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

AB-8401
File: 41-176179 Reg: 04057924

CEC ENTERTAINMENT, INC., dba Chuck E. Cheese's # 439
1143 Highland Avenue, National City, CA 91950,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED: MARCH 20, 2006

CEC Entertainment, Inc., doing business as Chuck E. Cheese's # 439 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days for appellant's employees selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant CEC Entertainment, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, 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 February 3, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on April 17, 1991. On August 31, 2004, the Department filed a two-count accusation against appellant charging that, on March 19, 2004, appellant's employees, Judy Bustos (count 1) and Melody Doolittle (count 2), sold or furnished an alcoholic beverage to 17-year-old Megan Barahura. Although not noted in the accusation, Barahura was working as a minor decoy for the National City Police Department at the time.

At the administrative hearing held on December 21, 2004, documentary evidence was received, and testimony concerning the sale was presented by Barahura (the decoy), by National City police officer John Dougherty, and by Melody Doolittle, appellant's manager.

The testimony established that Barahura went to the front counter, where Bustos was working, and ordered a beer. Bustos asked for the decoy's identification and the decoy gave her a leather card case with a clear plastic cover that contained her California identification card, which was visible through the cover. Bustos looked at the card, took money from the decoy, and gave her change and a receipt. Bustos had to call the manager to serve the beer, so the decoy waited at the counter for several minutes until Doolittle appeared and handed the decoy a plastic cup filled with beer.

Officer Dougherty and another officer then came up to the counter, identified themselves, and told Bustos and Doolittle of the sale-to-minor violation. The decoy, the officers, Bustos, and Doolittle then went to a storage room next to the manager's office, where the decoy was asked to identify who had sold her the beer. The decoy pointed to Bustos and said, "She did," and pointed to Doolittle and said, "She handed me the beer." When the decoy made her identifications, she was in close proximity to Bustos

and Doolittle, only about three feet from each of them. Citations were issued to Bustos and Doolittle after the decoy identified them.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense was established. Appellant has filed an appeal making the following contentions: (1) Rule 141(b)(5)[2] was violated, and (2) the Department violated appellant's right to due process by an ex parte communication.[3]

DISCUSSION

I

Rule 141(b)(5) requires, after a sale to a minor decoy, that 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." Appellant contends that this decoy operation did not strictly comply with

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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.

[3]The decoy, when asked who she identified as selling her the beer, said that she pointed "[t]o Andrea Sobian (sic), the clerk." [RT 14.] The person who took the decoy's payment, made change, and gave the decoy a receipt is named Judy Bustos. There is no other reference in the record to anyone named Andrea Sobian.

At oral argument before this Board, appellant's attorney pointed this out and demanded that the Board have the court reporter recertify the hearing transcript. Counsel said that this may be a mistake by the reporter, in which case there is no certified record. If the decoy named Andrea Sobian as the person she identified, counsel asserted, there is no proof that the person who sold the beer was identified as required by rule 141(b)(5).

It is clear from the reporter's insertion of "(sic)" following the name Andrea Sobian that it was not a mistake of the reporter, but a misstatement by the decoy. However, regardless of what the decoy thought the person's name was, it is clear from the record as a whole that it was Judy Bustos she pointed to. In any case, this argument, if it had any validity, should have been made long ago. The decoy was not questioned at the hearing about the name she gave, nor was any question raised during the six months before oral argument that appellant had a copy of the transcript. Under the circumstances, the decoy's misstatement is of no consequence.

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, it asserts that the identification must be conducted so that "the circumstances lead to the seller's knowing that he or she was being identified." (App. Br. at p. 13.) The Department did not show this in the case of Doolittle, appellant asserts, because Doolittle was being interviewed by officer Dougherty at the time the decoy was identifying her and Doolittle had no knowledge that she was being identified.

The administrative law judge (ALJ) addressed the identification process in Finding of Fact II-C:

> The preponderance of the evidence established that a face to face identification of the seller and/or the furnisher of the beer did in fact take place as to Counts 1 and 2 of the Accusation. When everyone arrived at this storage room, the decoy was asked to identify the person who had sold her the beer. The decoy then pointed to Bustos and said, "She did." The decoy also pointed to the manager and stated, "She handed me the beer." When the decoy identified Bustos, the decoy was standing at the doorway separating the storage room and the manager's office and Bustos was standing in the storage room in close proximity to the decoy. When the decoy identified the manager, the manager was sitting in her office and was in close proximity to the decoy. Exhibit 5-A is a photograph that shows the decoy standing next to Bustos and the decoy is holding the cup of beer that was sold to her. Exhibit 5-B is a photograph of the manager sitting in her office. Both of these photographs were taken after the decoy had identified Bustos and the manager. A citation was issued to Bustos and to the manager after the decoy had identified them.

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*. (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.

Appellant contends that this language means that the clerk must be aware that the identification is taking place. Appellant is 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.]"

Not only is appellant wrong about the legal standard to be used, it is wrong about the facts it uses to support its argument. Officer Dougherty testified that when the decoy identified Doolittle, they were facing each other [RT 35] and only about three feet away from each other [RT 35]. In addition, Dougherty testified that he interviewed Doolittle "during the citation process," which took place *after* the identification process. [RT 36, 43.] Under these circumstances, Doolittle reasonably ought to have been knowledgeable that she was being accused and pointed out as the furnisher of beer. She was in close proximity to the decoy and no evidence was presented of any distraction or other event at that time that would interfere with her ability to be aware of what the decoy was doing.

The *Chun* definition of "face-to-face" takes into consideration the context of a decoy operation, where the safety of the decoy is often 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 in this case and the manager had the opportunity to look at the decoy again. That opportunity is all that needs to be provided in order to strictly comply with rule 141(b)(5).

II

Appellant asserts the Department violated its right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the 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. Appellant 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.

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").[4]

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.

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[4]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.)

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.)

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 appellant at the hearing. Appellant has 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 appellant has 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 appellant, it appears to us that appellant received the process that was due it 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, appellant is 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. Appellant's motion is denied.

ORDER

The decision of the Department is affirmed.[5]

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

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[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.