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

AB-8440
File: 47-69313 Reg: 04058477

EL TORITO RESTAURANTS, INC. dba El Torito Restaurant
5242 Lakewood Boulevard, Lakewood, CA 90712,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: March 2, 2006
Los Angeles, CA

ISSUED JUNE 7, 2006

El Torito Restaurants, Inc., doing business as El Torito Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for its bartender, Joel Rodriguez, having furnished Miller Lite beer to Holly Hak and Iris Pyun, 18-year-old police minor decoys, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant El Torito Restaurants, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

---

[1]The decision of the Department, dated April 25, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on January 2, 1973. On December 15, 2004, the Department instituted an accusation against appellant charging the sale or furnishing of alcoholic beverages to a minor.

An administrative hearing was held on March 11, 2005, at which time oral and documentary evidence was received. At that hearing, testimony established that appellant's bartender, after examining California drivers' licenses showing the true ages of Holly Hak and Iris Pyun, each of whom were 18 years of age, furnished each of them a bottle of Miller Lite beer. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and appellant had failed to establish a defense under Department Rule 141.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Its motion to compel specified documents was improperly denied; (2) it was denied due process as a result of an ex parte communication to the Department's decision maker; and (3) there was no compliance with Rule 141(b)(2).

DISCUSSION

I

Appellant asserts in its brief that their pre-hearing motion seeking discovery of all decisions certified by the Department over a four-year period "where there is therein a finding or an effective determination that the decoy at issue therein did not 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," was improperly denied. Appellant alleges that ALJ Gruen, who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellant failed to show that the requested items were relevant or would lead to admissible evidence.

Appellant spends much of its brief arguing that the provisions of the Civil Discovery Act (Code Civ. Proc., §§ 2016-2036) apply to administrative proceedings, a contention this Board rejected in numerous cases in 1999 and 2000 (see, e.g., *The Southland Corporation/Rogers* (2000) AB-7030a), all of which were argued by the same law firm representing the present appellant. Those decisions of the Appeals Board held:

> "[T]he exclusive right to and method of discovery as to any proceeding governed by [the APA]" is provided in §11507.6. (Gov. Code, §11507.5.) The plain meaning of this is that any right to discovery that appellants may have in an administrative proceeding before the Department must fall within the list of specific items found in Government Code §11507.6, not in the Civil Discovery Act. . . . . [¶] In addition, §11507.7 requires that a motion to compel discovery pursuant to §11507.6 "shall state . . . the reason or reasons why the matter is discoverable *under that section* . . . ." [Emphasis added.] [¶] Therefore, we believe that appellants are limited in their discovery request to those items that they can show fall clearly within the provisions of §11507.6.

Appellant's arguments in the present appeal, repeating, almost verbatim, the arguments made in 1999 and 2000, are no more persuasive today than they were six or seven years ago.

Appellant argues it is entitled to the materials sought because they will help it "prepare its defense by knowing . . . what factors have been considered by the Department in deciding how a decoy's appearance violated the rule" (App. Br. at p.14) so that it can compare the appearance of the decoy who purchased alcohol at its

premises with the "characteristics, features and factors which have been shown in the past to be inconsistent with the general expectations . . . of the rule." (App. Br. at p. 13.) It asserts "it is more than reasonable" that decisions in which decoys were found not to comply with rule 141(b)(2) "could assist the ALJ in this case by comparison." (*Ibid*.) However, appellant does not explain how an ALJ is expected to make such a comparison.

It is conceivable that each decoy found not to display the appearance required by the rule had some particular indicium, or combination of indicia, of age that warranted his or her disqualification. We have considerable doubt, however, that any such indicia, which an ALJ would only be able to examine from a photograph or written description, would be of any assistance in assessing the appearance of a different decoy who is present at an administrative hearing.

The most important indicium at the time of the sale is probably the decoy's facial countenance, since that is the feature that confronts the clerk more than any other. Yet, it is, in every case, an ALJ's overall assessment of a decoy's appearance that matters, not simply a focus on some narrow aspect of a decoy's appearance.

We know from our own experience that appellant's attorneys represent well over half of all appellants before this Board. We would think, therefore, that the vast bulk of the information appellant seeks is already in the possession of their attorneys, a fact of which the Board can take official notice. This, coupled with the questionable assistance the information sought could provide to an ALJ in assessing the appearance of a decoy

present at the hearing,[2] persuades us that ALJ Gruen did not abuse his discretion in denying appellant's motion.

