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

AB-9547
File: 20-427108; Reg: 15082132

BIG PAPPAS OIL, INC.,
dba Garden Grove Service Station, Arco AM/PM
12931 Garden Grove Boulevard,
Garden Grove, CA 92843,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: May 5, 2016
Los Angeles, CA

ISSUED JUNE 6, 2016

Appearances: *Appellants:* Jennifer Oden, of Solomon Saltsman & Jamieson, as counsel for appellant Big Pappas Oil, Inc.
Respondent: Kerry K. Winters and Jacob Rambo, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Big Pappas Oil, Inc., doing business as Garden Grove Service Station, Arco AM/PM, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 10 days because its clerk sold an alcoholic beverage to a police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 30, 2005. On

[1]The decision of the Department, dated September 18, 2015, is set forth in the appendix.

March 17, 2015, the Department filed an accusation charging that appellant's clerk, Michael Garcia (the clerk), sold an alcoholic beverage to 19-year-old Michelle Estrada[2] on December 18, 2014. Although not noted in the accusation, Estrada was working as a minor decoy for the Garden Grove Police Department and the Department of Alcoholic Beverage Control at the time.

Prior to the administrative hearing, on April 8, 2015, appellants filed a Request for Discovery pursuant to Government Code section 11507.6 seeking the contact information for the decoy. On April 22, 2015, appellants received the Department's response to the discovery request, providing the address for the Department's Santa Ana District Office for contacting the decoy. On April 22, 2015, appellants sent a letter to the Department asking to meet and confer on the basis that the Department's discovery response was incomplete, specifically requesting the decoy's telephone number and home address. The Department's reply was received on April 27, 2015. The Department explained that pursuant to *Mauri Restaurant Group* (1999) AB-7276, providing the address of the law enforcement agency under which the decoy acted complies with Government Code section 11507.6. (*Id*. at p. 8.) Appellants filed a Motion to Compel Discovery (Exh. A) on April 29, 2015, and the Department filed opposition to the motion. (Exh. 2.) Oral argument was heard telephonically, and the motion was denied by the administrative law judge (ALJ). No written order was prepared.

At the administrative hearing held on June 30, 2015, documentary evidence was received, and testimony concerning the sale was presented by Estrada (the decoy) and by

[2]We refer to the decoy here as she identified herself at the administrative hearing (RT at p. 9) and as she was identified throughout the Department's decision. She was also identified more fully as Michelle Netty Estrada-Monsanto. (RT at p. 7; Exh. 5.)

Department Agent Eric Silva. Appellant presented no witnesses.

Testimony established that on the day of the operation, Agent Silva entered the licensed premises followed shortly thereafter by the decoy. The decoy went to the coolers and selected a six-pack of Shock Top beer in 12 ounce bottles. She took the beer to the counter and set it down. The clerk asked to see her identification and she handed him her California driver's license. (Exh. 5.) The clerk looked at her ID and said, "This isn't you in the picture," (RT at p. 25) and the decoy replied, "yes, it's me." (*Ibid*.) The clerk then handed the ID back to the decoy and completed the sale without asking any age-related questions. After the decoy paid for the beer she exited the store. Agent Silva remained inside.

Silva contacted the clerk, identified himself as a Department agent, and explained the violation that had taken place. The decoy then re-entered the premises with two Garden Grove police officers. Agent Silva asked the decoy if this person was the clerk who sold her the beer and she said that it was. (RT at pp. 27, 43.) Agent Silva also asked the decoy how old she was and she said she was 19 years old. (*Ibid*.) The decoy and clerk were two to three feet apart during this exchange. A photo was taken of the decoy with the clerk (Exh. 6) after which the clerk was issued a citation.

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

Appellant then filed a timely appeal contending: (1) the face-to-face identification was unduly suggestive, in violation of rule 141(b)(5)[3]; (2) the administrative law judge (ALJ) abused his discretion by denying appellant's motion to compel disclosure of the

[3]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.

decoy's actual address; and (3) the ALJ violated appellant's due process rights by interfering with its right to present a meaningful case.

