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

AB-8112
File: 47-5802 Reg: 02054040

EL TORITO RESTAURANTS, INC. dba El Torito Restaurant
445 Camino Del Rio South, San Diego, CA 92108,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: April 8, 2004
Los Angeles, CA

ISSUED JUNE 9, 2004

El Torito Restaurants, Inc., doing business as El Torito Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control,[1] entered after a hearing on an accusation, which suspended its license for 10 days, all of which were conditionally stayed for one year, for its bartender, Jose Lejarraga, having sold a bottle of Budweiser beer to Brooke Edwards, a 17-year old minor acting as a decoy for the San Diego Police Department, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant El Torito Restaurants, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated March 6, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on December 1, 1976. The accusation, which charged the sale of an alcoholic beverage to a minor on August 9, 2002, was filed on September 12, 2002.

An administrative hearing was held on January 28, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the transaction had occurred as alleged, and which ordered the stayed suspension from which this timely appeal has been taken.

Appellant raises the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(3) was violated; and (3) the refusal of the administrative law judge (ALJ) to grant appellant's peremptory challenge resulted in a violation of the equal protection clauses of the California and United States Constitutions.

DISCUSSION

I

Appellant contends that Rule 141(b))(2) was violated. Rule 141(b)(2) provides that a 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."

Appellant argues that, in relying on the decoy's "soft-spoken nature" and apparent nervousness while testifying, the ALJ considered factors that were not part of the circumstances presented to the seller at the time of the sale. However, the ALJ relied on the decoy's overall appearance, including her demeanor, poise, mannerisms, size and physical appearance. At least some of these physical and nonphysical aspects of appearance would have been present at the time of the sale, whether or not

the bartender observed them.

An ALJ must make an independent judgment about the decoy's apparent age, based on the evidence presented in testimony, documentary evidence, and his own observations of the decoy. He or she is not limited to the aspects of the decoy's appearance that were actually observed by the seller or by the seller's misperception:

> The decoy must only present an appearance which could generally be expected of a person under the age of 21 years. If the clerk, observing a decoy who presents such appearance generally, perceives the decoy to be older than 21, he does so at his peril. A licensee cannot escape liability by employing clerks unable to make a reasonable judgment as to a buyer's age.

(*Prestige Stations, Inc.* (2000) AB-7248 [ftnt.2])

It is worth noting that the transaction in question took place only eight days after the decoy turned 17, and that she was wearing a shirt with cartoon characters depicted on its front.

Appellant also suggests that the ALJ did not consider the physical characteristics of the decoy, referring to her height - 5'9" and weight - 180 pounds. Since he included these statistics in his description of the decoy (see Findings E and E.1), we do not believe it can be said that he did not consider them.

Finally, appellant contends that the ALJ should not have included in his analysis the statement of the bartender, made to the police officer, that he believed the decoy to be 20. Appellant argues that there is no evidence the bartender held that belief at the time of the sale, and suggests he formed that belief only after being told he had sold to a minor.

As we read the record, there is some ambiguity as to when the bartender entertained that belief. However, we do not think the ALJ's reference to the bartender's statement, whichever time the belief was formed, impairs his decision.

II

Rule 141(b)(3) provides that a decoy carrying identification must present it upon request to any seller of alcoholic beverages. Appellant contends that this rule was violated because, although the decoy presented her military identification, she was told by the officer directing the decoy operation not to carry her high school identification.

The decoy carried only her military identification; it showed her name, correct date of birth, dates of issuance and expiration, description, and photograph; and she showed the identification card to the bartender at his request. The decoy complied fully with rule 141(b)(3).

It appears that appellants are asserting a violation of the fairness requirement of rule 141(a) rather than a violation of rule 141(b)(3). The unfairness results, according to appellants, from the officer instructing the decoy not to carry her high school identification card. They speculate that the decoy's high school identification card would have provided the appropriate information and, if she had carried that card and shown it to the bartender, the bartender would not have sold to her.

Although we feel the officer's instruction was questionable, we have no reason to believe that it was done for any improper motive, and do not believe that the instruction can be considered a violation of either 141(a) or 141(b)(3), especially in light of the lack of evidence showing that the high school identification card contained the appropriate information. According to the decoy, it did not contain her date of birth.

Nor do we agree with appellant that the reference on the military identification to the rank and pay grade of the decoy's sponsor, presumably a parent, is a matter of concern. The card clearly stated the decoy's civilian status.

III

Before the administrative hearing, appellant filed with the Administrative Hearing Office (AOH) of the Department, a "Notice of Peremptory Challenge" (Exhibit A), seeking the disqualification of ALJ Echeverria, who was assigned to hear this case. The notice stated that "Pursuant to section 11425.40(d) of the Business and Professions Code [sic; should be "Government Code"], section 1034 of the California Code of Regulations, Respondent is entitled to one disqualification without cause of the assigned ALJ which will be granted in any APA hearing." Attached was a declaration of appellant's counsel setting out the matters required by the California Code of Regulations, title 1, section 1034 (rule 1034).

