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

AB-8506
File: 20-272028 Reg: 05060264

7-ELEVEN, INC., GLENN J. HIEBING, and MARIA C. HIEBING
dba 7-Eleven #2131-13575
10049 Campo Road, Spring Valley, CA 91977,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 7, 2006
Los Angeles, CA

Redeliberation: January 11, 2007; February 1, 2007

ISSUED APRIL 11, 2007

7-Eleven, Inc., Glenn J. Hiebing, and Maria C. Hiebing, doing business as 7-Eleven #2131-13575 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk, Jason Jones, having sold a six-pack of Budweiser beer to Christopher Blair, a 17-year-old minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Glen J. Hiebing, and Maria C. Hiebing, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ghazal Yashouafar, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

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[1]The decision of the Department, dated January 12, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 25, 1992. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on April 22, 2005.

An administrative hearing was held on October 20, 2005, at which time oral and documentary evidence was received. 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 an affirmative defense under Department Rule 141(a) and (b)(2)

Appellants thereafter filed a timely appeal in which they contend that there was no compliance with Rule 141(a) and 141(b)(2). Appellants have also filed a motion to augment the administrative record with any form 104 (Report of Hearing) included in the Department's file, and have filed a supplemental letter brief regarding the recent decision of the California Supreme Court in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (November 13, 2006) 40 Cal.4th 1 [50 Cal.Reporter 3d. 585] (*Quintanar*).

DISCUSSION

i

Appellants contend that decoy Blair did not display the appearance required by Rule 141(b)(2), i.e., that he display the appearance which could generally be expected of a person under 21 years of age. They further contend that the use of a decoy possessing the physical stature of Blair - 5'8" tall and weighing 240 pounds - did not meet the requirement of Rule 141(a) that the decoy operation be conducted in a manner which promotes fairness. In addition to his size and weight, appellants point to

a wristband and an identification badge Blair wore around his neck,[2] contending that the words 'ACCES-PUB" on the badge and the word "Army" on the wristband would tend to lead one to think Blair had some association with a pub and was more mature. This, they assert, would lull the average clerk into a false sense of security, and thus be unfair. Finally, appellants contend that the ratio of purchases to store visits - 50 percent - is such that the Board must conclude that he did not display the appearance required by Rule 141(b)(2).

The Board is being asked to consider the very same arguments made to the administrative law judge (ALJ) and addressed at some length in his findings of fact. He wrote (Findings of Fact D and E):

> FF D. The overall appearance of the decoy including his demeanor, his poise, his size, his mannerisms and his physical appearance were consistent with that of [a] person under the age of twenty-one and his appearance at the time of the hearing and on the day of the decoy operation was similar except that he was wearing an earring on the day of the hearing.
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> > 1. The decoy is five feet eight inches in height and he weighs two hundred forty pounds. Although the decoy has a corpulent build, he also has a chubby and very youthful looking face. On the day of the sale, he was clean-shaven, his hair was short and his clothing consisted of black pants, a black short sleeve shirt and black shoes. The decoy was not wearing any jewelry. However, he was wearing a wristband that had the word "Army" written on it and he was also wearing an identification badge that was attached by a string around his neck. The string had "I AM A MEMBER OF GOD'S TEAM" written on it. The badge contained the name of the decoy's employer (PETCO PARK), the decoy's name and photograph and the words "SPORTSERVICE" and "ACCES-PUB." The decoy explained that he worked as a vendor at PETCO which is a baseball stadium and that "ACCES-PUB" meant that he had access to all public areas.
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> > 2. The decoy testified that he volunteered to be a decoy and that he had not participated in any prior decoy operations.

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[2] The badge, depicted in Exhibit 5, contains a photo of Blair, beneath which is his name and the words "SPORTSERVICE," and "ACCES-PUB."

3. The photograph depicted in Exhibit A was taken inside the premises on the night of the sale and the photograph depicted in Exhibit 4 was taken on the night of the sale before going out on the decoy operation. Both of these photographs depict how the decoy appeared and what he was wearing when he was at the premises.

4. There was nothing remarkable about the decoy's nonphysical appearance. He provided straight forward answers while testifying.

5. After considering the two photographs of the decoy (Exhibit 4 and Exhibit A), the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

FF E. The preponderance of the evidence did not establish that the decoy operation was conducted in an unfair manner. The Respondents' attorney argued that the decoy operation was unfair because of the decoy's large stature, because the decoy was wearing a wristband that had the word "Army" written on it and because the decoy's identification badge had the words "ACCES-PUB" written on it. The appearance of the decoy was discussed above. Furthermore, the Respondents' clerk did not testify at the hearing and there was no evidence presented at the hearing indicating that the clerk had even noticed what was written on the wristband or on the identification badge.

Whether the decoy displayed the appearance required by Rule 141(b)(2) is a ordinarily a question of fact, and is in this case. This Board is ill-equipped to substitute its judgment of whether the decoy displayed the appearance required by Rule 141(b)(2). This Board does not have the opportunity to see and hear the decoy, and has only the cold record to inform it. On the other hand, the ALJ sees and hears the decoy when he testifies, and, with the opportunity to ask the decoy questions beyond those posed by counsel, is far better equipped to make the determination required by the rule.

The Board has said many times that, in the absence of some extraordinary circumstance, it will defer to the ALJ for his or her judgment with respect to the decoy's appearance. We see no such circumstance here. Without any testimony from the

clerk, the suggestion that the clerk may have understood the decoy's badge to mean he was old enough to frequent a "pub," is only speculation. It should be noted that the clerk made no such claim to the police officer at the time of the incident.

II

On November 13, 2006, the California Supreme Court held that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. (*Quintanar*, *supra*, 40 Cal.4th 1.) In *Quintanar*, the Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access to the report of hearing, establishing, the court held, "that the reports of hearing were provided to the agency's decision maker." *(Id.* at pp. 15-16.)

In the present case, appellant contends a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar* has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could

not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.[3]

ORDER

The decision of the Department is affirmed as to all issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[4]

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

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[3] The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Administrative Hearing Office. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

[4] This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.