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

AB-8633
File: 20-399505 Reg: 06062268

7-ELEVEN, INC., PARAMJEET KAUR UPPLE, and SHINDA UPPLE,
dba 7-Eleven Store # 2133 18655F
300 North Chester, Bakersfield, CA 93308,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: November 1, 2007
Los Angeles, CA

ISSUED JANUARY 17, 2008

7-Eleven, Inc., Paramjeet Kaur Upple, and Shinda Upple, doing business as 7-Eleven Store # 2133 18655F (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., Paramjeet Kaur Upple, and Shinda Upple, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated October 5, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 27, 2003. On March 23, 2006, the Department filed an accusation against appellants charging that, on February 1, 2006, their clerk, Kulwat Aujua (the clerk), sold an alcoholic beverage to 18-year-old Christopher Russell. Russell was working as a minor decoy for the Kern County Sheriff's Department at the time.

At the administrative hearing held on July 26, 2006, documentary evidence was received, and testimony concerning the sale was presented by Russell (the decoy) and by Steven Bratcher, a Kern County Sheriff's officer. Appellants presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellants filed an appeal contending: (1) The administrative law judge (ALJ) improperly denied appellants the right to cross-examine a witness, and (2) the Department violated prohibitions against ex parte communications with the decision maker.[2]

DISCUSSION

I

Appellants contend that the ALJ improperly limited their right to cross-examine the police officer by sustaining the Department's objection to appellants' question whether the officer were aware if any other decoy operations were conducted at this premises after February 1, 2006. When appellants argued that the question was

[2]Appellants also filed a motion asking the Board to augment the record with any Report of Hearing in the Department's file for this case. Our decision on the ex parte communication issue makes augmenting the record unnecessary, and the motion is denied.

relevant because it concerned mitigation, the ALJ replied, "Well, then you put it on through your witnesses." [RT 39.]

On appeal, appellants assert that the question was asked to prove that they had taken "positive action . . . to correct [the] problem," one of the possible mitigating factors listed in the Department's penalty guidelines. (4 Cal. Code Regs., §144.) The ALJ's "true reason" for the ruling, that appellants should prove mitigation through their own witnesses, was an impermissible ground for disallowing the question, according to appellants.

The right to cross-examine witnesses is as fundamental to a fair hearing in an administrative adjudication as it is in a court. (*Dole Bakersfield v. Workers' Comp. Appeals Bd*. (1998) 64 Cal.App.4th 1273, 1276 [75 Cal.Rptr.2d 836]; *Fox v. State Pers. Bd*. (1996) 49 Cal.App.4th 1034, 1040 [57 Cal.Rptr.2d 279]; *McLeod v. Board of Pension Commissioners* (1970) 14 Cal.App.3d 23, 28 [94 Cal.Rptr. 58].) However, not every denial or limitation of that right is a violation of due process. Whether a denial of due process has occurred depends on the circumstances of the particular case. (*Priestly v. Superior Court* (1958) 50 Cal.2d 812, 822 [330 P.2d 39] (conc. opn.); *McCarthy v. Mobile Cranes, Inc*. (1962) 199 Cal.App.2d 500, 507 [18 Cal.Rptr. 750].)

We need not decide whether the ruling was erroneous, because even if it were, it would not warrant reversal. This alleged error, if it existed, would be no more than harmless error. The mitigating factor appellants sought to prove was "positive action by licensee to correct problem." Yet all that could have been proved by questioning the officer would have been what action the police took. The officer could not testify to what appellants did to prevent further violations. In fact, no evidence was presented of anything appellants did in response to the violation. Appellants presented no witnesses

at all. Whether erroneous or not, the ALJ's ruling clearly was not prejudicial to appellants' case.

As to appellants' complaint that the ALJ sustained the Department's objection for an impermissible reason, as long as the ruling itself was not patently wrong, the reason behind it could not invalidate the ruling. Appellants would have to show a clear abuse of the ALJ's discretion to prevail on this issue. They clearly have not done so.

II

Appellants contend the Department violated due process and the Administrative Procedure Act (APA)[3] by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision, citing the California Supreme Court's holding in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*). Appellants argue that this violation of the APA is ipso facto a violation of due process. Due process was also violated, appellants assert, because the Department's attorney assumed the roles of both advocate and advisor to the decision maker.[4] Appellants contend the decision of the Department must be reversed.

The Department disputes appellants' allegations of ex parte communications and

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[3]Government Code sections 11340-11529.

[4]In *Quintanar*, *supra*, on page 17, footnote 13, the Court stated:

> Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

We also decline to address appellants' due process contention.

asks the Appeals Board to remand this matter so that the factual question of whether such a communication was made can be resolved.

We agree with appellants that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar*, *supra*.

However, we agree with the Department that remand is the appropriate remedy at this juncture. As we have done in the numerous other cases involving this issue, we will remand the matter to the Department for an evidentiary hearing concerning whether the ex parte communication alleged by appellant occurred.

ORDER

The decision of the Department is affirmed as to all issues raised other than that 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
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.