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

AB-9069
File: 20-424230 Reg: 09070351

HARBOR MINI MART, INC., dba Broadway AM/PM
2100 Broadway, Sacramento, CA 95818,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: October 7, 2010
San Francisco, CA

ISSUED NOVEMBER 23, 2010

Harbor Mini Mart, Inc., doing business as Broadway AM/PM (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its 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 Harbor Mini Mart, Inc., appearing through its counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

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[1]The decision of the Department, dated September 8, 2009, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 27, 2005. On January 21, 2009, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 18-year-old Tyler Murphy on September 3, 2008. Although not noted in the accusation, Murphy was working as a minor decoy for the Sacramento Police Department at the time.

At the administrative hearing held on June 3 and July 13, 2009, documentary evidence was received and testimony concerning the sale was presented by Murphy (the decoy) and by Matthew Moore, a Sacramento police officer. Appellant presented no witnesses.

The evidence at the hearing established that the decoy entered appellant's licensed premises, selected a 6-pack of Budweiser beer, and took it to the counter. The clerk requested, and was given, the decoy's valid California driver's license bearing a red stripe with white lettering stating "AGE 21 IN 2011." The clerk looked at the license, returned it to the decoy, and sold him the beer. Following the sale, the decoy identified the clerk as the seller of the beer. A citation was issued to the clerk for selling an alcoholic beverage to a person under the age of 21.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no affirmative defense was established.

Appellant filed an appeal contending: (1) It was error for the administrative law judge (ALJ) to consider the decoy's testimony, which was irrelevant and unreliable; (2) the Department did not prove compliance with rule 141(b)(4)[2]; and (3) the ALJ committed reversible error by admitting exhibit 3 into evidence.

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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.

DISCUSSION

I

Appellant contends that the decoy's testimony was irrelevant and unreliable, and therefore should not be considered, because the decoy testified regarding events that occurred on October 3, 2008, not September 3, 2008, the date of the violation. This argument arises because when the accusation was issued it stated, erroneously, that the violation occurred on October 3, 2008. At the hearing, after the decoy and the officer testified, the Department moved to amend the accusation to conform to the evidence by changing the date in the accusation to September 3, 2008. The ALJ granted the Department's motion; he also granted appellant's motion to continue the hearing because appellant's counsel "indicated that the month period caused him to prepare his case differently." [RT 50.]

Appellant's counsel made the following closing argument [RT 68]:

> Your Honor, I don't believe the department has met its burden of proof by preponderance of the evidence the accusation as it stands now [*sic*]. The testimony is too conflicted all over the record as to what date this incident allegedly occurred. In order to prove, as the accusation says, it occurred on September 3rd, 2008, we have documents - - witnesses saying a different date. I don't think we can say with a preponderance of the evidence when the alleged incident occurred. And respondent will raise all defenses of 141 and we'll submit it on that, Your Honor.

In Determination of Issues 4, the ALJ addressed the argument appellant made at the hearing:

> Respondent contends the Department failed to prove by a preponderance of the evidence that the "date of the incident" was on September 3, 2008. This argument is based on the Department's amendment of Count 1 from 10-03-08 to 09-03-08, and on the decoy's testimony regarding the operation putatively occurring on 10-03-08. Indeed, the decoy did make reference to the operation taking place on 10-03-08 rather than 09-03-08. However, many of his responses were to leading questions, both by the Department counsel and Respondent's counsel, concerning the date of the operation being on 10-03-08. There

> is compelling and substantial evidence that the decoy operation involving decoy Murphy and the Sacramento police officers at Broadway AM PM occurred on 09-03-08. [The remainder of the paragraph details the evidence showing that the date of the violation was September 3, 2008.]

Appellant did not contend at the hearing, as it does here, that the decoy's testimony should be disregarded as irrelevant and unreliable because of the date discrepancy; it argued that the date of the violation was not proved. Numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) The Board is entitled to consider this issue waived. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §400, p. 458.)

Even if we were to consider the issue properly raised, we would reject appellant's argument. The decoy did not mention the date of the violation; he merely responded to questions that included "October 3, 2008," many of which, as the ALJ pointed out, were leading questions. The decoy had no reason to think that the Department (in one instance during direct examination) and appellant (13 times during cross examination) would refer to the wrong date. It was reasonable to infer, as the ALJ obviously did, that the decoy responded to the substance of the questions, not the date tacked on the end of them. The ALJ had no reason to disregard the decoy's testimony, even if appellant had asked him to at the hearing.

II

Appellant contends that, because the testimony of the decoy was irrelevant, substantial evidence did not exist to establish that the decoy complied with rule 141(b)(4), which requires a decoy to "answer truthfully any questions about his or her age."

As discussed in part I., above, the decoy's testimony was not irrelevant, and substantial evidence did exist to establish that the decoy was not asked any questions about his age, making compliance with rule 141(b)(4) a moot question. Additionally, this issue was not raised at the hearing and, as discussed above, the Board may consider the issue waived.

Appellant's premise, that the Department had to prove compliance with rule 141 is wrong. Rule 141 provides an affirmative defense, and it is appellant's burden to prove non-compliance with the rule.