II

Appellant asserts the Department violated its right to procedural due process when the attorney 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. Appellant 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]

---

[2] Unless a minor is deceased or too ill to be present, or unless the minor's presence is waived, he or she must be produced at the hearing by the Department in all cases charging violations of Business and Professions Code sections 25658, 25663, and 25665. (See Bus. & Prof. Code section 25666.)

[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 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.

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 it 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.

III

Appellant contends that Rule 141(b)(2) was violated when the police officer conducting the decoy operation sat next to the decoys. Appellant contends that the three were "together" within the rule established in *Hurtado* (2000) AB-7246, because

one of the two decoys had to be facing the police officer when the two were engaged in conversation. Appellant argues that the presence of the 29-year-old officer next to the decoys at an otherwise empty bar counter created the appearance that the three were together, causing the 18-year-old decoys to appear older than 21.

The two decoys entered the restaurant's bar area together, and seated themselves on stools located next to a post. The police officer in question entered the bar 30 seconds after the decoys, and sat next to them. There were empty bar stools on the other side of the officer. There is no evidence that either of the decoys acknowledged the officer's presence or spoke to her during the entire time they were seated at the bar.

When the decoys were seated, the bartender asked if they would like chips and salsa. One of the two gave an affirmative response, and he brought them a bowl of chips and some salsa. Hak then ordered two Miller Lite beers, but the bartender apparently did not hear her. Pyun later gained the bartender's attention and also ordered two Miller Lite beers. The bartender asked each of the decoys for identification, and each decoy gave him her California driver's license. Each license bore the decoy's true date of birth. Hak's license had a blue stripe with white letters stating "PROVISIONAL UNTIL AGE 18 IN 2003;" the blue stripe on Pyun's license stated "PROVISIONAL UNTIL AGE 18 IN 2004." Both licenses also contained a red stripe with bold white letters stating, in Hak's case, "AGE 21 IN 2006," and in Pyun's case, "AGE 21 IN 2007." The bartender looked at the licenses, returned them to the decoys, and served them the beers.

Appellant argues that the case is governed by the Board's decision in *Hurtado* (2000) AB-7246, a case in which a police officer shared a table with the decoy and each ordered a beer. In that case, the Board concluded that the officer's presence created a circumstance incompatible with Rule 141, stating:

> Here consideration of the effect of another person is essential for disposition. Certainly, if the officer ordered the beers, that would completely taint the decoy operation. Even if he did not order the beer for the minor, we find the officer's active participation in the decoy operation to be highly likely to affect how the decoy appeared and to mislead the seller. We conclude that the officer accompanying the decoy as a companion was unfair, and violated Rule 141.

The circumstances in *Hurtado* are very different from those in this case. In *Hurtado*, the decoy and the officer entered the premises together, sat down at a table together, and ordered beers together.[4] In the present case, the officer did not enter the bar with the decoys, and was not involved in the placing of their order. She did not talk to them, and they did not talk to her.

The bartender did not testify, so no one knows what he believed. We do know that he checked the identification of both decoys, and, if at all diligent, would have known that neither was old enough to buy an alcoholic beverage. Appellant does not challenge any of the ALJ's findings regarding the appearance of Hak and Pyun.

Appellant's argument, reduced to its essence, is that a minor, who otherwise displays the appearance required by Rule 141(b)(2), who is merely seated next to a total stranger who happens to be 28 or 29 years of age, or older, cannot, as a matter of law, display the appearance which could generally be expected of a person under 21

---

[4] In *Hurtado*, the waitress testified that the police officer ordered two beers, and the decoy paid for them. The officer and the decoy testified that each ordered a beer. The ALJ concluded that it did not matter who placed the order, because the waitress expected both of them to drink the beer.

years of age. Under appellant's theory, the absence of any interaction between the decoy and the other person, physical or vocal, is irrelevant, if they happen to be sitting next to each other at a bar. To state the argument is to refute it. This case has little resemblance to *Hurtado*, and certainly not enough to warrant reversal on the facts of that case.

ORDER

The decision of the Department is affirmed.[5]

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

[5] 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.