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

AB-8639
File: 20-369336 Reg: 06061988

CHEVRON STATIONS, INC. dba Chevron
4221 Raley Boulevard, Sacramento, CA 95838,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: October 4, 2007
San Francisco, CA

ISSUED JANUARY 2, 2008

Chevron Stations, Inc., doing business as Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk having sold a six-pack of Budweiser beer to Michael Severi, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., 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, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 21, 2000.

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[1]The decision of the Department, dated October 17, 2006, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on December 14, 2005.

An administrative hearing was held on August 23, 2006, at which time oral and documentary evidence was received. The evidence established that Severi, the decoy, took a six-pack of beer to the counter, and, at the request of the clerk, displayed his valid California driver's license. The license showed Severi's true date of birth, and contained a red strip with the words "AGE 21 in 2007." After looking at the license, the clerk said "O.K.," or words to that effect, and sold the beer to the decoy. The decoy left the store, returned with two police officers, and identified the person who sold him the beer. Appellant presented no evidence on its behalf.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged in the accusation, and that appellant had failed to establish a defense under Rule 141(b)(2).

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was no compliance with Rule 141(b)(2); (2) the Department violated the APA's prohibition of ex parte communications; and (3) appellant was denied discovery.

DISCUSSION

I

Appellant asserts that the decoy did not display the appearance required by Rule 141(b)(2), i.e., that "which could generally be expected of a person under the age of 21 under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." According to appellant's brief, the decoy's "abnormally large physical appearance" (App. Br., page 9) disqualified him from acting as a decoy.

The only aspect of the decoy's appearance appellant mentions is his height -- six feet.

The decoy's weight is not disclosed in the transcript. His California driver's license, issued May 9, 2005, only seven months prior to the sale in question, records his weight as 136 pounds.

At the administrative hearing, appellant's counsel made much of the decoy's experience in other decoy operations, claiming it gave him an air of confidence in his dealings with the clerk.

The only interaction between the decoy and the clerk was when she asked him for his identification, which he produced for her to examine. It is difficult for us to imagine how this brief exchange could have led the clerk to think this 19-year-old 6' 0" 136 pound "string bean" was so "abnormally large" as to mislead her into believing him to be of legal age.

We have already devoted more time to this issue than it deserves. Appellant's contentions lack merit.

II

Appellant asserts in its brief that the ALJ improperly denied its pre-hearing motion to compel discovery. Its motion was brought in response to the Department's failure to comply with those parts of its discovery request that sought "any findings by the Administrative Law Judge or the Department of ABC that the decoy [presumably, the decoy in the present matter] 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." For all of the decisions specified, appellant also requested "all photographs of the decoy at issue therein."

Administrative law judge (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 APA 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. Appellant asserts that the items requested are discoverable under the provisions of subdivisions (b) through (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;
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> (c) Statements of witnesses then proposed to be called by the party and of other persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, not included in (a) or (b) above;
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> (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 it 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 them prepare a defense under rule 141(b)(2) (4 Cal. Code Regs., § 141, subd. (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. It would then be able, it asserts, 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.[2]

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

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[2] 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.)

matters, not simply a focus on some narrow aspect of that appearance.

We know from our own experience that appellant' 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 its 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 its contention, and we are unaware of any such authority. Appellant 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.

It also contends that its motion was improperly denied because the items it requested might allow them to assert a collateral estoppel defense. We presume it

means that if it had the material requested from the Department, it might find that a prior Department decision sustained a rule 141 defense with respect to this particular decoy, allowing it to assert collateral estoppel as a defense.[3] It insists that, even if it found no evidence to support a collateral estoppel defense in a particular case, it is "entitled to seek and obtain what evidence does exist at the discovery stage." (App. Br. at p. 20.)

Whatever merit this argument might have, or lack, when considered in isolation, it fails immediately when put in context. No matter what the justification, appellant is not entitled to the items requested unless those items come within the language of section 11507.6. We concluded in our discussion above that the items did not come within the statutory language. Therefore, this entire argument is moot.

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, it argues, denying the motion because the request was burdensome, would require an undue

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[3]It relies in large part on the case of *People v. Garcia* (2006) 39 Cal.4th 1070 [141 P.3d 197, 48 Cal.Rptr.3d 75] (*Garcia*). We must admit 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 brief, quoted here 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. Br. at p. 19.)

We do not find in this a compelling argument.

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 its brief (italicized below):

> In the present case, the ALJ denied Appellant's [*sic*] request for discovery on grounds not contemplated by Govt. Code Sections 11507.6 and 11507.7. Those two Sections provide the "exclusive right to and method of discovery," (Gov't. Code § 11507.5,) *and similarly state the objections upon which the Department may argue and an ALJ may rely in deciding a Motion to Compel Discovery* in an administrative hearing. *(See* Gov't. 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

Appellant contends that the Department submitted an ex parte communication, in the form of a report of hearing, to its decision maker, in violation of the proscriptions against ex part communications in the Administration Procedure Act (Gov. Code §11430.10. Appellant has also filed a motion to augment the record with the addition of any report of hearing submitted in this matter.

This contention has been made many times before and has been adjudicated by 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*). This Board has followed *Quintanar* in numerous appeals, remanding the matters to the Department for evidentiary hearings to resolve the factual issues

regarding ex parte communications raised in these cases. (E.g., *Dakramanji* (2007) AB-8572; *BP West Coast Products, LLC* (2007) AB-8549; *Hong* (2007) AB-8492; *Chevron Stations, Inc.* (2007) AB-8488; *Circle K Stores, Inc.* (2006) AB-8404.) The ex parte communication contention in the present appeal is virtually identical to those made in the earlier appeals, and we decide this issue in the present appeal as we did the same issue in the earlier appeals just cited.

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.[4]

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

[4]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.