The Department filed an objection to the peremptory challenge, arguing that rule 1034 applies only in the case of a hearing before an ALJ from the Office of Administrative Hearings (OAH). Government Code section 11425.40, subdivision (d), provides that "An agency that conducts an adjudicative proceeding may provide by regulation for peremptory challenge of the presiding officer." The Department's AHO has not adopted such a regulation. OAH adopted rule 1034, allowing a peremptory challenge, or disqualification without cause, of an ALJ assigned "in any OAH Hearing." Rule 1034 applies only to OAH judges, the Department argues, and because the Department does not have a regulation allowing for peremptory challenge of an ALJ, appellant's challenge has no legal basis.

The ALJ agreed with the Department's reasoning, denying the peremptory challenge because OAH rule 1034 did not apply in the present case and the Department had not adopted a provision allowing for a peremptory challenge to a Department ALJ.

On appeal, appellant urges that the Department violates the equal protection clauses of the state and federal Constitutions by allowing peremptory challenges to ALJ's in some cases before it and not in others.

The equal protection provisions of the California and United States Constitutions "in general assure that persons in like circumstances be given equal protection and security in the enjoyment of their rights." (*Whittaker v. Superior Court* (1968) 68 Cal.2d 357, 367 [66 Cal.Rptr. 710].)

Appellant contends that the practice of the Department (through AOH) of employing ALJ's from OAH to hear some Department cases causes a denial of equal protection. It asserts that this practice results in some licensees having the opportunity to peremptorily challenge an ALJ while others do not have that opportunity, and, because of this difference, two licensees, one appearing before an ALJ from AOH and the other appearing before an ALJ from OAH, "would be treated significantly differently in their administrative hearings with the only underlying difference being the source of their judges."

The usual equal protection challenge is to an act of the Legislature creating classifications that cause similarly situated persons to be treated differently. However, the acts of state officials in administering the laws may also be found to violate equal protection, where a statute is applied in a discriminatory manner.

Appellant is objecting to the Department's use of two groups of ALJ's, some of whom are subject to peremptory challenge and some of whom are not. In some sense, this is a statutorily created classification. However, the statutes and regulation involved – OAH rule 1034, Government Code section 11525.40, and Business and Professions

Code section 24210 – are neutral on their faces. Where a statute is fair and nondiscriminatory on its face, and the contention is that it is applied in a discriminatory manner, an equal protection violation will be found only if the objector can show an *intentional and arbitrary discrimination* by the state in applying the statute.

> Unequal application of a statute or rule to persons entitled to be treated alike is not a denial of equal protection "unless there is shown to be present in it an element of intentional or purposeful discrimination." (*Snowden v. Hughes* (1944) 321 U.S. 1, 8 [64 S. Ct. 397, 401, 88 L. Ed. 497].) What the equal protection guarantee prohibits is state officials "purposefully and intentionally singling out individuals for disparate treatment on an invidiously discriminatory basis." (*Murgia v. Municipal Court* (1975) 15 Cal. 3d 286, 297 [124 Cal. Rptr. 204, 540 P.2d 44].)

(Cilderman v. Los Angeles (1998) 67 Cal.App.4th 1466, 1470 [80 Cal.Rptr.2d 20].)

Appellant does not allege any intentional and arbitrary discrimination by the Department in its practice of employing ALJ's from OAH. It does not even allege a "classification" created by legislation or the Department's practice. It merely alleges that two similarly situated licensees could receive significantly different treatment based upon simply whether their judge is from OAH or from the AOH. Under these circumstances, appellant has not shown "intentional or arbitrary discrimination" in the Department's action. Therefore, the action does not violate equal protection guarantees.

Even if we were to approach appellant's contention using the standard applicable in challenging a legislatively created classification, appellant's contention would fail. The right to a peremptory challenge is not constitutionally protected, but has been created by statute. Since the challenge does not involve a suspect classification or a fundamental right, the "rational relationship" standard is used. (*People v. Leung* (1992) 5 Cal.App.4th 482, 494 [7 Cal.Rptr.2d 290].) This means that a statutory classification

will be found valid if it bears a rational relationship to a legitimate governmental purpose. (*Board of Supervisors v. Local Agency Formation Com.*, 3 Cal. 4th 903, 913 [13 Cal.Rptr.2d 245].)

The need to provide timely hearings is clearly a legitimate governmental purpose, and the Department's temporary use of additional ALJ's from OAH, the agency created with the purpose of providing ALJ's for other state agencies, is rationally related to that purpose. The Department's practice of using ALJ's from OAH would satisfy the rational relationship test if it were used here.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.