DISCUSSION

I

Appellant contends that the face-to-face identification of the clerk was unduly suggestive, in violation of rule 141(b)(5), because the identification was made by the Department agent rather than the decoy. (App.Br. at p. 7.)

Rule 141(b)(5) provides:

> 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.

This rule provides an affirmative defense. The burden is, therefore, on appellant to show non-compliance. (*Chevron Stations, Inc.* (2015) AB-9445; *7-Eleven, Inc./Lo* (2006) AB-8384.) As appellant correctly points out, the rule requires "strict adherence." (See *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] [finding that no attempt, reasonable or otherwise, was made to identify the clerk].) Notably, the plain language of the rule in no way forbids the officers to first make contact with the suspected seller.

In *Chun* (1999) AB-7287, cited by appellant, this Board observed:

> The phrase "face to face" means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

(*Id.* at p. 5.) Appellant contends the instant case is factually similar to *Chun* in that law enforcement personnel were the first to contact the clerk in both cases. What appellant overlooks, however, is that in *Chun* the decoy never approached the clerk — he pointed the clerk out from across the room. In this case, by contrast, the face-to-face identification took place at a distance of two to three feet.

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the Board clarified application of the rule in cases where, as here, an officer initiates contact with the clerk following the sale:

> As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

(*Id.* at pp. 7-8; see also *7-Eleven,* Inc*./Morales* (*2014) AB-9312; 7-Eleven, Inc./Paintal Corp.* (2013) AB-9310; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *West Coasts Products LLC* (2005) AB-8270; *Chevron Stations, Inc.* (2004) AB-8187.)

The court of appeals has found compliance with rule 141(b)(5) even where police escorted a clerk outside the premises in order to complete the identification. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Keller*) (2003) 109 Cal.App.4th 1687 [3 Cal.Rptr.3d 339].) As the court noted:

> [S]ingle person show-ups are not inherently unfair. (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].) While an unduly suggestive one-person show-up is impermissible (*ibid.*), in the context of a decoy buy operations [*sic*], there is no greater danger of such suggestion in conducting

the show-up off, rather than on, the premises where the sale occurred.

The *Keller* court concluded that "[t]he literal terms of [rule 141(b)(5)] leave the location of the identification to the discretion of the peace officer." (*Id.* at p. 1697.)

In *Carlos M.*, *supra*, the court said:

> The burden is on the defendant to demonstrate unfairness in the manner the show-up was conducted, i.e., to demonstrate that the circumstances were unduly suggestive. (*People v. Hunt* (1977) 19 Cal.3d 888, 893-894 [140 Cal.Rptr. 651, 568 P.2d 376].) Appellant must show unfairness as a demonstrable reality, not just speculation. (*People v. Perkins* (1986) 184 Cal.App.3d 583, 589 [229 Cal.Rptr. 219].)

(*In re Carlos M.*, *supra*, at p. 386.)

The ALJ made the following findings on this issue:

> 7. Agent Silva remained inside the Licensed Premises. He contacted Garcia, identified himself, and explained the violation. Estrada re-entered the Licensed Premises accompanied by two Garden Grove police officers. Agent Silva asked her if this was the person who sold her the beer. She said that it was. Agent Silva also asked her how old she was. She stated that she was 19. Estrada and Garcia were two to three feet apart during this time and Garcia was not otherwise engaged. A photo of Estrada and Garcia was taken (Exhibit 6), after which Garcia was cited.

(Finding of Fact, ¶ 7.) Based on these findings, the ALJ reached the following conclusions:

> 6. With respect to rule 141(b)(5), the Respondent argued that the face-to-face identification was overly suggestive since Agent Eric Silva contacted Garcia before asking Estrada to identify him. Further, the Respondent objected to the form of the question, which it alleged was leading. Both of these arguments are without merit. There is no evidence that Estrada was led (or misled) into identifying anyone. Indeed, by contacting Garcia first and explaining the violation to him, Agent Silva ensured that Garcia would be aware that he was being identified and why. Agent Silva then asked Estrada if this was the person who sold her the beer—a rather basic yes or no question. Had Garcia not been the clerk in question, Estrada could have simply said so. (Finding of Fact ¶ 7.)

