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

AB-9387
File: 20-473301 Reg: 13078497

7-ELEVEN, INC., JAGTAR SINGH SAMRA, and SANDEEP KAUR SAMRA,
dba 7-Eleven Store #2172-13779
13054 Chapman Avenue, Garden Grove, CA 92840,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 7, 2014
Los Angeles, CA

ISSUED AUGUST 20, 2014

7-Eleven, Inc., Jagtar Singh Samra, and Sandeep Kaur Samra, doing business as 7-Eleven Store #2172-13779 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, all conditionally stayed, for their 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 appellants 7-Eleven, Inc., Jagtar Singh Samra, and Sandeep Kaur Samra, appearing through their counsel, R. Bruce Evans and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

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[1]The decision of the Department, dated November 1, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' present off-sale beer and wine license was issued on December 12, 2008.[2] On May 10, 2013, the Department filed an accusation against appellants charging that, on January 19, 2013, appellants' clerk, Rampreet Singh (the clerk), sold an alcoholic beverage to 18-year-old Samantha Moctezuma. Although not noted in the accusation, Moctezuma was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on September 12, 2013, documentary evidence was received and testimony concerning the sale was presented by Moctezuma (the decoy) and by Matthew Pavlich, a Department of Alcoholic Beverage Control agent. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the premises, proceeded to the beer coolers, and selected a six-pack of Bud Light beer in bottles. She carried the beer to the sales register and placed it on the counter. The clerk asked the decoy for her identification, and the decoy handed the clerk her California driver's license. The license bore the decoy's correct date of birth, as well as a red stripe stating "AGE 21 in 2015." The clerk examined the license briefly, looked at the decoy, then returned the license without asking the decoy's age or date of birth. The clerk then rang up the beer. After paying for the beer, the decoy left the premises and met up with Department agents.

The Department's decision determined that the violation charged was proved

[2]The 2008 license was issued in order to add appellant Sandeep Kaur Samra. Previously, appellants 7-Eleven, Inc., and Jagtar Singh Samra held an off-sale beer and wine license, issued on April 25, 1994.

and no defense was established.

Appellants then filed an appeal contending: (1) the record provided to the Department director included an ex parte communication — specifically, the Notice to Appear issued to appellants' clerk, Rampreet Singh — and (2) the ALJ failed to proceed in the manner required by law and abused his discretion when he disregarded appellants' rule 141(b)(2)[3] defense.

DISCUSSION

I

Appellants contend that their Exhibit B, a Notice to Appear issued by the Department to their clerk, Rampreet Singh, was improperly included in the administrative record forwarded to the Department director, and therefore constitutes an ex parte communication meriting reversal.

An ex parte communication is broadly defined as "[a] generally prohibited communication between counsel and the court when opposing counsel is not present." (Black's Law Dictionary (7th ed. 1999) p. 597.) Section 11430.10 of the Government Code provides, in relevant part:

> (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.
>
> (b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

This Board has recently confronted a number of cases involving allegations of ex

[3]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.

parte communications. As we have noted elsewhere, the hallmark of an ex parte communication is the inability of the opposing party to respond. (See, e.g., *7-Eleven, Inc./Khanmohamed* (2014) AB-9383.) This aligns with the *Quintanar* holding:

> The APA bars only advocate-decision maker ex parte contacts, not all contacts. Thus, for example, nothing in the APA precludes the ultimate decision maker from considering posthearing briefs submitted by, and served on, each side. The Department if it so chooses may continue to use the report of hearing procedure *so long as it provides licensees a copy of the report and the opportunity to respond.* (Cf. § 11430.50 [contact with presiding officer or decision maker must be public, and all parties must be afforded opportunity to respond].)

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Quintanar)* (2006) 40 Cal.4th 1, 11-14, 17 [50 Cal.Rptr.3d 585], emphasis added.)

In this case, appellants themselves introduced the Notice to Appear in the course of cross-examining Agent Pavlich. (RT at p. 39.) The document was marked Exhibit B. (*Ibid.*) Counsel for appellants proceeded to question Agent Pavlich regarding Exhibit B, including which Department agent filled it out and issued it to the offending clerk. (RT at pp. 39-40.) The Department also questioned Agent Pavlich, briefly, about Exhibit B on redirect examination. (RT at p. 41.)

Before closing arguments, the ALJ addressed all exhibits, including appellants Exhibits A and B:

> THE COURT: Any objections to A or B?
>
> ¶ . . . ¶
>
> MR. EVANS: I'm just requesting A be admitted.
>
> THE COURT: Oh, you don't want B? Okay.
>
> ¶ . . . ¶
>
> THE COURT: All right. Exhibit A is being admitted into evidence.

(Complainant's Exhibit A was received in evidence by the Court.)

THE COURT: And you're withdrawing Exhibit B?

MR. EVANS: No.

THE COURT: As far as you don't want it entered?

MR. EVANS: It has been marked. I have not requested that it be move [sic] into evidence.

(RT at pp. 42-43.) Exhibit B was then included in the documents provided to the Department director in his decisionmaking capacity.

