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

AB-8536
File: 20-403460 Reg: 05060661

KAYO OIL COMPANY, dba Circle K # 76-2705736
19995 North Indian Canyon Drive, Palm Springs, CA 92262,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: February 1, 2007
Los Angeles, CA

ISSUED APRIL 26, 2007

Kayo Oil Company, doing business as Circle K # 76-2705736 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a minor decoy working for the Department, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Kayo Oil Company, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, 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 February 23, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 15, 2003. On September 15, 2005, the Department filed an accusation against appellant charging that, on August 29, 2005, appellant's clerk, William Armstrong (the clerk), sold an alcoholic beverage to 17-year-old Juan Meza. Although not noted in the accusation, Meza was working as a minor decoy for the Department at the time.

At the administrative hearing held on December 20, 2005, documentary evidence was received and testimony concerning the sale was presented by Meza (the decoy) and by Department investigator Michael Piltz. Appellant's district manager testified regarding the company's response to the violation.

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

Appellant has filed an appeal contending: (1) The Department violated appellant's discovery rights; (2) the Department violated rule 141(b)(2)[2]; (3) the Department failed to follow its penalty guideline; and (4) the Department violated prohibitions against ex parte communications with the decision maker.

DISCUSSION

I

Appellant asserts in its opening brief that the administrative law judge (ALJ) improperly denied its discovery requests, but beyond the bald assertion that the requests are permitted by Government Code section 11507.6, its provides no argument in support of that assertion. Appellant's counsel has made this contention, with

[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.

extensive argument, in many other appeals, and this Board has routinely rejected it. (See, e.g., *7-Eleven, Inc./P R Cutshaw, Inc*. (2006) AB-8484; *7-Eleven, Inc./Sidhu* (2006) AB-8467; *The Southland Corporation/Rogers* (2000) AB-7030a.) We reject appellant's contention here based on its failure to provide any support for the contention in this case and on our rejection of the same contention in prior decisions.[3]

II

Appellant contends the Department's decision finds that the decoy looked younger at the hearing than in the pictures taken during the decoy operation. Therefore, it asserts, the ALJ improperly relied on the decoy's appearance at the hearing in determining that the decoy complied with rule 141(b)(2), rather than on the decoy's appearance at the time of the decoy operation, as required by the rule.

Although appellant does not reveal the basis for its assertion beyond a vague reference to Finding of Fact (FF) 5 and Exhibits 3 and A, the decision deals with the decoy's appearance at some length, in FF 5, FF 11, and Conclusion of Law (CL) 5:

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[3]In its closing brief, appellant insists that the Board "must now revisit its now incorrect determination relative to discovery and the Supreme Court." (App. Cl. Br. at p. 4.) It cites the case of *People v. Garcia* (2006) 39 Cal.4th 1070 [141 P.3d 197, 48 Cal.Rptr.3d 75] (*Garcia*). We must admit that we fail to see the relevance of *Garcia* to the issue of whether appellant's motion to compel discovery was properly denied. Appellant's argument in its closing brief, quoted here in full and exactly as written, left us even more confused:

> *Garcia*, *supra* now resolves important issues not correctly decided by this Board in previous decisions that preclude *Garcia*, *supra* may Collateral Estoppel preclude a second or subsequent proceeding over the Department in a Certified Decision finds a Rule 141(b)(2) violation as to a certain decoy and if so, can the Department then withhold the information concerning its own decisions from Appellant acting under Government Code Section 11507.6?

(App. Cl. Br., *supra*.)

We do not find in this a compelling reason to revisit our prior decisions.

> FF 5 Meza appeared at the hearing. He testified that he stood about 6 feet in height and weighed approximately 195 pounds, although both measurements appeared to be a bit of an exaggeration. On August 29, 2005, at Respondent's store, Meza wore blue jeans, a dark T-shirt over a white shirt, and white sneaker-type shoes. (*See* Exhibits 3 and A.) His black hair was closely trimmed all over as is shown in the Exhibit A photograph. He wore a wristwatch and was clean shaven. Meza dressed almost identically at the hearing. His hair appeared a bit shorter than it does in the Exhibits 3 and A photographs and his claimed height and weight remained the same. At Respondent's Licensed Premises on the date of the decoy operation, Meza looked substantially the same as he did at the hearing. At the time of the hearing, decoy Meza was still just 17 years of age.
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> FF 11 Decoy Meza is a male teenager who gave the appearance at the hearing of one less than 21 years of age. Based on his overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of clerk Armstrong at the Licensed Premises on August 29, 2005, Meza displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Armstrong. While Meza might have appeared a year or two older than his true age, he did not give the general appearance of one 21 years of age or older. [Fn. omitted.]
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> CL 5 Respondent argued there was a failure to comply with section 141(b)(2) of Chapter 1, title 4, California Code of Regulations [Rule 141]. Therefore, Rule 141(c) applies and the Accusation should be dismissed. Respondent acknowledged that decoy Meza's apparent age complied with the Rule at the hearing, but argued that the Exhibit 3 and Exhibit A photographs show a person who does not fit within the Rule. The apparent age of decoy Meza was treated in Findings of Fact, paragraphs 5 and 11. Perhaps Respondent is focusing its attention too much on the serious facial expression Meza affects in the photographs. His overall appearance appears to comport with the Rule. The Rule 141(b)(2) defense asserted by Respondent is rejected.

The paragraphs quoted above demonstrate that, although the ALJ thought Meza looked as though he might be 18 or 19 instead of 17, Meza's appearance was that of a person under the age of 21. The ALJ also states that Meza's appearance was substantially the same at the hearing and at the time of the decoy operation.

The ALJ saw the decoy and the photographs and concluded that the decoy complied with rule 141(b)(2). We have no reason to second-guess him.

III

Appellant contends that the Department did not follow its penalty guidelines (4 Cal. Code Regs., § 144 [rule 144]) because the factors in mitigation described in Finding of Fact 12 were not considered. This contention is apparently based on appellant's belief that, had the factors been considered, they would have resulted in something less than the standard 15-day suspension that was imposed.

This Board will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

The premise on which appellant's "argument" is based is faulty. The existence of mitigating factors does not automatically mean that a penalty will be less than the standard penalty. Imposition of the standard penalty was well within the Department's discretion.

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 Administrative Procedure Act (Gov. Code, §§ 11430.10-11430.80). (*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*).) 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 (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)
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.