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

AB-9531
File: 20-519696 Reg: 14080918

7-ELEVEN, INC. and AMIT GUPTA,
dba 7-Eleven Store #2368-35068
1790 West Bush Street, Lemoore, CA 93245,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 7, 2016
Sacramento, CA

ISSUED MAY 2, 2016

Appearances: *Appellants:* Michelangelo Tatone, of Solomon Saltsman & Jamieson, as counsel for appellants 7-Eleven, Inc. and Amit Gupta.
Respondent: Sean Klein as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc. and Amit Gupta, doing business as 7-Eleven Store #2368-35068 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 15 days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 3, 2012. On July

[1]The decision of the Department, dated July 23, 2015, is set forth in the appendix.

31, 2014, the Department filed an accusation against appellants charging that, on May 22, 2014, appellants' clerk sold an alcoholic beverage to 18-year-old Maribell Garcia. Although not noted in the accusation, Garcia was working as a minor decoy in a joint operation between the Department of Alcoholic Beverage Control and the Lemoore Police Department at the time.

At the administrative hearing held on May 19, 2015, counsel for appellants requested that the hearing be videotaped. (RT at p. 5.) The videographer had been paid by appellants, and had accompanied them to the hearing. (*Ibid.*) Appellants argued that "[a] videographer can catch critical elements of testimony that is not captured through the court reporter" including "the witness's appearance, demeanor and mannerisms," which are relevant to a rule 141(b)(2) defense. (*Ibid.*) They paraphrased this Board's previous commentary on the issue:

> [T]he appeals board recently in a 2014 case, Appeals Board 9178(b) [*sic*], in a footnote — it was footnote two even mentioned that perhaps the time is now right for making digital recordings of all administrative hearings per review by the board to decide for ourselves whether the record of evidence is sufficient to support findings essential to the legal issues.

(*Ibid.*; see also *Garfield Beach CVS* (2014) AB-9178a, at p. 7, fn. 2.)

The Department responded that the decoy's appearance is a question of fact reserved for the ALJ. (RT at pp. 6-7.) It also pointed out that the Appeals Board language on which appellants relied was only a footnote, that there was a stenographer present to accurately record the hearing, and that the Government Code only permits videotaping if both parties consent. (RT at p. 7; see also Gov. Code, § 11512(d).) Accordingly, the Department declined to consent to appellants' request. (*Ibid.*)

Appellants countered that Government Code section 11512(d) does not apply to videotape. (RT at pp. 7-8.) They argued that the legislative history of the statute

indicates that the word "electronically" is intended to refer only to "audio recording in lieu of stenographic recordings." (*Ibid.*)

The ALJ expressed concern that appellants alone would control the videotape, and about whether the videotape could be properly admitted into evidence. (RT at pp. 8-9.) Appellants responded that the videotape would not necessarily be used as evidence, but would be "similar to how we get a transcript ordered if there is an appeal." (RT at p. 9.) They insisted they would provide a copy of the videotape upon the Department's request. (RT at pp. 9-10.)

The Department noted that the videographer, unlike the stenographer, is not an unbiased third party, and that appellants' arrangement lacked procedural safeguards. (RT at p. 10.)

The ALJ denied the request, relying on the his role as finder of fact, and on the absence of statutory authority that would permit him to overrule the Department's refusal to consent. (RT at p. 11.)

The administrative hearing proceeded with only a stenographic reporter.

Documentary evidence was received and testimony concerning the sale was presented by Garcia (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, a clerk working in appellants' store sold a six-pack of Bud Light beer, an alcoholic beverage, to the decoy. The clerk did not ask the decoy her age and did not ask to see her identification.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed this appeal contending (1) the ALJ failed to include his reasons for denying appellants' request to videotape the administrative hearing in the

decision below, and (2) the ALJ erred in denying appellants' request to videotape the administrative hearing. These issues will be addressed together.

