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

AB-8412
File: 20-214648 Reg: 04056817

7-ELEVEN, INC., HERBERT D. DOMENO, and PEARL M. DOMENO,
dba 7-Eleven Store No. 2173-13731
3450 Overland Avenue, Los Angeles, CA 90034,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 1, 2005
Los Angeles, CA

ISSUED: FEBRUARY 3, 2006

7-Eleven, Inc., Herbert D. Domeno, and Pearl M. Domeno, doing business as 7-Eleven Store No. 2173-13731 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 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., Herbert D. Domeno, and Pearl M. Domeno, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, 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 March 1, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 1977. On March 2, 2004, the Department filed an accusation against appellants charging that, on November 8, 2003, appellants' clerk, Maung Zaw (the clerk), sold an alcoholic beverage to 18-year-old Ashley Martin. Although not noted in the accusation, Martin was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on October 7, 2004, documentary evidence was received and testimony concerning the sale was presented by Martin (the decoy), by Los Angeles police officers Stephan Nassief and Edward Ginter, and by 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) the Department violated appellants' rights to due process by an ex parte communication.

DISCUSSION

I

Rule 141(b)(5) provides that, following any completed sale, but not later than the issuance of a citation, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the decoy make a face to face identification of the alleged seller.

The administrative law judge (ALJ) addressed the issue of rule 141(b)(5) in Finding of Fact II-C:

> C. The preponderance of the evidence established that a face to face identification of the seller of the beer did in fact take place.

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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.

1. After the sale had taken place, the decoy reentered the premises with Officers Ginter and Richards and they walked up to the sales counter. The decoy then pointed to the clerk and stated, "This is the person who sold me the alcohol." At the time of this identification, the clerk was standing behind the sales counter and the clerk was looking at the decoy. After the officers identified themselves to the clerk who sold beer to the decoy, they asked the clerk to step away from the cash register and they took the clerk to an area by the door to the stockroom. The decoy then identified the clerk a second time and stated, "This is the person who sold me the beer." At the time of this identification, the clerk was standing about one to two feet from the decoy and the clerk was looking at the decoy. Exhibit 3 is a photograph that was taken by the door to the stockroom and it shows the decoy pointing to the clerk that sold her the beer.

2. A citation was issued to the clerk after the decoy had identified him as the clerk who had sold her the beer.

Appellants assert that the first identification of the clerk by the decoy violated the rule because the clerk was helping customers at the time and therefore the clerk could not have been aware of the identification as required by the Board's decision in *Chun* (1999) AB-7287. They also contend the officer's testimony established that the citation was issued after the first identification, so that the second time the decoy identified the clerk, the rule was also violated.

Alternatively, if the Board finds that the citation was not issued following the first identification, appellants assert that the ambiguous testimony about when the citation was issued prevents the Department from being able to prove the citation was issued after a valid face-to-face identification. They contend that it was the Department's burden to prove compliance with rule 141(b)(5), and its inability to do so causes "[a]ppellants' defense [to be] established as a matter of law." (App. Br. at p. 12.)

Appellants waived this issue by not raising it at the hearing. With regard to rule 141, they argued only that the decoy did not display the appearance of a person under the age of 21 (rule 141(b)(2)) and that the decoy operation was not conducted in a

fashion that promoted fairness because the store was busy (rule 141(a)). In fact, their counsel stated during closing argument,

> As to the face-to-face, the clerk acknowledged that he had sold beer to the minor. I don't think that's an issue here. The issue is the minor appeared to be over the age of 21 at the time.

In any case, there is no merit to appellants' contentions. With regard to their insistence that the clerk must be made aware that he is being identified, this Board has said many times that it is not necessary that the clerk *actually* be aware that the identification is taking place. (*Greer* (2000) AB-7403.) The only "acknowledgment" required by *Chun*, *supra*, is achieved by "the seller's presence such that the seller is, *or reasonably ought to be*, knowledgeable that he or she is being accused and pointed out as the seller. [Italics added.]"

In any case, appellants misstate or, at best, selectively state, the evidence when they say that the clerk was busy with other customers when the decoy identified him. Although the clerk was ringing up customers when the officers and the decoy reentered the store, when the decoy pointed at him the clerk had stopped working and was looking at the decoy. [RT 26.] Also, officer Ginter testified that when the decoy pointed across the counter at the clerk and said that he was the one who sold to her, "[the clerk] was looking straight at her." [RT 47.]

Even if the first identification had somehow been faulty, appellants do not contest the validity of the second identification. They attempt to create an issue about the timing of the citation issued to the clerk, but it is clear from reading the record that the citation was issued after both of the identifications were completed. Appellants' attempts to argue that the officer's testimony meant something else are merely semantic contortions.

Finally, appellants argue that ambiguity in the evidence prevents the Department from proving the citation was issued after the face-to-face identification, and the Department's failure to prove compliance with rule 141(b)(5) creates a rule 141(b)(5) defense for appellants. Appellants are wrong again.

First, the only ambiguity in the evidence was that which appellants tried to create by their "semantic contortions" mentioned above. Secondly, a rule 141(b)(5) defense does not magically appear just because evidence is not presented about an issue not raised; rule 141 creates an affirmative defense and appellants bear the burden of showing that the rule was violated.

The Board has addressed similar arguments before, in which appellants mistakenly believed that they did not bear the burden of proof to establish that they were entitled to the defense afforded by rule 141. We quote from two particularly relevant examples:

> Appellants are mistaken. Rule 141 is an affirmative defense, and the burden of proof is on the licensee. Since the record is silent as to when the citation was issued, appellants have not satisfied their burden. It should be noted that appellants could have resolved the issue by simply asking their witness about the sequence of events.

7-Eleven, Inc. & Mandania (2002) AB-7828

> We disagree. Once there is affirmative testimony that the face-to-face identification occurred, the burden shifts to appellants to demonstrate non-compliance, i.e., that the normal procedure of issuing a citation after identification of the clerk, was not followed. We are unwilling to read our decision in The Southland Corporation/R.A.N. as expanding the affirmative defense created by Rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule.

7-Eleven, Inc. & Azzam (2001) AB-7631

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

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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.)

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 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 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.

Under the circumstances of this case and our disposition of the due process issue raised, appellants are 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. Appellants' motion is denied.

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.