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

AB-9002
File: 20-214946 Reg: 08068906

7-ELEVEN, INC., ANGELO PIGHETTI, and PATRICIA A. PIGHETTI,
dba 7-Eleven #2133 13888
7443 Hollister Avenue, Goleta, CA 93117,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 4, 2010
Los Angeles, CA

ISSUED DECEMBER 9, 2010

7-Eleven, Inc., Angelo Pighetti, and Patricia A. Pighetti, doing business as 7-Eleven #2133 13888 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with all 10 days stayed for one year, 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., Angelo Pighetti, and Patricia A. Pighetti, appearing through their counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

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[1]The decision of the Department, dated January 29, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 6, 1988. On June 3, 2008, the Department filed an accusation against appellants charging that on October 25, 2007, appellants' clerk, Henry Florez, sold an alcoholic beverage to 19-year-old Stephanie Turner. Although not noted in the accusation, Turner was working as a minor decoy for the Santa Barbara County Sheriff's Department at the time.

At the administrative hearing held on November 19, 2008, documentary evidence was received and testimony concerning the sale was presented by Turner (the decoy), Flores (the clerk), Deborah Cordero, appellants' store manager, and by Rodney Forney, a Santa Barbara County Sheriff's Department detective.

The Department's decision determined that the violation charged was proved and no defense to the charge was established.

Appellants then filed an appeal contending: (1) The administrative law judge (ALJ) erred by failing to grant appellants' motion to compel discovery, (2) the decoy did not display the appearance which could generally be expected of a person under 21 years of age, in violation of rule 141(b)(2),[2] and (3) there was no face-to-face identification as required by rule 141(b)(5).

DISCUSSION

I

Appellants first contend that the ALJ erred by failing to grant appellants' motion to compel discovery, which was made prior to the administrative hearing.

This is one of many cases presented over the years in which an appeal of an

[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.

interlocutory discovery ruling is presented together with the appeal of the Department's suspension or revocation order. All of these cases present the same or very similar issue with respect to discovery.[3]

When the Department objected to appellants' request for the investigative reports of other licensees who had sold to the decoy in question, appellants followed the procedure set out in section 11507.7.[4] The Motion to Compel Discovery was heard by ALJ Ronald Gruen on July 24, 2008, and in his Order Denying Motion to Compel he said:

> The licensees in this case served a request for discovery pursuant to Government Code Section 11507.6. The Department produced certain documents in response, including the names and addresses of other locations visited by the decoy in question. The Department did not produce investigative reports relating to the alleged violations at these other locations. The licensees subsequently filed a timely motion to compel seeking such investigative reports. The Department opposed this motion.
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> The administrative law judge finds that the information sought is protected by various individuals' privacy rights. The administrative law judge further finds that the information sought is speculative and remote and that the licensees have failed to establish its relevance.

Any analysis of this issue must start with the recognition that discovery is much more limited in administrative proceedings than in civil cases. Each has its own discovery provisions, and they are very different. Discovery in civil cases is governed by the Civil Discovery Act, found in the Code of Civil Procedure, sections 2016 through 2036. Discovery in administrative proceedings is controlled by the Administrative Procedure Act (APA), in Government Code sections 11507.5 through 11507.7.

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[3] Prior to 1995, review of an administrative law judge's ruling on discovery issues was by petition to the superior court.

[4] The full text of Government Code sections 11507.6 and 11507.7 are set forth in the Addendum attached hereto.

The Civil Discovery Act is broadly inclusive, authorizing a number of techniques for obtaining information from an adversary in the course of litigation, and expressly states that the matter sought need not be admissible if it "appears reasonably calculated" that it will lead to admissible evidence. Section 2017 provides that a party may obtain discovery:

> regarding any matter not privileged, that is relevant to the subject matter involved in the pending action ... if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.

Section 2019 of the Civil Discovery Act spells out the methods of discovery available. These include oral and written depositions; interrogatories to a party; inspection of documents, things and places; physical and mental examinations; requests for admissions; and simultaneous exchanges of expert trial witness information.

The APA, on the other hand, is more restrictive, specifying (in section 11507.5) that "The provisions of section 11507.6 provide the exclusive right to and method of discovery as to any proceeding governed by this chapter." Section 11507.6 then spells out specific types of material that are discoverable, and *does not* include any provision for permitting discovery of material that is not specifically listed or provided for in that section. The section limits discoverable material, by its very terms, to that which is more or less directly related to the acts or omissions giving rise to the administrative proceeding, thereby helping ensure that the material will be relevant.