DISCUSSION

Appellants contend that the ALJ erred in denying their request to videotape the administrative hearing. They apply, by analogy, the law and policy surrounding videotaped depositions, and cite the California Supreme Court's decision in *Emerson Electronics* as support for their assertion that videotape is "as reliable as, or more advantageous than, traditional means of recording," that it "makes the witness more candid," that it "provides a far better record of the examination than any transcript or audiotape," and that "a witness can be requested to demonstrate or 'act out' what happened." (App.Br. at p. 8, quoting *Emerson Electronics Co. v. Superior Ct.* (1997) 16 Cal.4th 1101, 1110, fn. 3 [68 Cal.Rptr.2d 883].)

Appellants also direct this Board to uncited legislative history[2] which, they

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[2]In their opening brief, appellants cite no legislative history whatsoever. In their closing brief — well after the Department has completed its response — appellants do finally cite to *some* legislative history. (See App.Cl.Br. at p. 3, citing Assembly Committee on Business and Professions, AB-1174, Feb. 22, 2015, at p. 2.) Unfortunately, nothing in the cited bill relates, even remotely, to section 11512(d) of the Government Code.

Independent research reveals, however, that Assembly Bill AB 1174, introduced on February 22, 2005 — *not* 2015, as cited by appellants — does pertain to section 11512(d). (See Assem. Bill No. 1174 (2005-2006 Reg. Sess.) as introduced Feb. 22, 2005.) A thorough reading of the bill reveals nothing limiting the word "electronically" to audiotaping only. (See *ibid.*) In fact, the bill — which was never enacted into law — would have granted discretion *to the agency* to employ either a stenographic or electronic recorder. (*Ibid.* ["The proceedings at the hearing may be reported, at the discretion of the agency, either by a stenographic reporter or electronically."].) As in the statute's current form, the opposing party was granted the opportunity to object. (*Ibid.* ["[T]he notice of hearing shall state that the proceedings will be reported electronically unless the respondent objects in writing within 15 days of the notice. If a timely objection is filed, then the proceedings shall be reported by a stenographic reporter."].)

The only reference to audiotapes comes from the opposition's assertion that

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contend, shows that "the word 'electronically' refers to audio recordings and not video recordings, and therefore, Appellants would not need the consent of the Department" in order to proceed with videotaping the administrative hearing. (App.Br. at p. 6.)

Moreover, appellants insist they provided good cause to videotape the hearing, but the ALJ nevertheless denied the request "without any good basis for doing so," thereby prejudicing them. (App.Br. at p. 7.)

Finally, appellants argue that the ALJ "failed — entirely — to address, in his Proposed Decision, Appellants' request to have the May 19, 2015 hearing videotaped," thus violating the mandate of *Topanga*. (App.Br. at pp. 5-6, citing *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] [holding that administrative decision must set forth findings].) According to appellants, this constituted an abuse of discretion.

Section 11512(d) of the Government Code dictates reporting procedures for administrative hearings: "The proceedings at the hearing shall be reported by a stenographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically."

This Board has recently received a slew of briefs premised on the same

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[2](...continued)
electronic reporting would not, as its proponents argued, save costs. (See Hearing, Assem. Comm. on Bus. & Prof., Assem. Bill No. 1174 (Apr. 12, 2005), at p. 2.) The opposition's analysis was based on the cost of audiotape recording:

> Electronic recording does not save money. It can take up to four individuals to produce an audiotape transcript: the electronic recording monitor, the electronic recording monitor supervisor, the clerk who keeps track of the tapes and billings of those tapes, and the transcriber who later receives the tape and turns them into a transcript.

(*Ibid*.) A summary cost-based analysis provided by the opposition in no way evinces legislative intent to limit the scope of proposed statutory language — particularly where, as here, the proposed statutory language was never passed.

interpretation of section 11512(d) — specifically, that the word "electronically" was intended by the legislature to encompass only audiorecordings, and that a videorecorded transcript may be allowed — even absent an opposing party's consent — provided it does not *replace* the stenographic transcript.

In the earliest of these appeals, we articulated our support for the notion of videorecorded transcripts generally, but nevertheless rejected appellants' strained interpretation of the statute:

> According to the plain language of the statute, the consent of both parties is required before an administrative hearing may be reported by videorecording. Videorecording — along with audiorecording and all other recording methods that invariably depend on electricity — fall under the broad term "electronically." Because consent could not be obtained, denial of appellants' request was proper as a matter of law.