(Conclusions of Law, ¶ 6.)

Appellant contends that law enforcement personnel were talking to the clerk during the face-to-face identification (App.Br. at p. 9), but this contention is not supported by the record.

> [MS. WINTERS]
> Q Drawing your attention when you went back in the store to identify the clerk, when you were asked to identify the clerk the other officers were not talking to the clerk; correct?
> [¶ . . . ¶
>
> [MS. ESTRADA]
> A I remember Agent Silva that was talking to me and talking to him at the same time. When he asked me to identify him it was only Agent Silva.

(RT at p. 33.) And later during the hearing:

> [MS. WINTERS]
> Q During the face-to-face was anybody else talking to the clerk?
>
> [AGENT SILVA]
> A No.

(RT at p. 40.) There does not appear to have been any interference by the police officers.

Nothing in the record suggests that the identification was erroneous, that the decoy was in any way pressured to misidentify the seller, that law enforcement personnel interfered with the identification, or that the identification was unduly suggestive. We find the face-to-face identification fully complies with rule 141(b)(5).

II

Appellant contends that the ALJ abused his discretion by denying appellant's motion to compel disclosure of the decoy's actual address. (App.Br. at pp. 10-11.)

Government Code section 11507.6 provides in pertinent part:

> 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 . . .

Appellant maintains section 11507.6 entitles them to the decoy's *personal* address and phone number. In response to appellant's motion, the Department supplied the address and phone number for the Department's Santa Ana District Office — the office that conducted the decoy operation in conjunction with the Garden Grove Police Department.

The Department maintains section 11507.6 only entitles appellant to *an* address — that the statute does not compel disclosure of a residential address. (Reply Br. at p. 6.) They argue that since the decoy was employed by the Department, and that, in her role as decoy, she was an agent of the Department, it was reasonable to supply only the Department's contact information. (*Ibid.*) Furthermore, they argue,

> "[b]ecause a decoy works under the direction of a peace officer (Bus. & Prof. Code § 25658, subd. (f)), the decoy's home address should be protected, similar to the protection given to peace officers. . . . Since a peace officer's home address is protected from disclosure, it follows that a decoy, who is an agent of the police agency, is likewise protected."

(*Id.* at pp. 6-7, citing Penal Code § 1328.5.) The Department maintains the safety of the decoy requires that his or her personal address not be disclosed because such disclosure would "set a dangerous precedent of requiring the Department to provide the same information when requested by any licensee." (*Id.* at p. 7.) We agree.

Appellant maintains the plain language of section 11507.6 requires the Department to disclose the decoy's contact information "to the extent known" to the Department. And that, since the Department was in possession of the decoy's home address, it should have been provided to appellant. (App.Br. at p. 11.)

It is the Department's position that appellant was not entitled to this information nor

was it prejudiced by being denied the decoy's personal address and phone number, because, the Department alleges, no attempt was made by appellant to actually contact the minor. (Reply Br. at p. 6.) Since the decoy *could* have been contacted through the Santa Ana District Office, but was not, appellant cannot now claim that the address provided was not useful. We agree.

Appellant has not shown how the refusal of the Department to provide the decoy's personal contact information prevented them from preparing a diligent and thorough investigation, or prevented them from preparing a response and defense to the accusation. The discovery required by Government Code section 11507.6 was provided and motion was properly denied by the ALJ. While appellant is entitled to an address for the decoy, it is not entitled to the decoy's home address.

On a final note, appellants urge the Board to overrule its decision in *Mauri Restaurant Group*, *supra* — the case in which the Board held that providing the address of the law enforcement agency under which the decoy acted complied with Government Code section 11507.6. The Department argues that the Board does not have the authority to overrule decisions in other cases. We are perplexed as to what the Department means by this. At oral argument the Department's General Counsel rose to explain that this argument, referenced as it is to a "decision in another case" meant the "law of the case," and that, accordingly, all the Department was saying was this Board could not go back and reverse a final decision with respect to the parties to that dispute. That, of course, goes without saying; it is indisputable.

