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

AB-8347
File: 20-390654 Reg: 04057346

7-ELEVEN, INC., and BAT CONVENIENCE STORES, INC.,
dba 7-Eleven Store # 2131-13564F
15 North Euclid Avenue, National City, CA 91950,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 4, 2005
Los Angeles, CA

ISSUED OCTOBER 12, 2005

7-Eleven, Inc., and Bat Convenience Stores, Inc., doing business as 7-Eleven Store # 2131-13564F (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days 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. and Bat Convenience Stores, Inc., appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Joshua E. Newstat, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated October 7, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 25, 2002. On May 18, 2004, the Department filed an accusation against appellants charging that, on February 6, 2004, appellants' clerk, Swran Malhotra (the clerk), sold an alcoholic beverage to 17-year-old Megan Barahura. Although not noted in the accusation, Barahura was working as a minor decoy for the National City Police Department at the time.

At the administrative hearing held on August 18, 2004, documentary evidence was received, and testimony concerning the sale was presented by Barahura (the decoy) and by David Kerr, a National City police officer.

The testimony established that the decoy entered appellants' premises, went to the beer cooler, and selected a six-pack of Budweiser beer. She took the beer to the sales counter, where the clerk asked for her identification. The decoy gave the clerk her California Identification Card, which bears her true date of birth and a red stripe with the words "AGE 21 IN 2007." The clerk looked at the card for several seconds, handed it back to the decoy, and proceeded to sell her the beer.

The decoy went outside with the beer, and officer Kerr, who had entered the store before the decoy and had observed the transaction, went to the clerk and told her he was a police officer and that she had just sold beer to a minor. The clerk told him she was confused by the age for tobacco sales, 18, but the officer pointed out that the decoy was only 17 years old.

The decoy re-entered the premises with one of the other officers and they went up to the sales counter. Officer Dougherty asked the decoy to identify who sold the beer to her, and the decoy pointed to the clerk and said, "She did." At the time, the

clerk was about two or three feet from the decoy, facing the decoy. A photograph was taken of the decoy and the clerk and a citation was issued to the clerk.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants filed an appeal contending: (1) Rule 141(b)(5)[2] was violated, and (2) appellants were denied due process.

DISCUSSION

I

Rule 141(b)(5) requires, after a sale of an alcoholic beverage to a minor decoy, that the "officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages." Failure of the law enforcement agency to comply with any of the provisions of rule 141 provides a complete defense to a sale-to-minor charge. (Cal. Code Regs., tit. 4, §141, subd. (c).)

Appellants contend that the face-to-face identification of the clerk by the decoy was an unduly suggestive one-person line-up, which the Court of Appeal has said is impermissible. (Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Keller) (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339] (hereafter *Keller*).) They base this contention on the testimony of the decoy during cross-examination that before she re-entered the premises, she saw officers talking to the clerk, and that the officers directed the clerk's attention to the decoy.

The *Keller* case, *supra*, did say that an *unduly suggestive* one-person line-up is impermissible, but also noted that "single person show-ups are not inherently unfair."

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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.

(*Keller*, *supra*, 109 Cal.App.4th at p. 1698.) Appellants have not shown that this identification was unduly suggestive.

The decoy had purchased the beer from the clerk just moments before she made the identification. It is highly improbable that she would have identified the wrong clerk. For this very reason, the courts have approved in-field one-person identifications. In *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447], the court found that a rape victim's identification of one of her attackers when he was brought, handcuffed, to her in the hospital immediately after she had positively identified another suspect, was not unduly suggestive. The court went on to say:

> Appellant contends, incorrectly, that single-person show-ups are impermissible absent a compelling reason. To the contrary, single-person show-ups *for purposes of in-field identifications* are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. [Citation.] The law permits the use of in-field identifications arising from single-person show-ups so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. [Citation.]

(*Id.* at p. 387.)

The Board has rejected arguments similar to appellants' in a number of appeals. (E.g., C*hevron Stations, Inc*. (2004) AB-8166; *Chevron Stations, Inc*. (2004) AB-8153; *The Vons Companies, Inc*. (2004) AB-8058.)

Appellants have given us no reason to think that the decoy was influenced in making this identification by anything the officers did or that she was mistaken in her identification. There was no violation of rule 141(b)(5).

II

Appellants contend that the Department's decision was made after the Department's decision maker received an ex parte communication from the Department's trial counsel, which violates due process.

The Appeals Board considered virtually identical allegations of due process violations, and reversed the Department's decisions, in three appeals: *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 attorney acts as an advisor to the Department's decision maker by providing a document entitled "Report of Hearing" before the Department's decision is made.

Although the legal issue here is the same as that in the *Quintanar* cases, there is a factual difference that 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 this appeal, however, the

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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 response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. *(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

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 appellants 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 appellants, 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 for 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.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.