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

AB-8436
File: 20-287963 Reg: 04058253

7-ELEVEN, INC., MANJIT S. GREWAL, and GURPAL GREWAL
dba 7-Eleven #2237-19976
1399 North Main Street, Manteca, CA 95336,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: April 6, 2006
San Francisco, CA

ISSUED JULY 18, 2006

7-Eleven, Inc., Manjit S. Grewal, and Gurpal Grewal, doing business as 7-Eleven #2237-19976 (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 40-ounce bottle of Bud Light beer to Justin Chisick, 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., Manjit S. Grewal, and Gurpal Grewal, 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, Matthew Botting.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 20, 1993.

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[1]The decision of the Department, dated April 25, 2005, is set forth in the appendix.

On October 29, 2004, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on May 21, 2004.

An administrative hearing was held on March 15, 2005, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged, and no affirmative defense had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) appellants' motion to compel discovery was improperly denied; (2) appellants were denied due process as a result of an ex parte communication; (3) there was no compliance with Rules 141(a) and 141(b)(2); and (4) the Department abused its discretion by refusing to consider mitigation of the penalty.

DISCUSSION

I

Appellants assert in their brief that their pre-hearing motion seeking discovery of 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 to the seller of alcoholic beverages at the time of the alleged offense," was improperly denied. Appellants allege that administrative law judge (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 spend much of their brief arguing that the provisions of the Civil

Discovery Act (Code Civ. Proc., §§ 2016-2036) apply to administrative proceedings, a contention this Board rejected in numerous cases in 1999 and 2000 (see, e.g., *The Southland Corporation/Rogers* (2000) AB-7030a), all of which were argued by the same law firm representing the present appellants. Those decisions of the Appeals Board held:

> "[T]he exclusive right to and method of discovery as to any proceeding governed by [the APA]" is provided in §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 §11507.6, not in the Civil Discovery Act. . . . . [¶] In addition, §11507.7 requires that a motion to compel discovery pursuant to §11507.6 "shall state . . . the reason or reasons why the matter is discoverable *under that section* . . . ." [Emphasis added.] [¶] Therefore, we believe that appellants are limited in their discovery request to those items that they can show fall clearly within the provisions of §11507.6.

Appellants' arguments in the present appeal, repeating, almost verbatim, the arguments made in 1999 and 2000, are no more persuasive today than they were six or seven years ago.

Appellants argue they are entitled to the materials sought because they will help them "prepare its [sic] defense by knowing . . . what factors have been considered by the Department in deciding how a decoy's appearance violated the rule" (App. Br. at p.14) so that they can compare the appearance of the decoy who purchased alcohol at their premises with the "characteristics, features and factors which have been shown in the past to be inconsistent with the general expectations . . . of the rule." (App. Br. at p. 13.) They assert "it is more than reasonable" that decisions in which decoys were found not to comply with rule 141(b)(2) "could assist the ALJ in this case by comparison." (*Ibid*.) However, appellants do not explain how an ALJ is expected to make such a comparison.

It is conceivable that each decoy found not to display the appearance required by the rule had some particular indicium, or combination of indicia, of age that warranted his or her disqualification. We have considerable doubt, however, that any such indicia, 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 an administrative hearing.

The most important indicium 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, it is, in every case, an ALJ's overall assessment of a decoy's appearance that matters, not simply a focus on some narrow aspect of a decoy's appearance.

We know from our own experience that appellants' attorneys represent well over half of all appellants before this Board. We would think, therefore, that the vast bulk of the information appellants seek is already in the possession of their attorneys, a fact of which the Board can take official notice. This, coupled with the questionable assistance the information sought could provide to an ALJ in assessing the appearance of a decoy present at the hearing,[2] persuades us that ALJ Gruen did not abuse his discretion in denying appellants' motion.

II

Appellants assert the Department violated their right to procedural due process when the attorney 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

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[2] Unless a minor is deceased or too ill to be present, or unless the minor's presence is waived, he or she must be produced at the hearing by the Department in all cases charging violations of Business and Professions Code sections 25658, 25663, and 25665. (See Bus. & Prof. Code section 25666.)

(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. 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 motions 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

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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.)

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 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 them in this administrative proceeding. Under these

circumstances, and with the potential of 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.

III

Appellants assert in their brief (App. Br., p. 2) that the decoy lacked the appearance required by Rule 141(b)(2) and violated the "fairness" requirement of Rule 141(a), Other than that bare assertion, the brief is entirely silent with respect to the decoy's appearance or conduct. In the absence of any explanation as to how, or in what manner, the use by the police of the decoy in question contravened Rule 141, we must conclude that the contention lacks merit.

It is the practice of appellants' attorneys to incorporate in their briefs arguments that have been made in other appeals. We assume that, in doing so in this case, this particular claim was not meant to be included.