But to be perfectly clear, if this Board believed our decision on the law in *Mauri* or any other matter was no longer warranted, either because of changed law, circumstances or both, we have the authority to reconsider that decision; and have reversed past decisions

for legal reasons explaining why we have done so. Whether our decisions are (indisputably) "persuasive authority" for the points of law explicated in a factual context, or (apparently disputable) "binding precedents" for the legal principles stated, the Board expects them to be followed and, when relevant, called to our attention in counsel's briefs. Failure of counsel to cite in their briefs to the Board's pertinent decisions will not assist them in argument. For the orderly and predictable resolution of appeals, this Board will continue to rely on its previous rulings unless a change in law is necessitated by extenuating changes in controlling law or circumstances. That goes for our decision in *Mauri*, which appellants have not persuaded us was legally wrong.

III

Appellant contends that the ALJ violated appellant's due process rights by interfering with their right to present a meaningful case. (App.Br. at p. 13.)

Government Code section 11513, subdivision (b) states in pertinent part that "each party has the right to rebut the evidence against him or her." Appellant argues that "due process requires full and fair administrative hearings that provide respondents with a meaningful opportunity to present their case." (App.Br. at p. 13, citing *Petrus v. State Dept. of Motor Vehicles* (2011) 194 Cal.App.4th 1240, 1244 [123 Cal.Rptr.3d 686].)

In *Petrus*, due process was found to have been denied when blood alcohol results were provided only moments before a trial — denying that party an opportunity to prepare a rebuttal case. In the instant case, appellant maintains that the Department's withholding of the decoy's home address also denied appellant the opportunity to present a meaningful case and to rebut the evidence against them. The cases cited by appellant in support of this argument, however, derive entirely from the realm of criminal law, and are less than helpful in an administrative setting.

As the court found in *Cimarusti*, administrative and criminal proceedings are quite different:

> Petitioners contend that as an element of their due process right to a fair hearing, they had a prehearing right to contact the wards personally. They rely on a criminal case that held that . . . a criminal defendant's attorney or investigator has a right to contact the victim and request an interview, although the victim has no obligation to give one. [Citation.] Petitioners' analogy to criminal cases is inapt.
>
> Generally, there is no due process right to prehearing discovery in administrative hearing cases, and particularly no constitutional right to take depositions. The scope of discovery in administrative hearings is governed by statute and the agency's discretion. [Citations.]
>
> Petitioners' contention that they were denied due process is unpersuasive. Petitioners have been provided with the wards' prior statements. At the hearing, which will be conducted in accordance with the Administrative Procedure Act . . . , petitioners can call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter even if not covered on direct examination, impeach witnesses, and rebut evidence. . . . The statutory prehearing discovery and hearing procedures are sufficient to satisfy petitioners' due process rights. [Citation.]

(*Cimarusti v. Sup. Court* (2000) 79 Cal.App.4th 799, 808-809 [94 Cal.Rptr.2d 336].)

Unlike the *Petrus* case, *supra*, where information was provided moments before the hearing — thus depriving the party of an opportunity to prepare a defense — no information was withheld in this case. Appellant was provided with an address for the decoy, photographs of the decoy, a photograph of the decoy with the clerk, and a form listing the premises visited during the decoy operation indicating whether or not a violation occurred. In addition, counsel for appellant was able to cross-examine the decoy during the hearing.

Appellant has not shown how the refusal of the Department to provide the decoy's personal contact information prevented it from preparing a diligent and thorough investigation, or prevented it from preparing a response and defense to the accusation. Appellant's motion was properly denied by the ALJ.

Having said that, however, appellant *is* entitled to make a request to interview the decoy, and that request should be in writing and delivered to the law enforcement agency (or district office) that conducted the decoy operation. In the event the law enforcement agency (or district office) fails to forward such a written request to the decoy, the possibility exists that this could present grounds for reversal on due process grounds in another matter. The facts in this matter, however, do not support such a reversal. While the Board is aware of appellant's concern about its inability to more fully investigate decoys prior to the administrative hearing, the streamlined processes and statutory limitations of the APA are simply not helpful to appellant's contention.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]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.