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

AB-8265
File: 20-215113 Reg: 03055779

7-ELEVEN, INC., HELEN Y. KANG, and HOSAEN KANG dba 7-Eleven 2133 19387
8960 Woodman Avenue, Arleta, CA 91331,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: December 2, 2004
Los Angeles, CA

ISSUED JANUARY 28, 2005

7-Eleven, Inc., Helen Y. Kang, and Hosaen Kang, doing business as 7-Eleven 2133 19387 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk having sold a container of beer to Manuel Zamora, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Helen Y. Kang, and Hosaen Kang, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 2, 1985. On

[1]The decision of the Department, dated March 11, 2004, is set forth in the appendix.

August 28, 2003, the Department instituted an accusation against appellants charging that, on May 9, 2003, their clerk made an unlawful sale of an alcoholic beverage to a minor. An administrative hearing was held on January 22, 2004. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellants had failed to establish any affirmative defense.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the Department's practice with reference to its assignment of administrative law judges (ALJ's) denied appellants due process of law; and (2) the Department violated Rule 141(b)(5).

DISCUSSION

I

Appellants contend that the Department's arrangement with its ALJ's violates due process because it gives them a financial interest in the outcome of the proceedings, citing the California Supreme Court's ruling in *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 [119 Cal.Rptr.2d 341]. They also contend that the Department's practice of employing retired annuitants on an hourly basis also results in a denial of due process, and that the Department's policy governing the assignment of ALJ's is itself an illegal underground regulation.

Appellants point out in their brief that these issues were not addressed in any way in the proposed decision. We do not find that surprising, since there was never a reference to them in the course of the administrative hearing. Neither at the outset of the hearing nor during closing argument did appellants' counsel suggest in any way that Judge Gruen should not hear the case.

It is true that the issue was one of 19 special defenses set forth in appellants' Special Notice of Defense, filed September 25, 2002, approximately four months prior to the administrative hearing. However, we do not think it can be said that the issues were preserved merely because they were included in this boilerplate document, one which resembles an omnibus attempt to raise every issue which could conceivably emerge in the course of the hearing.

When a Special Notice of Defense is filed, it goes into the case file well before the case has been set for hearing. We cannot expect an ALJ to address with particularity any of the defenses asserted in the Special Notice of Defense unless, at the hearing, the ALJ is told that it is the contention of the licensee or licensees that one or more of the defenses there set forth will be pressed. When that is done, the ALJ is fairly on notice that the issue has been preserved and should be dealt with. When that is not done, the issue must be considered waived. An ALJ cannot be expected to assume that the licensee intends to assert every one of the defenses in the Special Notice of Defense whether or not it has any relevance to the case.

As stated in the Witkin treatise, "An appellate court will not ordinarily consider procedural defects or erroneous rulings with respect to relief sought or defenses asserted where an objection could have been, but was not presented to the lower court. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §394, p.444.)

II

Appellants contend that, although the decision finds that there was a citation issued, and there was a face-to face identification, "the evidence is unclear, ambivalent, and not subject to a definitive finding as to the sequence of face-to-face identification vis-a-vis issuance of a citation." (App. Br., at Page 15.) They assert that the ALJ made

a "leap of faith" to determine that a citation was issued following the face-to-face identification, since it cannot be determined from the record that a citation issued.

Rule 141(b)(5) provides:

> Following any completed sale, *but not later than the time a citation, if any*, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages. (Emphasis supplied.)

Subsection (c) of Rule 141 provides that a failure to comply with the rule shall be a defense to any action brought pursuant to Business and Professions Code section 25658.

Rule 141(b)(5) does not require that a citation be issued. If none were issued, contrary to the finding by the ALJ (see Finding of Fact 5), then Rule 141(b)(5) cannot have been violated, since, as appellants concede, there was a face-to-face identification.

On the other hand, if a citation did issue, the evidence at the hearing indicates that the process of its issuance was still in progress when the decoy left the store after identifying the seller.

The decoy testified that, after his purchase, he was stopped by one of the police officers and told to reenter the store. "As soon as I stepped out they told me to walk back in." He estimated that only 30 seconds elapsed between the time he reentered the store and when he identified the clerk who sold to him. He also testified that he was photographed with the clerk, after which he left the store. As he left, he observed the officers writing something.

It is most unlikely that a police officer could have obtained the necessary information for a citation, and filled out the citation form, in the brief period of time that

transpired between the decoy's exit and reentry. More likely, what the decoy saw was the beginning of the citation issuance process.

The ALJ could have inferred, from the fact that the case arose from a police decoy operation, that the issuance of the citation is what brought the matter to the attention of the Department. The decoy's testimony also suggests that a citation was issued.

But, even if a citation did not issue, and the ALJ's finding that one did issue was in error, appellants gain nothing, simply because the rule does not contain a requirement that a citation issue. For appellants to establish the affirmative defense Rule 141 offers, they would have to show that a citation did in fact issue and that the face to face identification followed.

Having said all that, we could just as well have found the defense waived, since, like the issue involving the ALJ discussed earlier in Part I, there was no reference to this defense during the course of the hearing. Burying it in a document not brought to the attention of the ALJ at the time of the hearing is inconsistent with sound practice.

ORDER

The decision of the Department is affirmed.[2]

TED HUNT, CHAIRMAN
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.