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

AB-8542
File: 20-419032 Reg: 05060490

7-ELEVEN, INC., and KAREN KAUR GILL, dba 7-Eleven # 2131-29518C
2441 Jamacha Road, Suite 108, El Cajon, Ca 92019,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 1, 2007
Los Angeles, CA

ISSUED APRIL 30, 2007

7-Eleven, Inc., and Karen Kaur Gill, doing business as 7-Eleven # 2131-29518C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days 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., and Karen Kaur Gill, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

---

[1]The decision of the Department, dated March 16, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 20, 2004. Thereafter, the Department instituted an accusation against appellants charging that, on July 1, 2005, appellants' clerk, Geeta Bhati (the clerk), sold an alcoholic beverage to 16-year-old Alexis Coronado. Although not noted in the accusation, Coronado was working as a minor decoy for the San Diego County Sheriff's Department at the time.

At the administrative hearing held on January 13, 2006, documentary evidence was received and testimony concerning the sale was presented by Coronado (the decoy) and by Edward Southcott, a San Diego County Sheriff's deputy. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense was established.

Appellants filed an appeal making the following contentions: (1) The Department violated appellants' right to discovery, (2) the administrative law judge (ALJ) erred in denying appellants' request to hold the record open after the hearing, (3) the decoy's testimony was not credible, (4) there was not compliance with rule 141(b)(5)[2], and (5) the Department violated the ex parte communication provisions of the Administrative Procedure Act.

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

[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.

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."

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 appellants failed to show that the requested items were relevant or would lead to admissible evidence. Appellants argue that the items requested are expressly included as discoverable matters in the Administrative Procedure Act (APA) (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 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 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; . . .

Appellants argue they are 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 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.

---

[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.)

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 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, 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.

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 abused his discretion by denying their motion to hold open the record for 30 days after the hearing. Ryan Kroll, appellants' counsel, stated that he was not asking for a continuance, since a previous continuance had been granted, but asked to keep the record open for 30 days. Kroll asserted that notice of the hearing had not been received by his office, that co-appellant Gill had received the notice just the day before, and that they had not had adequate time to prepare for the

hearing. The ALJ denied appellants' motion, finding that good cause was not established, since the prior postponement had been granted just one day before the prior hearing date, and appellants should, presumably, have been ready for the hearing at that time.

Appellants argue first that the motion should have been granted because notice of the continued hearing was not received in a timely manner. Since co-appellant Gill did not receive notice of the continued hearing until the day before and their counsel did not receive the notice at all, they argue it is logical to assume that "some error must have occurred in the dissemination of the Notices of Hearing," and "the existence of such error" means that the Department failed to provide the required 10 days' notice of the hearing. (Gov. Code, § 11509.) Therefore, appellants conclude, it was an abuse of discretion to deny their request that the record remain open.

Secondly, appellants state that it was error to deny their motion because they established good cause for keeping the record open. They allege that the ALJ denied this motion because, in hindsight, he determined that the earlier motion for continuance should not have been granted, or because he had already granted one continuance. Appellants urge that multiple requests for continuances are not precluded by the Administrative Procedure Act and the ALJ should grant multiple requests as long as there is a showing of good cause in each instance.

Pursuant to Government Code section 11524, the ALJ has the right to grant a request for continuance for good cause. There is no absolute right to a continuance; one is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of

discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198]; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)

The proof of service for the hearing notice shows that was mailed more than 10 days before the hearing date, the corporate office received the notice 10 days before the hearing date, and appellants do not allege that the addresses shown are incorrect. Appellants' argument that the motion should have been granted because of a lack of notice is groundless.

Appellants' argument that they established good cause is belied by the ALJ's specific finding that good cause was not established. [RT 45.] Looking at appellants' justifications for keeping the record open, we cannot say that we disagree with the ALJ. Kroll stated that he needed "a little time to prep [the case] afterwards [and] to properly speak to the client after [the hearing]." [RT 7,8.] He said he wasn't sure if he wanted the clerk there to testify, that he just wanted "to see how this hearing goes [and] speak with the licensee afterwards." [RT 10-11.] The ALJ ascertained that, if the prior hearing had taken place as scheduled, appellants would not have had the clerk testify, so he did not believe it would be appropriate to allow the record to remain open at that point for appellants to decide, after the Department had presented its case, whether or not they would like to have the clerk testify.

The ALJ's finding appears perfectly reasonable and proper. Appellants have not shown that there was an abuse of discretion in the denial of their motion.

III

Appellants allege the ALJ failed to explain why he accepted the decoy's testimony. It was unreasonable to do so, appellants assert, because the decoy could not remember "key details" about the sale and the face-to-face identification. Some of the "key details" she did not remember were how many customers were in the store when she entered it, what the clerk was doing when she placed the beer on the counter, or what he was doing when she re-entered the store to make the face-to-face identification.

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

The unimportant factors mentioned by appellants do not cause the ALJ's reliance on the decoy's testimony to be "highly suspect," as alleged by appellants. We find no basis to question the ALJ's credibility determinations.

IV

Appellants assert that the decoy and the officer were "unable to provide comprehensive testimony as to the details of the face-to-face identification," so it cannot be said that there was full compliance with rule 141(b)(5).

Rule 141 provides an opportunity for a licensee to establish an affirmative defense, and the burden is on the licensee to show that the rule was violated. Appellants have not even attempted to do so.

V

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. (*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*).) 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, appellants contend 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

---

[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.