It would be patently absurd for this Board to hold that an appellant could produce a document at hearing, request that it be marked for identification, conduct questioning based on the document, then successfully appeal on the grounds of ex parte communication because the document was included in the record. Appellants cannot, by any stretch of reason, claim they were unaware of their own exhibit, or that they were deprived of the opportunity to be heard regarding its contents. Notice and an opportunity to be heard are implicit in the act of introducing the document at hearing. Apart from the constraints of simple logic, the potential for manipulation is too great.

Moreover, we are deeply troubled by a statement made by appellants' counsel at oral argument, to the effect that appellants pursued an ex parte communication defense based on their own exhibit in order to test the Department's compliance with its General Order. (See Department of Alcoholic Beverage Control, General Order 2007-09 (August 10, 2007) [addressing which documents shall be internally forwarded to the Department Director].) This implies that appellants' introduction of the document at hearing, their request that the document *not* be admitted into evidence, and their subsequent claim of ex parte communication were merely a litigation strategy designed

to manufacture a defense. If so, counsel for appellants have patently violated the California Rules of Professional Conduct. Rule 5-200(B) states:

> In presenting a matter to a tribunal, a member:
>
> (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law.

The Business and Professions Code, section 6068(d), reiterates the rule:

> It is the duty of an attorney to do all of the following:
>
> (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

If appellants indeed introduced the exhibit in order to test the Department or to open the door to an ex parte communication defense, then they have deceived a tribunal by means of artifice. This Board will not tolerate such manipulation. Should counsel persist in this conduct, we will not hesitate to refer the matter to the California State Bar for proper sanctions.

II

Appellants contend that the ALJ disregarded evidence and arguments offered in support of a rule 141(b)(2) defense. Appellants claim that the ALJ failed to properly consider the decoy's physical stature, her experience as a police Explorer, her attendance at an ABC presentation, her preparation before the decoy operation, and the ease with which the transaction took place.

This Board is bound by the factual findings in the Department's decision, provided those findings are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends,* [*Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002)] 100 Cal.App.4th [1250,] 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; . . . .) 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.App2d 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 Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Rule 141 and its subdivisions constitute an affirmative defense. This Board has construed the language of rule 141, subdivision (c), to mean the licensee has the burden of establishing a prima facie case that there was no compliance.

The Department argues that appellants waived any defense under rule 141 by failing to raise it at the administrative hearing. If this Board gives appellants the full benefit of the doubt, it must credit counsel's statement, at the commencement of closing arguments, that "respondent will raise each and every affirmative defense asserted in the special notice of defense." (RT at p. 44.) The Special Notice of Defense does indeed include rule 141(b)(2) as one of eighteen boilerplate separate defenses.

The full extent of appellants' 141(b)(2) affirmative argument, then, is this:

> Respondent(s) demurs and objects to the Accusation on the grounds that the Department did not comply and has failed to show compliance with Rule 141. Specifically, the decoy operation was not conducted "in a fashion that promotes fairness" and in the following manner: The Department:

¶ . . . ¶

(b) utilized a decoy that 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.

(Special Notice of Defense, Exhibit 1, at ¶ 9.) Appellants presented no further argument on rule 141 at the hearing, nor did they direct the ALJ to any evidence in support of the statement made in the Special Notice of Defense.

Nevertheless, the ALJ made extensive factual findings regarding the decoy's physical appearance, including her stature, as well as her previous experience:

D. The decoy's overall appearance including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time fo the hearing was similar to her appearance in the day of the decoy operation.

1. On the day of the sale, the decoy was five feet five inches in height, she was approximately one hundred seventy-five pounds, her hair was combed down and she was not wearing any makeup or jewelry. Her clothing consisted of a blue shirt, a green sweater, dark jeans and brown boots. The photograph depicted in Exhibit 3 was taken prior to the decoy operation. All three of these photographs show how the decoy was dressed and how she appeared on the day of the sale.

2. The decoy testified that she had not participated in any prior decoy operations and that she had been an Explorer with the Orange County Sherriff's [sic] Department for five months prior to the subject decoy operation.

3. The decoy was soft-spoken, she provided straight forward answers while testifying and there was nothing about the decoy's physical or non-physical appearance that made her appear older than her actual age.

4. After considering the photographs depicted in Exhibits 3, 4-A and 4-B, the decoy's overall appearance when she testified and the way she conducted herself 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.

(Findings of Fact II.D.1-4.) Based on these findings, the ALJ determined the Department complied with rule 141(b)(2). (Determination of Issues II.)

Appellants cannot argue that the ALJ disregarded arguments they never made. In any event, the ALJ did indeed address the decoy's stature and her experience as an Explorer and found that her appearance, including her both physical and non-physical factors, complied with the rule. It does not matter that he omitted details appellants insist — on appeal — were relevant, such as her attendance at an ABC presentation or the fact that she had lunch with Department agents before the operation. (App.Br. at pp. 10-11.) An ALJ is not required to provide a laundry list of factors he found inconsequential. (See, e.g., *7-Eleven, Inc./Convenience Group, Inc.* (2014) AB-9350, at p. 4.) More importantly, appellants bore the burden of proof. If they felt certain factors were relevant to an assessment of the decoy's appearance, they ought to have explained their reasoning during the course of the administrative hearing.

An ALJ is a decisionmaker, not a clairvoyant. He cannot be expected to divine detailed, factually specific arguments from a few sentences of boilerplate. We see no error in the decision below.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.