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

**AB-8517**
File: 20-232934 Reg: 05060336

UNITED EL SEGUNDO, INC., dba Mobil Mart
14400 Telegraph Road, Whittier, CA 90604,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: November 2, 2006
Los Angeles, CA
Redeliberation: January 11, 2007; February 1, 2007

**ISSUED MARCH 29, 2007**

United El Segundo, Inc., doing business as Mobil Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for it's clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant United El Segundo, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ghazal A. Yashouafar, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated January 26, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 11, 1989. On July 27, 2005, the Department filed an accusation against appellant charging that, on April 29, 2005, appellant's clerk, Cesar Tovar (the clerk), sold an alcoholic beverage to 18-year-old Leslie Menjivar. Although not noted in the accusation, Menjivar was working as a minor decoy for the Department at the time.

At the administrative hearing held on December 2, 2005, documentary evidence was received and testimony concerning the sale was presented by Menjivar.

The Department's decision determined that the violation charged was proved, and that a defense to the charge was not established. Appellant then filed an appeal contending: (1) Appellant's right to due process was violated because the decision lacks a complete analysis of all the issues raised; (2) rule 141(a)[2] was violated; and (3) the administrative law judge (ALJ) improperly denied appellant's motion to compel discovery. Thereafter, appellant filed a supplemental letter 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 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*).

DISCUSSION

I

The Department adopted the proposed decision of the ALJ which imposed the penalty recommended by the Department at the hearing: a 10-day suspension of the license. The usual penalty for a first sale-to-minor violation, which this was, is a 15-day

[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.

suspension. (4 Cal. Code Regs., § 144 [Penalty Guidelines].) Appellant contends that the penalty was an abuse of discretion because the decision fails to explain why the clerk's statement to the decoy "You know what I'm doing is wrong," was an aggravating factor. The failure to explain is also a violation of due process, appellant asserts, because it violates the standard set for administrative decisions in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*).

Finding of Fact III of the decision states:

> Before selling the beer, Mr. Tovar asked to see the decoy's identification. The decoy replied, "I don't have it with me." Mr. Tovar then asked the decoy to step aside and proceeded to help two other customers. After helping the other customers, Mr. Tovar said to the decoy, "You know what I'm doing is wrong. Bring your i.d. next time." The decoy, feeling "guilty," shrugged her shoulders.

In Determination of Issues III, the ALJ discusses the penalty:

> The Department recommended that Respondent's license be suspended for ten, rather than the usual fifteen, days, due to the aggravating factor, and the mitigating factor, in this case. The aggravating factor is that Mr. Tovar sold the beer to the decoy even though he knew what he was doing was wrong. The mitigating factor is that Respondent's license had been discipline-free for nearly sixteen years at the time of the present violation. The recommended penalty is within the Department's discretion. Respondent's request for an all-stayed penalty is denied.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but 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 contention that the Department failed to comply with *Topanga* has been rejected by this Board numerous times before. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181, the Board explained:

> Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)[3]
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> In *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: " 'The holding in Topanga was, thus, that *in the total absence of findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be sustained.' " In the present appeal, there was no "total absence of findings" that would invoke the holding in *Topanga*.
>
> Appellants' demand that the ALJ "explain how [the conflict in testimony] was resolved" (App. Br. at p. 2) is little more than a demand for the reasoning process of the ALJ. The California Supreme Court made clear in *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768, 778-779 [122 Cal.Rptr. 543], that, as long as findings are made, a party is not entitled to attempt to delve into the reasoning process of the administrative adjudicator:

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[3]Appellant also relies on the Appeals Board's decision in *Silva & Morris* (2001) AB-7721, where the Board stated that "The reasoning of the *Topanga* case demands that the Department set forth the reasoning, grounds, and patterns of thought which caused the Department to decide that the penalty levied is rational and legally sufficient." On its face, the language of *Silva & Morris* does not stand up to scrutiny, since it dealt with a penalty determination, while *Topanga* applies only to the factual findings in an administrative decision. The language quoted from *Silva & Morris* was implicitly overruled by the analysis of *7-Eleven, Inc./Cheema*, quoted in the text, and we now specifically reject and overrule that language as an erroneous statement of the law.

> As we stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12]: "implicit in [Code of Civil Procedure] section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."[Fn.]
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> In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

Appellant has shown no abuse of discretion here. The Department is not required to explain the reasoning behind its decisions, and we see no reason it should be required to explain the reasoning behind its imposition of penalty unless there is a clear abuse of discretion shown. Discretion, by definition, does not require explanation, unless patently abusive. Since the standard penalty would have been a 15-day suspension and the penalty imposed was less than that, it was clearly within the realm of the Department's discretion. Whether or not the clerk's statement was properly considered an aggravating factor, the resulting penalty was within the Department's discretion, and that is the only issue for this Board to consider.

II

Appellant contends that the decoy operation was not conducted in a manner that "promotes fairness" because the decoy merely shrugged her shoulders in response to the clerk's statement "You know what I'm doing is wrong. Bring your i.d. next time." The clerk told the decoy to bring her identification with her next time because, according to appellant, that clerk held a good-faith belief that the decoy was over 21 years of age. The decoy's failure to correct the clerk's mistaken impression, appellant asserts, mislead the clerk and led to the violation.

Appellant's contention is based on pure speculation, since the clerk did not testify and we cannot know what he was thinking. His ambiguous statement might have meant he thought the decoy was at least 21, but there is no evidence to that effect. It could just as well have been an effort by the clerk to make some semblance of compliance with the law.

The clerk clearly knew he should not be selling to the decoy. The ALJ found that the decoy presented the appearance of a person under the age of 21, so it is reasonable to assume that the clerk knew he was selling to a person under the age of 21. There is no evidence that the clerk was mislead by the decoy's lack of response to his statement.

III

Appellant asserts in its brief that the denial of its pre-hearing Motion to Compel discovery was improper and denied it the opportunity to defend this action. 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 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. Appellant argues that the items requested are 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 appellant 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), (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; . . .

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 it 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. It would then

be able, it asserts, to compare the appearance of the decoy who purchased alcohol at its 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.[4]

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 appellant's 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

[4] 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.)

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.

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 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 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.

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 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, 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.[5]

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.[6]

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

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[5]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.

[6]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.