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

AB-8543
File: 21-347142 Reg: 05060451

SAN PABLO SUPERMARKET, INC., dba San Pablo Market
1188 International Market Place, San Pablo, CA 94806,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: January 11, 2007
Sacramento, CA
Redeliberation: February 1, 2007

ISSUED APRIL 5, 2007

San Pablo Supermarket, Inc., doing business as San Pablo Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for appellant's 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 appellant San Pablo Supermarket, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, Ryan M. Kroll, and Kevin R. Snyder, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated March 16, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 28, 1999. On August 17, 2005, the Department filed an accusation against appellant charging that, on June 10, 2005, appellant's clerk sold an alcoholic beverage to 18-year-old David Sanchez. Although not noted in the accusation, Sanchez was working as a minor decoy for the San Pablo Police Department at the time.

At the administrative hearing held on January 20, 2006, documentary evidence was received and testimony concerning the sale was presented by Sanchez (the decoy) and by Department investigator Brian Chan, who was present during the decoy operation conducted by the San Pablo Police Department.

The Department's decision determined that the violation charged was proved and no affirmative defense was established. Appellant then filed an appeal contending that Department rules 141(a),[2] 141(b)(2), and 141(b)(5) were violated, and that the Department violated the Administrative Procedure Act by making an ex parte communication.

DISCUSSION

I

Department rules 141(a) and 141(b)(2) require that law enforcement agencies conduct decoy operations "in a fashion that promotes fairness" and that decoys display an appearance that could generally be expected of a person under the age of 21, respectively. Appellant contends that these rules were violated in this case by the use of David Sanchez as a decoy. It argues that Sanchez's prior experience as a decoy

[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.

gave him a "confident and mature demeanor" making him appear to be at least 21 years old. Appellant asserts that the administrative law judge (ALJ) failed to "properly account for" the decoy's demeanor, experience, and other non-physical characteristics and the effect these attributes might have had on the decoy's overall experience.

On the contrary, the ALJ engaged in an extensive discussion of the decoy's physical and non-physical appearance, including his experience and lack of nervousness. (Findings of Fact IV-VI; VIII-IX.) In paragraph XI of his Findings, the ALJ also addressed the same argument appellant makes here, concluding that there was no evidence of unfairness and that the affirmative defense of rule 141 was not established.

Appellant asserts that the determination that rules 141(a) and 141(b)(2) were complied with, is "not supported by the overwhelming weight of the evidence presented at the hearing." However, that is not the standard the Board uses to review decisions of the Department; the Board reviews to see if substantial evidence supports the decision of the Department:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, supra,* 100 Cal.App.4th at p. 1254; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Substantial evidence clearly exists to support the ALJ's finding. As we explained in *7-Eleven, Nagra, & Sunner* (2004) AB-8064:

> This Board has considered in prior decisions assertions that substantial evidence did not support the ALJ's finding regarding the decoy's apparent age. In *Circle K Stores, Inc*. (2001) AB-7498, the Board declined to find that substantial evidence of the decoy's apparent age was lacking, saying, "The decoy himself provides the evidence of his appearance." In *The Southland Corporation/Amir* (2001) AB-7464a, the Board responded to the argument by saying: "We simply do not agree that an administrative law judge who must determine the apparent age of a decoy, and actually sees the decoy in person, lacks substantial evidence to make such a determination."

The ALJ made an express finding that the decoy displayed the appearance of a person under 21 years of age. He made this finding after having observed the decoy as he testified and taking into consideration the factors relied upon by appellant. The fact that appellant's assessment of the decoy's appearance differs from the ALJ's is neither surprising nor a sufficient basis for overturning the ALJ's finding.

II

Rule 141(b)(5) requires, after a sale to a minor decoy, "but no later than the time a citation, if any, is issued," that a reasonable attempt be made to "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 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], because the Department failed to make a prima facie showing that the citation was issued after the face-to-face identification. The Department's failure to prove the timing of the face-to-face identification, appellant asserts, "amounts to a complete defense to the accusation." Appellant relies on the Board's decision in *The Southland Corporation &*

R.A.N., Inc. (1998) AB-6967 (*R.A.N.*) for its contention that the Department must make a prima facie showing of compliance with rule 141 before the licensee must present any evidence that the rule was violated.

