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

AB-8418
File: 21-323832 Reg: 04057883

FORTUNE COMMERCIAL CORPORATION, dba Seafood City Supermarket
1420 East Plaza Boulevard, Space C, National City, CA 91950,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 3, 2005
Los Angeles, CA

ISSUED DECEMBER 30, 2005

Fortune Commercial Corporation, doing business as Seafood City Supermarket (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for eight days for appellant's 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 appellant Fortune Commercial Corporation, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Claire C. Weglarz, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated March 3, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 6, 1997. On August 25, 2004, the Department filed an accusation against appellant charging that, on April 16, 2004, appellant's clerk, Azucena Gallegos (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 January 11, 2005, documentary evidence was received, and testimony concerning the sale was presented by Barahura (the decoy), by National City Police officer Antonia Ybarra, and by the clerk.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant has filed an appeal making the following contentions: (1) Rule 141(b)(5)[2] was violated, and 2) the Department violated its right to due process.

DISCUSSION

I

Appellant contends that rule 141(b)(5), which provides for a "face-to-face" identification of the seller by the decoy, was violated because the evidence does not show that the clerk and the decoy were directly facing each other at the time of the identification, and because there is no finding that the clerk knew she was being accused by the decoy.

The face-to-face identification is addressed in Finding of Fact II.D.:

> D. Although the clerk testified that she did not see the decoy point at her, 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. The decoy testified that she was asked to return to the premises and that she did so with some of the officers. The decoy went back to the sales counter and the clerk who had sold her the beer was still there. When one of the officers asked her to identify the person who had sold her the beer, the decoy pointed to the clerk and said, "She did." When this identification took place, the decoy was standing in front of the clerk about two to three feet away from her. The clerk was just standing there and the decoy made eye contact with the clerk during the identification.

2. Officer Ybarra testified that he returned to the premises with the decoy, that they proceeded to the cash register where the sale to the decoy had taken place, that he identified himself to the clerk, that he advised the clerk that she had sold beer to a minor, that he closed the register, that he asked the decoy to identify the clerk who had sold her the beer, that the decoy pointed to the clerk and stated, "She sold me the beer." Ybarra also testified that the clerk and the decoy were standing next to each other and facing each other at the time of the identification.

3. The clerk did testify that the decoy was about five feet away from her after she returned to the premises with the police officers, that it did appear that the decoy said something to someone when the decoy was standing five feet away from her, that she could not hear what the decoy said and that she was looking at the decoy when the decoy said something.

The court in *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd*. (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126], said that there must be "strict adherence" to the provisions of rule 141. Appellant relies on this language for its contention that there must be a finding that the decoy and the clerk were directly facing each other, looking at each other, and that the evidence must support this for the identification to be valid.

The administrative law judge (ALJ) found that a face-to-face identification took place. He was not required to find that the decoy and the clerk were directly facing each other or that they were looking at each other, because neither of these situations is required to comply with the rule.

Appellant cites no authority for its assertion that "strict adherence" to the rule means the decoy and the clerk can only be considered "face to face" if they are directly facing each other. However, appellant is not really insisting on strict adherence to the rule, but rather on an inappropriately literal interpretation of the words "face to face."[3]

The same rules of construction used to interpret statutes apply when interpreting regulations. (*Farm Sanctuary, Inc. v. Dept. of Food & Agriculture* (1998) 63 Cal.App.4th 495, 505-506 [74 Cal.Rptr.2d 75]; *Goleta Valley Community Hospital v. Dept. of Health Services* (1983) 149 Cal.App.3d 1124, 1129 [197 Cal.Rptr. 294].) The words of a regulation must be given their "usual and ordinary meaning," the goal being "to determine the intent of the adopting authority." (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2003) 109 Cal.App.4th 1687, 1695-1696 [1 Cal.Rptr.3d 339].) If there is any ambiguity in the terms used, "we examine the context in which the language appears" and "consider the core objective of the regulation [citation] and its history and background." (*Id*. at p. 1696.)

Appellant's position appears to be that the "usual and ordinary meaning" of "face-to-face" is limited to a situation in which the two people involved are squarely facing each other, looking at each other, and intent on, and fully aware of, the actions and words of the other. We disagree; appellant's restrictive interpretation of the phrase does not constitute its usual and ordinary meaning, nor does it reflect the context or core objective of the regulation.

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[3]Appellant states in its brief that "the California legislature affirmatively chose to add the term 'face-to-face' to this subsection of Rule 141." The California Legislature, however, did not choose the wording. Rule 141 is not a statute enacted by the Legislature, but a regulation promulgated and adopted by the Department under the mandate of Business and Professions Code section 25658, subdivision (f). The mandate did not include use of the term "face-to-face."

A dictionary provides the usual and ordinary meanings of words. Following are a few examples of definitions of the expression "face-to-face":

- Webster's Third New International Dictionary (1986): "within each other's sight or presence : involving close contacts : in person"
- The American Heritage Dictionary (4th ed. 2000): (adj.) "Being in the presence of another; facing"; (adv.) "In person; directly"
- The American Heritage Dictionary of Idioms (1997): "In each other's presence, opposite one another; in direct communication." "Confronting each other"

The dictionary definitions focus on the parties being in each other's presence, rather than being directly opposite each other. We believe this comports with the ordinary meaning of the phrase.

The Appeals Board provided the following definition of "face to face" in the context of rule 141(b)(5) in *Chun* (1999) AB-7287:

> the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and 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.

Not only is this definition in accord with the dictionary definitions, it takes into consideration the context of a decoy operation, where the safety of the decoy is a concern, and the face-to-face identification is merely one part of the overall situation, not some theatrical confrontation. The core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, *supra*, 109 Cal.App.4th at p. 1698.) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid*.) It does not require a direct "face off" to accomplish these purposes. Regardless of whether the clerk heard what the decoy said to the officer, she had the opportunity to

look at the seller again. The opportunity is all that needs to be provided; if the opportunity is provided, but the clerk does not take advantage of the opportunity, the rule is not violated.

In any case, appellant is wrong about a lack of evidence that the decoy and the clerk were directly facing each other. The decoy testified she was two to three feet "in front of" the clerk, the clerk was just standing there, she made eye contact with the clerk, and she and clerk were facing each other. [RT 14-15, 33.] Officer Ybarra testified that the clerk and the decoy were "standing next to each other, facing each other." [RT 43.] The clerk testified that she and the decoy were about five feet apart, the decoy was directly in front of her, and she was looking at the decoy. [RT 54, 57, 63.]

Rule 141(b)(5) was clearly satisfied.

II

Appellant asserts the Department violated its 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.

The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants alleged due process violations virtually identical to the 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").[4]

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[4]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*

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.

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.

Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

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. Appellant has 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 appellant has 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 appellant received the process that was due to it 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.[5]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[5]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.