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

AB-8537
File: 20-305202 Reg: 05059785

7-ELEVEN, INC., and ALLEN L. WALKER dba 7-Eleven No. 2131-15070
10777 Jamacha Boulevard, Spring Valley, CA 91978,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 7, 2006
Los Angeles, CA

Redeliberation: January 11, 2007; February 1, 2007

ISSUED APRIL 26, 2007

7-Eleven, Inc., and Allen L. Walker, doing business as 7-Eleven No. 2131-15070 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for a violation of Business and Professions Code section 25658, subdivision (a). Appellants' clerk, William Felton, sold a six-pack of Budweiser beer to Caleb Ernst, an 18-year-old minor acting as a decoy for the Department of Alcoholic Beverage Control,

Appearances on appeal include appellants 7-Eleven, Inc., and Allen L. Walker, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Claire C. Weglarz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

FACTS AND PROCEDURAL HISTORY

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[1]The decision of the Department, dated February 23, 2006, is set forth in the appendix.

Appellants' off-sale beer and wine license was issued on July 1, 1998. On May 26, 2005, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on February 26, 2005.

An administrative hearing was held on December 8, 2005, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the decoy, Caleb Ernst, and Brent Bowser, one of the Department investigators participating in the decoy operation. Jennifer Walker, the wife of co-licensee Allen L. Walker, testified that she has managed the business since her husband was totally disabled in a motorcycle accident, and that she terminated the clerk for his violation of store policy.

The evidence established that the clerk did not ask the decoy for his age or for any identification and that the decoy identified the clerk as the seller on two occasions, the first time as the decoy and investigators entered the store after the sale took place, and the second time when being photographed with the clerk.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained, and that no defense had been established under Department Rule 141.

Appellants thereafter filed a timely appeal, contending that the administrative law judge precluded the licensee from presenting evidence on an issue of mitigation, and prevented appellants from presenting a defense by denying their request for discovery.[2]

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[2] The Department has moved to dismiss the appeal, contending that the late filing of appellants' opening brief has prejudiced its ability to respond to the issues raised by appellant. The Department's motion was filed before its receipt of appellants' brief. Upon our review of appellants' brief and the record, we find little that might prejudice the Department's ability to respond. Therefore, we deny the Department's (continued...)

DISCUSSION

I

Appellants assert in their brief that the denial of their pre-hearing Motion to Compel discovery was improper and denied them the opportunity to defend this action. Their motion was brought in response to the Department's failure to comply with those parts of their 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. Appellants argue that the items requested were 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 appellants may have in an

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[2](...continued)
motion.

administrative proceeding before the Department must fall within the list of specific items found in Government Code section 11507.6. Appellants assert that the items requested are discoverable under the provisions of subdivision (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;
> ¶...¶
> (c) 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; ...

Appellants argue they are entitled to the materials sought because previous findings of 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 in evidence, and the photographs are "writings" that appellants would offer into evidence so the ALJ could compare them to the decoy present at the hearing.

Appellants argue the material requested would help them 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. They would then be able, they assert, 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.[3]

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 appellants' attorneys represent well over half of all appeals this Board hears. We must assume, therefore, that the vast bulk of the information they seek is already in the possession of their 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 appellants' motion.

We are unwilling to agree with appellants' 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

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[3] 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.)

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.

Appellants have cited no authority for their contention, and we are unaware of any such authority. Appellants would have this Board afford them 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.

Appellants also contend 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, they argue, the denial of the motion because the discovery 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.

Appellants' contention is based on the false premise stated in their brief (italicized below):

> In the present case, the ALJ denied Appellant's [*sic*] 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.

II

Appellants contend that the ALJ improperly limited their ability to present mitigation evidence by confining their questions about employee training to that provided to the clerk who made the sale. They point to mitigating factors identified in the Department's penalty guidelines (Department Rule 144 [4 Cal. Code Regs., §144]), and argue that the Department's objection to their attempt to elicit broader evidence of training provided to all employees denied them the benefit of these mitigation factors.

Rule 144 states, in part, that higher or lower penalties from the schedule of penalties contained in the rule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. Appellants focus on two of the mitigating factors: "[p]ositive action by licensee to correct problem," and "[d]ocumented training of licensee and employees."

The Department raised its objection *after* the licensee had testified that the store policy called for the immediate firing of an employee who fails to card, or who sells to, an underage person, and that she trained her employees and had a computer-based training program. While the ALJ did not specifically rule on the objection, he did state that he felt specific questioning about the training given the clerk who made the sale would be relevant. As to that, she testified that the clerk had been told "to card anyone who looked under 27 for alcohol, cigarettes and tobacco," but had not had the benefit of the computer-based training. She further testified that employees are now required to ask for identification from customers appearing to be under the age of 30.

The ALJ made no specific reference to either aggravation or mitigation in his proposed decision. He summarized the licensee's testimony about store policy and training, and concluded that "based on all the evidence presented at the hearing, a

penalty consisting of a fifteen-day suspension is an appropriate penalty in this matter." (Findings of Fact E and F.)

Although the Appeals Board may examine the issue of whether a penalty is excessive (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183]), it may not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].)

We cannot say that the penalty in this case is an abuse of discretion, or that any additional evidence of training of other employees would have justified a lesser penalty. The sale was made to an 18-year-old decoy with "an extremely young looking face." (Finding of Fact D-1.) Appellant was able to elicit evidence of computer-based training for employees other than clerk Felton, as well as the action taken to correct the problem, i.e., Felton's termination and the stiffening of the requirement that identification be demanded from customers under the age of 30. The ALJ's response to the Department's objection does not appear to have materially restricted appellants' ability to present meaningful evidence of mitigation.

III

Appellants have also filed a motion to augment the administrative record with any form 104 (Report of Hearing) included in the Department's file, and have filed a supplemental 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 [50 Cal.Rptr.3d. 585] (*Quintanar*).

The California Supreme Court held in *Quintanar* 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.[4]

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] 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.

[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.