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

AB-8480
File: 20-214483 Reg: 05059489

7-ELEVEN, INC., CAROL CRIBBS, and CHARLES CRIBBS
dba 7-Eleven #2237-22014
518 South Lovers Lane, Visalia, CA 93292,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 5, 2006
San Francisco, CA

Redeliberation: January 11, 2007; February 1, 2007

ISSUED MARCH 20, 2007

7-Eleven, Inc., Carol Cribbs, and Charles Cribbs, doing business as 7-Eleven #2237-22014 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Eddie Patino, having sold a 12-pack of Bud Light beer to Martha Bautista, 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., Carol Cribbs, and Charles Cribbs, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ghazal A. Yashouafar, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

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[1]The decision of the Department, dated September 8, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued in July 1981 or July 1988.[2] Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on January 19, 2005.

An administrative hearing was held on August 11, 2005, at which time oral and documentary evidence was received. At that hearing, decoy Bautista testified that, when the clerk asked for identification, she produced her California driver's license (Exhibit 2). The license sets forth her date of birth (September 8, 1985) and bears a red stripe with the legend "21 IN 2006." The clerk examined the license, and showed it to a second clerk, Pat Sweat, who said it was, "fine." Patino then went ahead with the sale. Bautista left the store with the beer, then returned and identified Patino as the person who sold her the beer. Luma Fahoum, a Visalia police officer who was present in the store and observed the transaction, corroborated Bautista's testimony. Fahoum issued a citation to Patino after the face to face identification.

Sweat, the other clerk on duty, testified that he was suspicious of the license, because Bautista "didn't look a day over 17 to me." Nonetheless, he decided that the identification was valid, and advised Patino to go ahead with the sale. Sweat testified that he "never really paid that much attention" to the red stripe on the license.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and that the face to face identification had not been unduly suggestive. Additionally, the decision rejected

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[2] The accusation alleged that the license was issued in July 1988. Appellants contended the license was issued in July 1981. The administrative law judge found it unnecessary to decide which was the correct date.

appellants' contentions that a search of the decoy after the transaction might have disclosed that the decoy displayed a false identification to Patino.

Appellants thereafter filed a timely appeal in which they contend that the decision violated Department Rule 141(b)(3) by failing to address the central issue of the true and correct identification of the minor decoy.

DISCUSSION

I

Appellants contend that the decision is defective because it fails to address the contention made at the administrative hearing that a more effective search of the decoy might have disclosed that she carried, and displayed to the clerks, a false identification that showed her to be 21 years of age, thus violating Department Rule 141(b)(3).[3]

The decision, in Findings of Fact III and V, discusses at some length the issue appellants claim was ignored:

> FF III Shortly before the decoy operation began, Visalia Police Officer Fahoum searched all of the pockets on the decoy's clothes to be sure that the decoy was carrying only one form of identification. That identification was the decoy's California driver license, which showed the decoy's date of birth was September 8, 1985 and contained in a red stripe the words "AGE 21 IN 2006". From the time of the search to the time that the decoy purchased the beer at Respondents' store, the decoy was never out of Officer Fahoum's sight.
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> FF V After paying for the beer, the decoy exited the store with it. Officer Fahoum, who had been in the store and witnessed the decoy's purchase, identified herself as a police officer and informed Patino that he had sold beer to an underage customer. Both Patino and the second clerk replied that they had checked the decoy's identification and that it showed she was old enough to purchase beer. The decoy returned to the store shortly thereafter.

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[3] Rule 141(b)(3) provides:

> A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages.

Respondents argued that at that point, Officer Fahoum should have searched the decoy for a false identification, and that her failure to do so made the decoy operation "unfair", establishing a defense for Respondents in accordance with the Department's Rule 141(a) and Rule 141(c). Title 4, California Code of Regulations, Sections 141(a) and 141(c). The argument is rejected.

In light of Officer Fahoum's search of the decoy just before the beginning of the decoy operation, and the fact that the decoy thereafter was continuously in Officer Fahoum's sight until the purchase of the beer, there was no way that the decoy could have had a false identification to show to Patino. Therefore, it was reasonable for Officer Fahoum to give little weight to the statement from Patino and the second clerk. Moreover, a search of the decoy at that point would be occurring after the decoy had exited Respondents' store and had an opportunity to conceal any alleged false identification.

The decoy testified that she produced her valid California driver's license in response to the clerk's request for identification. Exhibits 4A and 4B are photographs depicting the decoy and the clerk who sold her the beer. She is holding her driver's license in each of the photographs. The red strip indicating that she was a minor is apparent in both photographs. She denied having ever possessed a false identification or a valid identification issued to some other person.

Patino, the clerk who made the sale, did not testify. Pat Sweat, the other clerk, testified that he was chopping vegetables when he was asked by Patino to look at the decoy's identification. He testified that the identification he examined showed that the decoy was 21. He recalled that the year of birth on the identification was 1984, and the day was sometime before the 19th of January.

Admitting that the decoy "did not look a day over 17," Sweat said he "shut up" when the police officer said the decoy was 19. Although Sweat assumed she had presented false identification, neither clerk claimed at the time that they had been shown false identification. Nor, when he testified, did Sweat claim the identification displayed to him by Officer Fahoum (Exhibit 2) was different from that displayed by the

decoy.

Appellants' theory appears to be that, in the face of testimonial and documentary evidence of the decoy's age, the claimed failure of the police officer to conduct an effective search of the decoy prior to her visit to the store, coupled with the clerk's testimony that he saw identification showing the decoy to be 21, is evidence from which it can be inferred that the decoy carried false identification.

Officer Fahoum testified that she searched the decoy prior to the commencement of the operation, and while she did not recall if the shirt the decoy was wearing had pockets, she would have searched them because of their obvious presence.

