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

AB-8318
File: 20-357765 Reg: 04056521

7-ELEVEN, INC., SUKHRAJ KAUR, and KAMLESHWER JIT SINGH
dba 7-Eleven Store No. 2237-23948
1903 Jensen Avenue, Sanger, CA 93657,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 7, 2005
Re-deliberation May 5, 2005
San Francisco, CA

ISSUED JUNE 8, 2005

7-Eleven, Inc., Sukhraj Kaur, and Kamleshwer Jit Singh, doing business as 7-Eleven Store No. 2237-23948 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale beer and wine license for 15 days for their clerk, Gina Rahl, having sold a 12-pack of Coors Light beer to Mark Kilner, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Sukhraj Kaur, and Kamleshwer Jit Singh, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated July 15, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 28, 1999. On January 6, 2004, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on June 3, 2004, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Mark Kilner ("the decoy") and Detective Robert McEwen of the Fresno County Sheriff's Department.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and which rejected appellants' contention that the decoy's appearance did not comply with Rule 141(b)(2).[2]

Appellants thereafter filed a timely appeal in which they contend that the Department is collaterally estopped from concluding that there was compliance with Rule 141(b)(2). Appellants have also filed a Motion to Augment Record, requesting that a document entitled "Report of Hearing" be included in the administrative record, and have asserted that the Department violated its due process rights when the attorney who represented the Department at the hearing before the administrative law judge (ALJ) provided a Report of Hearing to the Department's decision maker after the hearing, but before the Department issued its decision.

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[2] Rule 141(b)(2) provides:

"The decoy shall 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; . . ."

DISCUSSION

I

Appellants contend that the Department is collaterally estopped from asserting that the decoy's appearance complied with Rule 141(b)(2) because the Department has certified a decision in a later case, *Ovations Fanfare, Limited Partnership*, Registration No. 04056523, File No. 47-379570 (hereinafter "*Ovations*") in which a different ALJ found that the same decoy's appearance did not comply with Rule 141(b)(2).

In the present case, the decoy purchased a 12-pack of Coors Light beer from a clerk at a convenience store on September 19, 2003. In *Ovations*, the same decoy purchased a cup of Bud Light beer from a beer stand at the Fresno County Fairgrounds on October 1, 2003.

Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue already determined in a prior proceeding. There are three basic requirements for application of the doctrine of collateral estoppel: "(1) the issue decided in the prior case is identical to the one presented in the action in which the defense is asserted; (2) a final judgment has been entered on the merits in the prior action; and (3) the party against whom the defense is asserted was a party to the prior adjudication." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 342 [272 Cal.Rptr.767].)

There is no dispute that the third requirement of *Lucido* has been met; the decision in *Ovations* is a decision of the Department and the Department was a party to the *Ovations* proceeding. However, neither the first or second of the three requirements is met. The *Ovations* decision *followed* the decision in this case by several months. The *Lucido* case teaches that collateral estoppel applies only to subsequently-decided cases. And, there has been no showing that the issues in the two cases were identical.

We believe that strict adherence to the rule as prescribed by *Acapulco Restaurants, Inc.* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126], requires the conclusion that collateral estoppel is not applicable because the issues are not identical. Each case must be evaluated separately, because Rule 141(b)(2) requires that a decoy display the appearance of a person under the age of 21 *under the actual circumstances presented to the seller of alcoholic beverages*. In the present case, the transaction took place in a convenience store. In *Ovations*, the transaction took place at a booth at the Fresno County Fairgrounds. In this case, Judge Lo was required to gauge the decoy's appearance in the context of a convenience store transaction. In *Ovations*, Judge Echeverria considered the appearance of the decoy under very different circumstances - in the context of a purchase at a booth at the Fresno County Fairgrounds.

We have rejected claims of collateral estoppel in earlier cases (see *7-Eleven, Inc./Amroli* (2002) AB-7784; *7-Eleven, Inc./O'Brien* (2001) AB-7751) and do so here as well. As we pointed out in those cases, the consideration of the decoy's appearance independently in each case makes practical sense as well. Even if, as here, the two violations involving the same decoy occur within a short time of each other, the physical situation will be different, the clerks will be different, the time of day will be different, and the decoy may have dressed differently in the two transactions. By its use of the phrase "could generally be expected," the rule makes it clear that not everyone who sees the decoy will agree that he or she appears to be under 21.

We must rely on the integrity of the ALJ to judge the decoy's appearance solely in the context of the case then before the ALJ. We have also said that we are not in a position to second-guess the ALJ, since the ALJ will have seen the decoy in person, while we have not. Without some substantial indication that the ALJ's task was not

performed properly, we are not inclined to overturn an ALJ's determination of the apparent age of the decoy.

II

Appellants assert the Department violated their right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellants have filed a Motion to Augment Record (the motion), requesting that the report provided to the Department's decision maker be made part of the record. The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motion and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").[3]

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting

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[3] The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615 [25 Cal.Rptr.3d 821]. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. (127 Cal.App.4th 615; ___ Cal.Rptr.3d ___). The Department has petitioned the California Supreme Court for review. The petition was pending at the time of this decision.

attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the administrative law judge (ALJ) had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellants have not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellants have not argued to the contrary), and it was the ALJ's

decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellant, it appears to us that appellants received the process that was due to them in this administrative proceeding. Under these circumstances, and with the potential of an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellant is not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellant's motion is denied.

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN
SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.