Appellant, in a footnote, insists that this Board has held that rule 141 does not create an affirmative defense and that it is the Department, not the licensee, that bears the burden of proof on whether the rule was complied with. The Board has addressed this contention time and time again, most recently in *7-Eleven & Lo* (2006) AB-8384. In that case, the appellants also relied on *R.A.N.*, *supra*. The Board reviewed many of the decisions subsequent to *R.A.N.*, quoting language from *The Von's Corporation* (2002) AB-7819 (*Vons*) that clearly repudiates appellant's argument:

> Appellant misunderstands the differing natures of the various burden-of-proof standards. The requirement of "substantial evidence" to support a Department decision is the standard used by this Board, and the appellate courts, when reviewing a decision. The ultimate burden of persuasion at the administrative hearing is the preponderance of the evidence. *The Department's initial burden of producing evidence, however, is merely to make a prima facie case, that is, to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence.*
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> Appellant cites this Board's decision in *The Southland Corporation/R.A.N.* (1998) AB-6967, in support of its contention that the Department failed to meet its burden of proof. The appellants in *7-Eleven/Azzam* (2001) AB-7631, also cited that Board decision when they argued that the Department had not met its burden of proving that Rule 141(b)(5) had been complied with because no specific evidence was presented of the sequence of events to show that the face-to-face identification was made before the selling clerk was cited. The Board rejected that argument, saying,
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> > "In our view, once there has been affirmative testimony that the face to face identification occurred, the burden shifts to appellants to demonstrate why it did not comply with the rule, i.e., that the normal procedure, for the issuance of a citation following the identification of the accused, was not followed. We are unwilling to read our decision in The Southland Corporation/R.A.N. as

> expanding the affirmative defense created by Rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule."
>
> We reiterate here that a Rule 141 defense requires evidence that there was a violation of the rule.
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> The evidence presented by the Department in the present case was clearly sufficient to allow the ALJ to conclude that the violation had occurred and that the decoy operation was conducted fairly; it was appellant's burden at that point to present evidence rebutting that evidence. If appellant chose not to present any evidence, but to rely solely on its mistaken belief that the Department had not met its initial burden of producing evidence, it has no basis for complaint on appeal.

The Board then noted numerous Board decisions that quoted *Vons* or expressed the same conclusion using different language: *7-Eleven, Inc. & Gonser* (2001) AB-7750; *7-Eleven, Inc. & Singh* (2002) AB-7792; *7-Eleven, Inc. & C Bar J Ranch, Inc.* (2002) AB-7800; *7-Eleven, Inc. & Mandania* (2002) AB-7828*; 7-Eleven, Inc. & Saulat* (2002) AB-7862; *7-Eleven, Inc. & Bal* (2002) AB-7872; and *7-Eleven, Inc. & Veera* (2003) AB-7890. The Board concluded by saying:

> Appellants are attempting to resurrect a long-dead notion, and it appears that much of the impetus for their attempt comes from their reading of *The Southland Corporation/R.A.N.*, *supra*. We have struggled with the anomaly of that appeal for a number of years and have attempted to bring the troublesome language of the opinion into line with the rest of the Board's opinions. It has become obvious to us that this approach requires the Appeals Board to address and reject, over and over again, contentions such as appellants make here. This promotes neither fairness nor justice. Therefore, to the extent that *The Southland Corporation/R.A.N.* is seen as imposing on the Department an initial burden of proof with regard to the affirmative defense of rule 141 before an appellant has presented any evidence of a violation of that rule, it is overruled.

We repeat the language from *7-Eleven & Lo* to put licensees and their counsel on notice that this aspect of *R.A.N.* has been overruled and should no longer be cited for the proposition appellant is arguing here.

III

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. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*).) 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 Office of Administrative Hearings. 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.