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

AB-8395
File: 20-214995 Reg: 04057887

7-ELEVEN, INC., HARJINDER SINGH POONI, and TARSEM KAUR POONI,
dba 7-Eleven Store # 2175-27005
11853 Downey Avenue, Downey, CA 90241,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: December 1, 2005
Los Angeles, CA

ISSUED: JANUARY 31, 2006

7-Eleven, Inc., Harjinder Singh Pooni, and Tarsem Kaur Pooni, doing business as 7-Eleven Store # 2175-27005 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, with five days stayed on the condition that appellants operate discipline-free for one year, 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., Harjinder Singh Pooni, and Tarsem Kaur Pooni, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Claire C. Weglarz, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated February 3, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging that, on April 21, 2004, appellants' clerk, Surinder Randahwa (the clerk), sold an alcoholic beverage to 18-year-old Griselda Martinez. Although not noted in the accusation, Martinez was working as a minor decoy for the Downey Police Department at the time.

An administrative hearing was held on January 7, 2005, at which time documentary evidence was received, and testimony concerning the sale was presented by Martinez (the decoy) and by Mark McDaniel, a Downey police officer.

The Department's decision determined that the violation charged was proved, and no defense was established. Appellants then filed an appeal contending: (1) The Department violated appellants' rights to due process; (2) rule 141(b)(5)[2] was not strictly adhered to; and (3) if the decision is sustained, the penalty should be reduced.

DISCUSSION

I

Appellants assert the Department violated their right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the administrative law judge (ALJ) provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellants also filed a Motion to Augment Record (the motion), requesting that the report provided to the Department's decision maker be made part of the record.

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[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.

The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motion and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar"* or "the *Quintanar* cases").[3]

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

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[3]The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. *(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the ALJ had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellants at the hearing. Appellants have not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellants have not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellants, it appears to us that appellants received the process that was due to them in this administrative proceeding. Under these circumstances, and with the potential for an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellants are not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no

relevant purpose that would be served by the production of any post-hearing document. Appellants' motion is denied.

II

Rule 141(b)(5) requires that, after a sale to a minor decoy, the "officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages." Appellants contend that this decoy operation did not strictly comply with rule 141(b)(5) as required by *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd*. (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126]. Relying on this Board's decision in *Chun* (1999) AB-7287, they assert that the identification must be conducted so that the seller is put on notice that he or she is being identified by the decoy as the seller of alcoholic beverages. According to appellants, the Department failed to establish this because the evidence was unclear about whether the clerk was aware of the decoy's presence and whether the clerk was helping customers at the time the decoy made the identification.

The ALJ made the following finding with regard to the face-to-face identification (Finding of Fact V):

> Upon entering the store, one of the police officers asked the decoy to identify the person who sold the beer to her. The decoy identified Mr. Randahwa, who was the only clerk in the store. During the identification, the decoy and Mr. Randahwa were five to seven feet apart, separated by the counter, and facing each other.
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> After this identification took place, one of the police officers took a photograph of the decoy identifying [Mr.] Randahwa as the person who sold the beer to her. The photograph shows the decoy pointing at Mr. Randahwa. The two of them are face-to-face.
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> Each of these two identifications complied with the Department's Rule 141(b)(5).

Appellant is arguing, essentially, that this finding is not supported by substantial evidence. "Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734].)

In *Chun, supra,* the Board said "face-to-face" means that:

> the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Appellants contend that this language means that the clerk must be "put on notice" that the identification is taking place.[4] However, appellants are wrong. As the Board said in *Greer* (2000) AB-7403, it is not necessary that the clerk *actually* be aware that the identification is taking place. The only "acknowledgment" required is achieved by "the seller's presence such that the seller is, *or reasonably ought to be*, knowledgeable that he or she is being accused and pointed out as the seller. [Italics added.]"

The *Chun* definition of "face-to-face" takes into consideration the context of a decoy operation, where the safety of the decoy is a concern, and the face-to-face identification is merely one part of the overall situation, not some theatrical accusation. The core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339].) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid*.) It does not require a direct "face off" or any overt "acknowledgment" to accomplish these purposes. There was no evidence of misidentification and the clerk had the opportunity to look at the decoy again. The opportunity is all that needs to be provided.

The ALJ found that rule 141(b)(5) was satisfied twice, once right after the decoy re-entered the store with the officers, and again when a photograph was taken of the

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[4]Appellants state in their brief that "the California legislature affirmatively chose to add the term 'face-to-face' to this subsection of Rule 141." The California Legislature, however, did not choose the wording. Rule 141 is not a statute enacted by the Legislature, but a regulation promulgated and adopted by the Department under the mandate of Business and Professions Code section 25658, subdivision (f). The mandate did not include use of the term "face-to-face."

clerk and the decoy. The testimony established that the clerk was facing the decoy and the decoy was no more than five to seven feet from the clerk when she first identified him after re-entering the store. Exhibit 4 is a photograph of the decoy facing the clerk and pointing to him while he is facing her; they are no more than a foot or two apart.

The finding is adequately supported by substantial evidence. It was appellants' burden to show the rule was violated, and they presented no evidence contradicting the Department's evidence. Under these circumstances, their argument fails.

III

Appellants contend the Appeals Board should further mitigate the penalty imposed because they received commendations from the Downey Police Department in the past for not selling to minors and because their previous violation was in 1998.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

Even if the Appeals Board were to find that a penalty was excessive and an abuse of discretion, it has no power to change the penalty imposed, nor may it order the Department to impose a particular penalty. The Board may direct the Department

to reconsider a matter, but "shall not limit or control in any way the discretion vested by law in the department." (Bus. & Prof. Code, § 23085.) The most this Board could do if it found the penalty to be an abuse of discretion would be to remand the matter to the Department for reconsideration. Only the Department may impose penalties.

In this case, however, there is no basis for this Board to remand this matter for reconsideration of the penalty. The Department already mitigated the penalty by staying five days of the suspension. While the Department could have reduced the suspension term outright, it was clearly not unreasonable for it to stay some part conditioned on a term of discipline-free operation of the premises. There was no abuse of discretion in imposing this penalty.

ORDER

The decision of the Department is affirmed.[5]

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

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

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