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

AB-8606
File: 21-404404 Reg: 05061484

HELEN HUONG LE and KHOA XUAN LE dba Speedy Liquor
3036 East Fourth Street, Long Beach, CA 90814,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: May 3, 2007
Los Angeles, CA

ISSUED JULY 19, 2007

Helen Huong Le and Khoa Xuan Le, doing business as Speedy Liquor (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which revoked their license for their clerk, Tommy Vu, having sold a 24-ounce can of Budweiser beer to Navey Kov, a 17-year-old minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Helen Huong Le and Khoa Xuan Le, 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, Kerry Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 7, 2003. Thereafter,

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[1]The decision of the Department, dated August 24, 2006, is set forth in the appendix.

the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on November 17, 2005. The accusation also charged that appellants had incurred discipline for prior sale-to-minor violations on April 2, 2004, and October 14, 2004.

An administrative hearing was held on July 11, 2006, at which time oral and documentary evidence was received. At that hearing, Navey Kov, the decoy, and Matthew Pavlich, a Department investigator, testified in support of the charge of the accusation. Helen Le testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged in the accusation had been proved, that no affirmative defense had been established, that it was appellant's third violation within a 19-month period, and ordered the license revoked.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the Department's ex parte communication violated the APA; (2) appellants' motion to compel discovery was improperly denied; and (3) the decoy lacked the appearance required by Rule 141(b)(2).

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 [40 Cal.Rptr. 3d. 585] (*Quintanar*).

DISCUSSION

I

Appellants contend that the decoy, because of her appearance, training as a

Sheriff's Explorer, and her prior experience as a decoy, lacked the appearance required by Rule 141(b)(2).[2]

Appellants' brief overstates its case. This decoy had not been in ten prior decoy operations, as appellants' brief seems to imply (App. Br., p. 21). The operation involved in this case was only her third, and she was sold an alcoholic beverage in only three of eleven locations. There is no requirement that a decoy not participate in more than a single decoy operation, and this Board is disinclined to create one.

Nor is it correct to say, as do appellants, that this decoy had eighteen weeks of training as a Sheriff's Explorer, when that training consisted of only eighteen Saturdays. We find it difficult to accept the suggestion that such training might add years to the appearance displayed by a decoy.

More importantly, appellants simply ignore the careful assessment of the decoy reflected in the administrative law judge's (ALJ's) proposed decision, where he described her appearance (Findings of Fact 5 and 9, and Conclusion of Law 5):

> FF 5: Kov appeared and testified at the hearing. She stood about 5 feet, 8 inches tall and weighed approximately 120 pounds. Her black hair was long and straight. Her hair length is slightly past her shoulders. At the time of the decoy operation her hair length was about to the middle of her back. She wore blue jeans and a pink top which was covered by a white jacket. Kov dressed the same at the hearing as she did when she visited Respondent's [*sic*] store on November 17, 2005. (See Exhibits 2A and 2B.) On the evening of the decoy operation Kov did not wear any makeup nor did she wear any jewelry. Kov's height and weight have remained the same since the date of the operation. At Respondent's [*sic*] Licensed Premises on the date of the decoy operation, Kov looked substantially the same as she did at the hearing.
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> FF 9: Decoy Kov appears her age, 17 years of age at the time of the decoy

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[2] Rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2)) states: "The decoy shall display the appearance 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."

> operation. Based on her overall appearance, *i.e*. her physical appearance, dress, poise, demeanor, maturity and mannerisms shown at the hearing, and her appearance/conduct in front of clerk Vu at the Licensed Premises on November 17, 2005, Kov displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Vu. Kov appeared her true age.
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> CL 5: Respondent [*sic*] argued that Rule 141(b)(2) was violated because the decoy had an appearance of a person over the age of 21. Respondent [*sic*] cites Kov being a police explorer and having participated in two prior decoy operations. This argument is rejected. Kov's overall appearance, as noted in Findings of Fact ¶¶ 4 through 10, was that of a typical high school teenager.

Nor do we believe we should ignore the ALJ's assessment of the decoy's appearance and, as appellants argue, rely solely of the photograph of the decoy which is in the record. We agree that a photograph is an important piece of evidence to consider, but find it of the most use when the ALJ's description of the decoy departs substantially from what a reasonable viewer might see in examining the photograph. There is no such departure here.

II

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 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;
> [¶]...[¶]
> (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 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

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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.)

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, 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.

III

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.[4]

ORDER

The decision of the Department is affirmed as to 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

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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.

accordance with the foregoing opinion.[5]

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

[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.