The sweeping methods and tools of discovery available in superior court proceedings through the Civil Discovery Act are conspicuously absent from the APA's discovery provisions. There is no language in the APA's discovery provisions at all comparable to the language in the Civil Discovery Act which spells out the broad scope and methods of discovery there authorized.

"[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, not in the Civil Discovery Act. This view is supported by *Romero v. California State Labor Commissioner* (1969) 276 Cal.App.2d 787, 789-790 [81 Cal.Rptr. 281]:

> Except for disciplinary proceedings before the State Bar, . . . *the Civil Discovery Act (Code Civ.Proc., §2016 et seq.) does not apply to administrative adjudication.* (See *Shively v. Stewart* (1966) 55 Cal.Rptr. 217 [421 P.2d 651]; *Everett v. Gordon* (1968) 266 Cal.App.2d 667 [72 Cal.Rptr. 379]; Comments, Discovery in State Administrative Adjudication (1958), 56 Cal.L.Rev. 756; and Discovery Prior to Administrative Adjudications–A Statutory Proposal (1964) 52 Cal.L.Rev. 823.) [Emphasis added.]

Therefore, appellants are limited in their discovery request to those items that they can show fall clearly within the provisions of section 11507.6.

The Board has issued a number of decisions directly addressing this discovery issue. (See, e.g., *The Circle K Corporation* (Jan. 2000) AB-7031a; *The Southland Corporation and Mouannes* (Jan.2000) AB-7077a; *Circle K Stores, Inc.* (Jan. 2000) AB-7091a; *Prestige Stations, Inc.* (Jan. 2000) AB-7248; *The Southland Corporation and Pooni* (Jan. 2000) AB-7264.)

In these cases, and many others, the Board determined that the appellants were limited to the discovery provided in Government Code section 11507.6, and that "witnesses," as used in subdivision (c) of that section was not restricted to percipient witnesses. We concluded that:

> A reasonable interpretation of the term "witnesses" in §11507.6 would entitle appellant to the names and addresses of the other licensees, if any, who sold to the same decoy as in this case, in the course of the same decoy operation conducted during the same work shift as in this case. This limitation will help keep the number of intervening variables at a minimum and prevent a "fishing expedition" while ensuring fairness to the parties in

preparing their cases.

In the instant case, appellants are in receipt of the information outlined in the paragraph above, which is the names and addresses of other licensees who sold to this decoy on the same day as the incident in the Accusation. Appellants are not entitled to the names and addresses of persons, other than the licensees, who may have sold alcoholic beverages to this decoy, nor to the information regarding citations issued.

We are satisfied that the ALJ ruled correctly when he refused to compel the Department to produce the information in question, and that to rule otherwise would permit the type of "fishing expedition" we have declined to endorse in the past.

II

Appellants next contend that the decoy did not display the appearance which could generally be expected of a person under 21 years of age, in violation of rule 141(b)(2), and that the Department failed to provide substantial evidence of compliance with this rule.

Rule 141(b)(2) provides: "The decoy shall 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."

Appellants contend that the decoy failed to present the appearance of a person under the age of 21, asserting that the issue must be resolved in their favor because the ALJ's findings on this issue were not based upon substantial evidence.

As we said in *7-Eleven, Nagra, & Sunner* (2004) AB-8064:

> This Board has considered in prior decisions assertions that substantial evidence did not support the ALJ's finding regarding the decoy's apparent age. In *Circle K Stores, Inc*. (2001) AB-7498, the Board declined to find that substantial evidence of the decoy's apparent age was lacking, saying, "The decoy himself provides the evidence of his appearance." In *The Southland Corporation/Amir* (2001) AB-7464a, the Board responded to the argument by saying: "We simply do not agree that an administrative law judge who must determine the apparent age of a decoy, and actually sees the decoy in person,

lacks substantial evidence to make such a determination."

The ALJ addressed the decoy's appearance in Findings of Fact 11:

> Decoy Turner is a female adult who appeared her age. Based on her overall appearance, *i.e.*, her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing and in the photographs, Exhibits 3 and 6, decoy Turner displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to the clerk.

As the court stated in *Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 25 Cal.App.3d 331, 335 [101 Cal.Rptr. 815]:

> In examining the sufficiency of the evidence, all conflicts must be resolved in favor of the department, and all legitimate and reasonable inferences indulged in to uphold its findings if possible. When findings are attacked as being unsupported by the evidence, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the findings. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the department. (See 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 245, pp. 4236-4238.)

Compliance with rule 141(b)(2) is a factual question for the ALJ. As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as she testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that she possessed 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. We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that she did not.