All that appellants have to fault the decision is the speculation of a witness still in appellants' employ that the decoy might have had false identification because he and his fellow clerk discerned from what they were shown that she was 21. In contrast, the Department can point to the decoy's denial of ever possessing false identification, the police officer's testimony that a search of the decoy's pockets was negative for any identification other than the decoy's valid California driver's license, and to the license itself.

Appellants' reference to *Topanga Ass'n for a Scenic Community v. Los Angeles County* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836) misses the mark. The ALJ's findings indicate quite clearly how he reached the result he did. He simply gave little or no weight to the testimony of clerk Sweat, electing to accept instead the decoy's denial of ever possessing false identification and the police officer's testimony that a search did not discover any other identification than the decoy's valid California driver's license.

Appellants appear to read the *Topanga* decision as requiring findings in their

favor no matter how non-existent or speculative the factual foundation for their defense. That is an unreasonable view of what the court held. The decision which appellants have challenged is clear as to how it relates the evidence to the findings and the findings to the decision. *Topanga* does not require more. Appellants' claim that false identification may have been presented is speculation unsupported by evidence.

Appellants rely on the Board's decision in *The Southland Corporation & R.A.N., Inc*. (1998) AB-6967 (*R.A.N.*) for their contention that the Department must make a prima facie showing of compliance with rule 141 before the licensee must present any evidence that the rule was violated.

Appellants state that this Board has held that rule 141 does not create an affirmative defense and that it is the Department, not the licensee, that bears the burden of proof on whether the rule was complied with. The Board has addressed this contention time and time again, most recently in *7-Eleven & Lo* (2006) AB-8384. In that case, the appellants also relied on *R.A.N.*, *supra*. The Board reviewed many of the decisions subsequent to *R.A.N.*, quoting language from *The Von's Corporation* (2002) AB-7819 (*Vons*) that clearly repudiates appellants' argument:

> Appellant misunderstands the differing natures of the various burden-of-proof standards. The requirement of "substantial evidence" to support a Department decision is the standard used by this Board, and the appellate courts, when reviewing a decision. The ultimate burden of persuasion at the administrative hearing is the preponderance of the evidence. *The Department's initial burden of producing evidence, however, is merely to make a prima facie case, that is, to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence.*
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> Appellant cites this Board's decision in *The Southland Corporation/R.A.N.* (1998) AB-6967, in support of its contention that the Department failed to meet its burden of proof. The appellants in *7-Eleven/Azzam* (2001) AB-7631, also cited that Board decision when they

argued that the Department had not met its burden of proving that Rule 141(b)(5) had been complied with because no specific evidence was presented of the sequence of events to show that the face-to-face identification was made before the selling clerk was cited. The Board rejected that argument, saying,

> "In our view, once there has been affirmative testimony that the face to face identification occurred, the burden shifts to appellants to demonstrate why it did not comply with the rule, i.e., that the normal procedure, for the issuance of a citation following the identification of the accused, 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."

We reiterate here that a Rule 141 defense requires evidence that there was a violation of the rule.

The evidence presented by the Department in the present case was clearly sufficient to allow the ALJ to conclude that the violation had occurred and that the decoy operation was conducted fairly; it was appellant's burden at that point to present evidence rebutting that evidence. If appellant chose not to present any evidence, but to rely solely on its mistaken belief that the Department had not met its initial burden of producing evidence, it has no basis for complaint on appeal.

The Board then noted the numerous Board decisions that quoted *Vons* or expressed the same conclusion using different language: *7-Eleven, Inc. & Gonser* (2001) AB-7750; *7-Eleven, Inc. & Singh* (2002) AB-7792; *7-Eleven, Inc. & C Bar J Ranch, Inc.* (2002) AB-7800; *7-Eleven, Inc. & Mandania* (2002) AB-7828*; 7-Eleven, Inc. & Saulat* (2002) AB-7862; *7-Eleven, Inc. & Bal* (2002) AB-7872; and *7-Eleven, Inc. & Veera* (2003) AB-7890. The Board concluded by saying:

> Appellants are attempting to resurrect a long-dead notion, and it appears that much of the impetus for their attempt comes from their reading of *The Southland Corporation/R.A.N.*, *supra*. We have struggled with the anomaly of that appeal for a number of years and have attempted to bring the troublesome language of the opinion into line with the rest of the Board's opinions. It has become obvious to us that this approach requires the Appeals Board to address and reject, over and over again,

> contentions such as appellants make here. This promotes neither fairness nor justice. Therefore, to the extent that *The Southland Corporation/R.A.N.* is seen as imposing on the Department an initial burden of proof with regard to the affirmative defense of rule 141 before an appellant has presented any evidence of a violation of that rule, it is overruled.

We repeat the language from *7-Eleven & Lo* to put licensees and their counsel on notice that this aspect of *R.A.N.* has been overruled and should no longer be cited for the proposition appellants are arguing here.

II

Appellants have filed a motion to augment the administrative record with any form 104 (Report of Hearing) included in the Department's file, and have filed a supplemental letter brief regarding the recent decision of the California Supreme Court in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [58 Cal.Rptr.3d. 585] (*Quintanar*).

On November 13, 2006, the California Supreme Court held that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. (Quintanar, *supra*, 40 Cal.4th 1.) In *Quintanar*, the Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access to the report of hearing, establishing, the court held, "that the reports of hearing were provided to the agency's decision maker." *(Id.* at pp. 15-16.)

In the present case, appellants contend a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar*

has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.[4]

ORDER

The decision of the Department is affirmed as to all issues raised other than that

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[4] The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[5]

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

[5]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.