained the name of the decoy's employer (PETCO PARK), the decoy's name and photograph and the words "SPORTSERVICE" and "ACCES-PUB". The decoy explained that he worked as a vendor at Petco Park which is a baseball stadium and that "ACCES-PUB" means that he has access to all public areas of the park.

2. The decoy testified that he was a high school student on the day of the sale, that his school required community service, that the decoy operation satisfied this requirement and that he had not participated in any prior decoy operations.

3. The photograph depicted in Exhibit 3 was taken inside the premises on the night of the sale and the photograph depicted in Exhibit 2 was taken on the night of the sale before going out on the decoy operation. Both of these photographs depict how the decoy appeared and what he was wearing when he was at the premises.

4. There was nothing remarkable about the decoy's nonphysical appearance. He provided straight forward answers while testifying.

5. After considering the two photographs of the decoy (Exhibits 2 and 3), the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which 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.

The ALJ also rejected the argument that the badge worn by the decoy made the operation unfair, noting that there was no testimony that the clerk (who did not testify)

had even noticed what was written on the badge.

Appellants' arguments with respect to this issue are no different than in so many other appeals brought by their counsel, and our views remain unchanged.

Whether the decoy displayed the appearance required by Rule 141(b)(2) is ordinarily a question of fact, and is in this case. This Board is ill-equipped to substitute its judgment of whether the decoy displayed the appearance required by Rule 141(b)(2). This Board does not have the opportunity to see and hear the decoy, and has only the cold record to inform it. On the other hand, the ALJ sees and hears the decoy when he testifies, and, with the opportunity to ask the decoy questions beyond those posed by counsel, is far better equipped to make the determination required by the rule.

The Board has said many times that, in the absence of some extraordinary circumstance, it will defer to the ALJ for his or her judgment with respect to the decoy's appearance. We see no such circumstance here. Without any testimony from the clerk, the suggestion that the clerk may have understood the decoy's badge to mean he was old enough to frequent a "pub," is only speculation.

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 subdivision (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 of 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 in 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.[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 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

[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.)

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 (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

Appellants have 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 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*).

The California Supreme Court held in that case 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.[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

---

[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.

Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[5]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
SOPHIE C. WONG, 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.