IV

Appellants contend that the penalty is excessive, claiming that the ALJ abused his discretion when he failed to mitigate the standard penalty for the sale-to-minor violation.

The Appeals Board may not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage*

Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The Department's standard penalty for a sale-to-minor violation is 15 days. (4 Cal. Code Regs., §144.) However, Rule 144 also sets out a number of what are considered mitigating factors by the Department, one of which is the length of licensure at the premises without prior discipline or problems.

At the administrative hearing, appellants urged that any suspension be stayed in its entirety, pointing to the fact that appellants had operated free of discipline since June 1996. The Department attorney recommended a ten-day suspension, also on the basis of appellants' nine-year discipline-free record.

The ALJ expressly considered appellants' discipline-free record, but declined to adopt either recommendation, stating:

> Complainant recommended a ten (10) day license suspension. This is five days less than the usual penalty sought for sales to minors where no prior violations have occurred in the past three years. Counsel for Complainant stated the reason for a lesser recommended penalty was based on a discipline free history since 1996. Counsel for respondents contends that if the Accusation is proven, a penalty should be stayed in its entirety since respondents have not violated the law since 1996.
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> In recommending a sanction for the violation established in this matter the above reasoning was considered. However, the evidence demonstrated a violation of law after an inspection by the selling clerk of a valid identification clearly indicating the customer was under age 21. No evidence was presented of employee training concerning sales of alcoholic beverages. Mitigation was not established.
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> The recommendation that follows should accomplish the Department's objective.
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> It would seem that the Department's objective was a penalty more lenient than

the standard 15-day suspension ordered by the ALJ. As this Board stated in *Corona* (2000) AB-7329, "[I]t views the Department's penalty recommendations as representing the Department's best thinking at that particular time, and, where an ALJ departs upwardly from the recommendation, he or she should explain why."

In this case, the ALJ did explain why, but both reasons he gave are reasons this Board has said are unsatisfactory. In *Busby* (1998) AB-6959, the Board rejected as an aggravating factor a clerk's reliance upon an expired driver's license, and remanded the case to the Department for reconsideration of a penalty which had exceeded that recommended by Department counsel. The Board's reasoning is instructive here:

> ... While the ALJ found that a reasonable person would not have been satisfied if presented with the license Meyerson used, and thus correctly concluded that the §25660 defense had not been established, we find nothing in his proposed decision suggesting, in addition, that appellant's clerk had acted in bad faith, so as to warrant even a larger penalty than the loss of the §25660 defense entailed.
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> This is not to say that the opposite is true, that is that the failure to request any identification must be an aggravating factor. In either case, it seems to us, the question is whether the actor acted negligently or in bad faith, and the two are not the same. While it is conceivable that the appearance of the minor, or some other aspect of the transaction may be such as to warrant the conclusion that the seller must have known he or she was selling an alcoholic beverage to a minor, the absence of any finding to that effect suggests that it would be inappropriate to aggravate the otherwise "standard" penalty.

The ALJ's second reason for finding the absence of mitigation is also one the Board has declined to accept. In *Prestige Stations, Inc.*, (2001) AB-7727, the Board reversed a penalty that exceeded the recommendation of Department counsel. The Board viewed the ALJ's action as treating the absence of mitigation as a factor in aggravation, and went on to say:

> The Department has routinely considered the existence and degree of employee training, such as attendance at Department LEAD programs, as an element of mitigation, sometimes resulting in a lessening of the penalty which otherwise

> would have been suggested. We are unaware of any instance where the absence of employee training has been considered an aggravating factor, except, perhaps, where there have been earlier licensee violations resulting from the same absence of training. In such cases, the Department may well believe that a licensee who has ignored warnings in prior disciplinary proceedings warrants an enhanced penalty. But where, as here, the licensee has committed no similar violations, we cannot approve of a harsher discipline than "standard," simply because there is no evidence that the licensee has trained its employees sufficiently.
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> Nor does it necessarily follow that the failure of appellant to offer evidence of employee training is evidence that there was no such training. It may well be that appellant had trained other clerks but not the clerk who made the sale. It may also be the case that appellant did not believe it had enough evidence of mitigation to offer any. Its failure to do so should not result in a sanction. Whatever the case, we think the enlargement of the penalty beyond that recommended by the Department lacks a valid or reasonable basis, so, to that extent, constitutes an abuse of discretion.

The fact that appellants were free of discipline for nine years suggests that something appellants were doing was effective, and the Department's recommendation implicitly acknowledged that.

ORDER

The decision of the Department is affirmed except as to penalty. The case is remanded to the Department for reconsideration of the penalty in light of our comments herein.[4]

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

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[4]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.