III

Appellant contends that it was reversible error for the ALJ to admit into evidence the Department's exhibit 3, consisting of a minute order of the superior court and a notice to appear issued to the clerk in this case. The minute order, which was received by Department counsel just before the hearing started and then given to appellant's counsel, shows that the clerk entered a plea of guilty to violation of Business and Professions Code section 25658, subdivision (a). Appellant argues that the exhibit is "minimally relevant" and unduly prejudicial.

Evidence Code section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The trier of fact is accorded broad discretion in ruling on the admissibility of evidence, and the ruling will be reversed only if there is a clear showing of an abuse of discretion. (*Aguayo v. Crompton & Knowles Corp*. (1986) 183 Cal.App.3d 1032, 1038 [228 Cal.Rptr. 768].)

> The admission or rejection of evidence by an administrative agency is not grounds for reversal unless the error has resulted in a miscarriage of justice. (*McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1054 [228 Cal.Rptr. 567].) In other words, it must be reasonably probable a more favorable result would have been reached absent the error. (*Brokopp v. Ford Motor Co*. (1977) 71 Cal.App.3d 841, 853–854 [139 Cal.Rptr. 888].) Such error "'is not prejudicial if the evidence "was merely cumulative or corroborative of other evidence properly in the record," or if the evidence "was not necessary, the judgment being supported by other evidence." [Citation.]'" (*McCoy*, *supra*, 183 Cal.App.3d at p. 1054, quoting *Rue-Ell Enterprises, Inc. v. City of Berkeley* (1983) 147 Cal.App.3d 81, 91 [194 Cal.Rptr. 919].)

(*Lone Star Security & Video, Inc. v. Bureau of Security & Investigative Services* (2009) 176 Cal.App.4th 1249, 1254-1255 [98 Cal.Rptr.3d 559].)

At the hearing, appellant's counsel appeared to argue that the prejudice from admitting the minute order was that he did not have time to verify that it was related to the case at issue. The ALJ asked appellant's counsel to explain what was prejudicial about the minute order, and counsel replied [RT 63-64]:

> MR. KROLL: Surely, I'll address that. I don't know for sure [counsel for the Department is] asserting this is related to our incident to this case [*sic*]. I just don't know. I just got handed this. There's a lot of information on there that tends to indicate it, but I don't know for sure. There's things I could do if, given time enough to do it to kind of verify, run my own sources to confirm, getting on the fly beforehand, although I know [counsel for the Department] just got handed it this morning, doesn't give me an opportunity verify this is it [*sic*]. I know it can come in under [Evidence Code]1280 that the court certified. But on behalf of my client, I need to check everything. That's the prejudice there. . . .

On appeal, appellant argues that the minute order was unduly prejudicial because of the

> effect that presenting evidence of the clerk's guilt would have on a fact finder. While in a normal jury trial, the judge would have held a bench conference and likely redacted such prejudicial statements, the Administrative Law Judge's role as judge and jury prevented any such precautions.

(App. Opening Br. at p. 13.)

First, appellant waived this argument because it was not made at the hearing. Second, even if the minute order contained material that would be excluded in a jury trial, where there is no jury it is generally assumed that the judge is competent to, and does, disregard evidence that should not be considered. The administrative hearing before the ALJ is the same in this respect as a bench trial, where the judge sits without a jury to do the factfinding. The Supreme Court has rejected a challenge similar to that made here by appellant:

> In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions. It is equally routine for them to instruct juries that no adverse inference may be drawn from a defendant's failure to testify; surely we must presume that they follow their own instructions when they are acting as factfinders.

(Harris v. Rivera (1981) 454 U.S. 339, 346-347 [102 S.Ct. 460; 70 L.Ed.2d 530].)

In addition, the ALJ specifically stated on the record that he was admitting the documents in Exhibit 3 for limited purposes [RT 65-66]:

> ADMINISTRATIVE LAW JUDGE LOEHR: . . . I believe that the minute order comes in under 1280, so it's not hearsay in that sense, and so I will accept the minute order with the certification.
>
> I think that the notice to appear, which Mr. Kroll is correct, I don't think the [superior court] can certify that because it's not his [*sic*] record, as you pointed out, but it comes in as administrative hearsay and it augments the record on other issues. It is relevant because when you take the notice to appear along with the officer's testimony and the report and the minute order, I think it explains some of the date discrepancies that we were earlier speaking of.

> I do agree and I'm making this clear on the record that I don't believe that Mr. Amen's plea of guilty binds the licensee in the sense that it just ends the case. . . .
>
> I don't think Mr. Amen's plea of guilty binds Harbor Mini-Mart, Inc. and establishes the department's case. I mean, it takes more than that because, as we know, a person may – an employee may plead guilty, nolo for many reasons other than saying that they're guilty. . . .
>
> So I want to make that clear that I'm not taking Exhibit 3 to establish the accusation and the facts that [underlie] it. So Exhibit 3 is entered into evidence for the purposes I've stated. It comes in under 1280, but the notice to appear does not. That comes in as administrative hearsay.

The erroneous admission of evidence is not reversible error. (*Lone Star Security & Video, Inc. v. Bureau of Security & Investigative Services* (2009) 176 Cal.App.4th 1249, 1254 [98 Cal.Rptr.3d 559].) Therefore, even if we were to disregard the reasons, explained above, showing that it was not error to admit the exhibit, and concluded that it was error to admit exhibit 3, it still would not be *reversible* error. Appellant's contention is meritless.

ORDER

The decision of the Department is affirmed.[3]

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

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[3]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.