(*7-Eleven, Inc./Arman Corp.* (2016) AB-9535, at p. 8.) The law has not changed, and the facts in this case are, for purposes of this issue, indistinguishable. We therefore repeat our conclusion that "we cannot find error in the ALJ's refusal to allow the production of a video transcript, particularly where the videographer is paid by one party, and the other party has unequivocally exercised its statutory right to decline." (*Id.* at p. 21.)

Unless the legislature modifies section 11512(d) or a higher court shines a brighter light on its meaning, we consider this legal issue duly resolved.

We find this particular appeal troubling, however, for two reasons. First, appellants allege no actual error in the decision below — they object only to the denial of their request to videotape the proceedings. Appellants insist the denial prejudiced them (App.Br. at p. 7), but fail to articulate what error, if any, might become apparent if this Board *did* have access to a videorecording. If the benefit of a videotaped transcript

is to better illustrate that a factual finding is clearly erroneous, then appellants — who argue no factual error whatsoever — cannot complain that the absence of a videorecording has prejudiced them. Appellants case is at best meritless, and at worst a frivolous boilerplate brief produced solely to delay disciplinary action.

Second — and indeed, most frustrating for this Board — is the conduct of appellants' counsel in scheduling and appearing for oral argument. On March 28, 2016, the Board's staff circulated an email requesting that all appellants whose cases appeared on the Board's April calendar "please advise the Board no later than the close of business on Monday, April 4, 2016, whether you plan to appear for oral argument, or if you will be submitting any matters on the pleadings." (Email from Liliana Chavez-Cardona, Legal Sect., Alcoholic Bev. Control Appeals Bd., to Appellants & Legal Counsel (Mar. 28, 2016, 15:05 PDT).) Counsel for appellants responded that he planned to present oral argument in the present case. (Email from Michelangelo Tatone, Atty., Solomon Saltsman & Jamieson, to Liliana Chavez-Cardona (Apr. 6, 2016, 08:24 PDT).)

At the Board's hearing, however, counsel for appellants declined to present oral argument. He stated that he was aware of this Board's decision in *7-Eleven, Inc./Arman Corp.*, *supra*, and that he was appearing merely to preserve appellants' right to appeal and would therefore be submitting the matter on the briefs.

Counsel for the Department responded with extreme frustration at having prepared for the hearing only to have counsel for appellants submit the matter without oral argument.

We agree with the Department that counsel's conduct was, to say the very least, confounding and inconsiderate. This Board's decision in *7-Eleven, Inc./Arman Corp.*,

supra, was issued on March 10, 2016, and amended on March 15. The case was briefed and argued by the very firm representing the present appellants. Counsel could not possibly have been unaware of this Board's position concerning the purely legal videorecording issue — the *only* issue raised in this appeal — at the time he indicated his intent to appear for oral argument. The decision to submit on the briefs alone could have and should have been made at that time, saving Department counsel time and expense, and sparing this Board the exasperation of preparing for oral argument on a purely legal issue it had already thoroughly resolved.[3]

We do not believe counsel for appellants actually sought to inconvenience either the Department or this Board, and we certainly hope he was not motivated by a desire to increase his clients' fees. Regardless of whether it was intentional, this Board expects that such conduct will *never* recur.

[3]It is true that this Board's decisions are not precedential. (See Bus. & Prof. Code, § 23083(b) [excepting Appeals Board determinations from ch. 4.5 of the Administrative Procedure Act, which provides for designation of precedential administrative decisions].) They are, however, persuasive authority, and for the sake of orderly and predictable resolution of appeals, this Board will rely on its previous rulings whenever possible. Given that their brief was largely indistinguishable from the brief submitted in *7-Eleven, Inc./Arman Corp.*, *supra*, appellants could not have reasonably anticipated that this Board would reverse course. While we understand counsel's desire to preserve clients' appeal rights, counsel could have achieved the same ends simply by submitting on the briefs.

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.