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

AB-8562
File: 21-409440 Reg: 05060695

PUNJABI KING, INC. dba Liquor King
6629 Ming Avenue, Bakersfield, CA 93309,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED MAY 9, 2007

Punjabi King, Inc., doing business as Liquor King (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk having sold a six-pack of Budweiser beer to Nicholas Esposito, a 17-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Punjabi King, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Steven A. Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

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[1]The decision of the Department, dated April 20, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 29, 2004. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on July 21, 2005.

An administrative hearing was held on February 28, 2006, at which time oral and documentary evidence was received. Following the hearing, the Department issued a decision which determined that the charge of the accusation had been proved and no affirmative defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends: (1) appellant was denied discovery; (2) there was no compliance with Rule 141(b)(2); (3) the decoy operation was conducted in an unfair manner; and (4) the face to face identification was insufficient. Contentions 2 and 3 are related and will be discussed together. Appellant has also filed a motion to augment the administrative record with any form 104 (Report of Hearing) included in the Department's file, and has 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] (*Quin*tanar).

DISCUSSION

I

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 appellant failed to show that the requested items were relevant or would lead to admissible evidence. Appellant argues 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 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 of the Department are statements of a party "pertaining to the subject matter of the proceeding," an ALJ's findings are relevant writings that would be admissible in evidence; and the photographs requested are "writings" that appellant would offer into 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.[2]

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

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[2] 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.)

half of all appeals this Board hears. We must assume, therefore, that the vast bulk of the information it 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 term "statements" and "writings" as used in that subdivision 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 made by any of the parties with respect to the particular subject matter of the proceeding in which the discovery is sought. To interpret the term to include any finding or decision by the Department in all 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, 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.

Appellant's contention is based on the false premise stated in its brief:

> 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.

II

Appellant contends that the decoy did not display the appearance required by Rule 141(b)(2), i.e., that 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, and that it was unfair to use him as a decoy, in violation of the requirement of Rule 141(a) that the decoy operation be conducted in a manner which promotes fairness. Appellant cites the decoy's height and weight, his eleven-month experience as a police Explorer, and places particular emphasis on his having purchased an alcoholic beverage in each of the four premises he visited without any asking his age or for identification.

The ALJ addressed the issue of the decoy's appearance in Findings of Fact 5 and 10, and Conclusion of Law 5:

FF 5. Esposito appeared at the hearing. He stood about 5 feet, 7 inches tall and weighed 186 pounds. His hair was brown, curly and styled with gel. (*See* Exhibit 2.) He dressed at the hearing identically to the way he was dressed at Respondent's store, a gray, collared, short-sleeved shirt over a gray T-shirt, baggie jeans and white tennis-type shoes, loosely laced. (*Id.*) At the hearing, at least, his shirt hung out over his baggie trousers. He wore no jewelry at the Licensed Premises, but he did have sunglasses held on his shirt front. (*Id.*) On July 21, 2005, at Respondent's licensed premises, decoy Esposito looked substantially the same as he did at the hearing. (*Id.*) At the time of the hearing, decoy Esposito was 17 years of age.

FF 10. Decoy Esposito is a male juvenile who appears a shade old for his age, 17 years of age at the hearing. Based on his overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of clerk Singh at the Licensed Premises on July 21, 2005, Esposito displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Singh. Esposito appeared a year or two older than his true age. He could not have appeared to be over 20 years of age when he presented himself to clerk Singh.

CL 5. Respondent argued there was a failure to comply with section 141(b)(2) of Chapter 1, title 4, California Code of Regulations [Rule 141]. Therefore, Rule 141(c) applies and the Accusation should be dismissed. Respondent argued that decoy Esposito failed to comply with the rule because his face showed maturity, his mannerisms are mature, and his success" rate shows his apparent age to be too old. The apparent age of decoy Esposito was treated in Findings of Fact, paragraphs 5 and 10. Due to the decoy's so-called "success" rate, even greater attention was given to this decoy's apparent age than the special attention usually given to police decoys. The success rate, however, is just one factor to be considered. It was given consideration. The very small sample size and careful observation of the decoy showed no support for Respondent's contention that decoy Esposito appeared older than the rule requires. The Rule 141(b)(2) defense asserted by Respondent is rejected. While the decoy may appear older than his actual 16/17 years of age, he does not present the appearance of one older than the 20 years of age or less required by the Rule.

Appellant cites *7-Eleven, Inc./Dianne Corporation* (2002) AB-7835 (*Dianne*) for the proposition that a very high "success rate" is strong evidence of the decoy looking over 21. While the Board did and does recognize that a high "success rate" is strong evidence with respect to a decoy's apparent age, it has also made it clear that *Dianne* did not establish a per se rule compelling reversal in such cases. The Board revisited

its decision in *Dianne* in *7-Eleven, Inc./Jain and Jain* (2004) AB-8082, and rejected the notion that it intended its language in *Dianne* to suggest a per se rule that proof of an 80-percent purchase rate compelled the conclusion that the rule was violated. Instead, the Board stated:

> Although an 80 percent purchase rate during a decoy operation raises questions in reasonable minds as to the fairness of a decoy operation, that in itself is not enough to show that rule 141(a) or rule 141(b)(2) were violated. Such a per se rule would be inappropriate since the sales could be attributed to a number of reasons other than a belief that the decoy appeared to be over the age of 21. If we did not make that clear in *7-Eleven/Dianne*, we do so now.

The ALJ in this case recognized the decoy's "success rate" as simply one more factor to be considered. We are not inclined to disagree with his assessment.

III

Appellant has asserted that the face to face identification required by Rule 141(b)(5) was inadequate. Appellant's brief, other than for this bare assertion, is silent as to why the identification was inadequate.

We have reviewed the record and find that the testimony of both the decoy and the accompanying police officer establishes beyond dispute that the decoy's identification of the seller satisfied the requirement of the rule. Indeed, such testimony probably also explains why the attorney who represented appellant at the administrative hearing chose not to raise the issue at the time.

Thus, the contention lacks both procedural and substantive merit. It was waived at the hearing and is unsupported by the evidence in the record.

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.[3]

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.[4]

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

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[3] 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.

[4]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.