Rule 141 creates an affirmative defense and appellants bear the burden of showing that the rule was violated. This they have failed to do. Our review of the record convinces us that the ALJ's conclusion regarding the decoy's appearance is reasonable,

supported by substantial evidence, and well within his discretion as trier of fact.

III

Appellants contend that rule 141(b)(5) was violated because no face-to-face identification took place. Rule 141(b)(5) states:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Appellants maintain that the record fails to show that a face-to-face identification of the clerk who sold the alcoholic beverage took place, in spite of exhibit 3, which shows a photograph of the decoy with the clerk who sold the beverage to her, and as confirmed by the testimony of the detective [RT 18] and the testimony of the decoy [RT 48].

Appellants' counsel, however, did not raise the issue of no face-to-face identification at the hearing. The Board is entitled to consider it waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §400, p. 458.)

The general rule in this regard is stated in *In re Aaron B*. (1996) 46 Cal.App.4th 843, 846 [54 Cal.Rptr.2d 27]:

> "[A] party is precluded from urging on appeal any point not raised in the trial court. [Citation.] Any other rule would ' " 'permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.' " [Citations.]' [Citation.]" (*In re Riva M*. (1991) 235 Cal.App.3d 403, 411-412 [286 Cal.Rptr. 592].)

Numerous other cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*E.g., Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966)

65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

We decline to address this issue.

ORDER

The decision of the Department is affirmed.[5]

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

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[5]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.

ADDENDUM TO AB-9002

California Government Code Section 11507.6

Request for Discovery

After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by the agency of the initial pleading or within 15 days after the service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party, including, but not limited to, those intended to be called to testify at the hearing, and (2) inspect and make a copy of any of the following in the possession or custody or under the control of the other party:

(a) A statement of a person, other than the respondent, named in the initial administrative pleading, or in any additional pleading, when it is claimed that the act or omission of the respondent as to this person is the basis for the administrative proceeding;

(b) A statement pertaining to the subject matter of the proceeding made by any party to another party or person;

(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;

(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;

(f) Investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that these reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof.

For the purpose of this section, "statements" include written statements by the person signed or otherwise authenticated by him or her, stenographic, mechanical, electrical or other recordings, or transcripts thereof, of oral statements by the person, and written reports or summaries of these oral statements.

Nothing in this section shall authorize the inspection or copying of any writing or thing which is privileged from disclosure by law or otherwise made confidential or protected as the attorney's work product.

California Government Code Section 11507.7

Motion to Compel Discovery; Order

(a) Any party claiming the party's request for discovery pursuant to Section 11507.6 has not been complied with may serve and file with the administrative law judge a motion to compel discovery, naming as respondent the party refusing or failing to comply with Section 11507.6. The motion shall state facts showing the respondent party failed or refused to comply with Section 11507.6, a description of the matters sought to be discovered, the reason or reasons why the matter is discoverable under that section, that a reasonable and good faith attempt to contact the respondent for an informal resolution of the issue has been made, and the ground or grounds of respondent's refusal so far as known to the moving party.

(b) The motion shall be served upon respondent party and filed within 15 days after the respondent party first evidenced failure or refusal to comply with Section 11507.6 or within 30 days after request was made and the party has failed to reply to the request, or within another time provided by stipulation, whichever period is longer.

(c) The hearing on the motion to compel discovery shall be held within 15 days after the motion is made, or a later time that the administrative law judge may on the judge's own motion for good cause determine. The respondent party shall have the right to serve and file a written answer or other response to the motion before or at the time of the hearing.

(d) Where the matter sought to be discovered is under the custody or control of the respondent party and the respondent party asserts that the matter is not a discoverable matter under the provisions of Section 11507.6, or is privileged against disclosure under those provisions, the administrative law judge may order lodged with it matters provided in subdivision (b) of Section 915 of the Evidence Code and examine the matters in accordance with its provisions.

(e) The administrative law judge shall decide the case on the matters examined in camera, the papers filed by the parties, and such oral argument and additional evidence as the administrative law judge may allow.

(f) Unless otherwise stipulated by the parties, the administrative law judge shall no later than 15 days after the hearing make its order denying or granting the motion. The order shall be in writing setting forth the matters the moving party is entitled to discover under Section 11507.6. A copy of the order shall forthwith be served by mail by the administrative law judge upon the parties. Where the order grants the motion in whole or in part, the order shall not become effective until 10 days after the date the order is served. Where the order denies relief to the moving party, the order shall be effective on the date it is served.