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

AB-8826
File: 20-260795 Reg: 07065708

7-ELEVEN, INC., NELOFER KIRMANI, and TANVEER KIRMANI,
dba 7-Eleven Store #2175-20269
2717 East Colorado Boulevard, Pasadena, CA 91107,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 4, 2009
Los Angeles, CA

ISSUED AUGUST 19, 2009

7-Eleven, Inc., Nelofer Kirmani, and Tanveer Kirmani, doing business as 7-Eleven Store #2175-20269 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale beer and wine license for 10 days, all of which were conditionally stayed for a one-year probationary period, for their clerk, Staniscaus Perera, having sold a six-bottle pack of Millers Genuine Draft beer, an alcoholic beverage, to Nathaly Yeremian, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Nelofer Kirmani, and Tanveer Kirmani, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control,

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[1]The decision of the Department, dated February 1, 2008, is set forth in the appendix.

appearing through its counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 7, 1991. On May 11, 2007, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on November 7, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented by Yeremian, the decoy, and by Tai Witherspoon, a Pasadena police officer.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and rejected appellants' claims that there had been no compliance with Department Rules 141(b)(2) and 141(b)(5) (4 Cal. Code Regs., §141, subds. (b)(2) and (b)(5)).

Appellants filed a timely notice of appeal in which they raise the following issues: (1) The Department supplied an incomplete and inaccurate administrative record; and (2) the decoy's appearance did not comply with the requirements of Rule 141(b)(2).

DISCUSSION

I

The Department furnished to the Appeals Board a purportedly complete certified administrative record in two parts, the first supplied on December 4, 2008, the second, on March 16, 2009. The contents of each are itemized in appellants' brief. As appellants note, the contents are different, and they are mutually exclusive. The first certification contains a certificate of decision, a proposed decision, an exhibit list, and copies of exhibits. The second includes a motion to compel discovery, supporting

points and authorities, the Department's opposition to the motion, an order denying the motion, and proofs of service.

Appellants say that the Board must reverse this matter in its entirety because, as a result of the two certifications,

> it is impossible to ascertain whether all of the key documents were reviewed in writing the Proposed Decision and in the later certification of that Decision by the Director or the Director's advisors.

(App. Br., p. 6.)

Appellants do not identify which of the so-called "key documents" might not have been reviewed, nor have they claimed that additional documents should be added to provide a fully compete record. Their argument is that since each of the certifications was made under penalty of perjury, and each recites that the record accompanying it is full and complete, neither certification can be relied on.

As we see it, appellants are attempting to capitalize on a procedural error on the part of the Department's clerical staff in determining whether to include in the record documents relating to a discovery motion.

The Board has by now visited this issue a number of times, and, with a single exception,[2] has rejected appellants' claims that the manner in which the administrative record was compiled warranted reversal. Indeed, in all these cases, there has never been a showing as to how the omission of the discovery pleadings and decision generated any prejudice. In none of them, as is true in this case as well, was there any

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[2] That exception involved an administrative record which included a number of documents it should not have, the content of which could have been prejudicial to the licensee's position. The Board reversed the decision in that case, and remanded the case to the Department, noting that the record was so tainted as to warrant dismissal. (*Circle K Stores, Inc*. (2007) AB-8597.)

connection shown between the substantive issues involved in the appeal and the discovery proceedings.

Appellants complain of the "unsettling yet unavoidable conclusion" that the Director may not have reviewed any of the attached documents prior to the signing off on the ALJ's proposed decision.

We do not find this so unsettling. Contrary to appellants' assertion that the Department is legally obligated to review the record before making its decision, it has long been the rule under section 11517 of the Administrative Procedure Act (Gov. Code, §§ 11340-11529) "that where the hearing officer acts alone the agency may adopt his decision without reading or otherwise familiarizing itself with the record." (*Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 399 [184 P.2d 323].) This principle was most recently affirmed in *Ventimiglia v. Board of Behavioral Sciences* (2008) 168 Cal.App.4th 296, 309 [85 Cal.Rptr.3d 423].

Appellants argue that, even assuming that the ALJ and Director reviewed all of the documents from both sets of administrative records, there is still no guarantee their due process rights have not been violated. Their argument, then, is that it does not matter that they were not prejudiced in any way - they have not shown any - it only matters that there was - albeit, only temporarily - an error in the compilation of the record for the Appeals Board. The argument is unpersuasive.

None of the cases appellants cite support reversal in circumstances where a complete administrative record can be, as in this case, supplied after appropriate remedial action that works no substantive change. In *Fraser v. Gourley* (2000) 85 Cal.App.4th 762 [102 Cal.Rptr.2d 433] and *Woodard v. Personnel Commission of the Compton Unified School District* (1979) 89 Cal.App.3d 552 [152 Cal.Rptr. 658] the

agencies involved refused to take remedial action to supply a proper record, and suffered adverse consequences. *In Hothem v. City of San Francisco* (1986) 186 Cal.App. 3d 702 [231 Cal.Rptr. 70] the case was remanded to determine if the record was complete. If not, a hearing was to be held to make a new record.

In this case, the record has been made complete. There is no evidence of any document missing from the supplemented record.

II

Appellants point to the decoy's glasses, her manner of dress, and an extremely high success rate in purchasing alcohol as direct evidence that she lacked the appearance required by Rule 141(b)(2).[3] Thus, they argue, the administrative law judge (ALJ) abused his discretion when he sustained the Department's use of this decoy.

The ALJ considered the very same factors upon which appellants rely, and reached a contrary conclusion. Appellants now ask this Board to look at these same factors and reach the result they desire.

The ALJ addressed the decoy's appearance in Findings of Fact 10 and 11 and Conclusion of Law 4:

> FF10: Decoy Yeremian was an experienced decoy, having worked on 4 or 5 earlier occasions, visiting at least 50 different stores. She had no connection with law enforcement aside from her work as a decoy and was not paid for those efforts. On March 10, 2007, Yeremian was sold an alcoholic beverage at 6 of 8 locations visited.
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> FF 11: Decoy Yeremian is a female adult who appeared her age. Based on her overall appearance, *i.e.*, her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing and in the photographs, Exhibits

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[3]The rule requires that a "decoy shall 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."

> 2A, 2B, 3A and 3B, decoy Yeremian displayed the appearance and dress that could generally be expected of a person less than 21 years of age under the actual circumstances presented to the clerk. This finding is made in spite of the high rate of sales achieved by decoy Yeremian on March 10, 2007. She did not give the appearance of one 21 years [of] age or older.
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> CL 4: ... Respondents argued that the high success rate of this decoy, her spectacles, and her acne skin condition made Yeremian appear other than her true age. The apparent age of the decoy was addressed above in Findings of Fact, paragraphs 5, 10 and 11. Despite her high rate of purchases, she displayed the appearance that generally could be expected of a person less than 21 years of age. The Rule 141(b)(2) defense is rejected.

This Board is not a trier of fact. That was the ALJ's job. Appellants ask us to substitute our judgment for that of the ALJ, in essence, to reweigh the evidence and reach a result more favorable to them. We are not permitted to do so. The Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (See, z*e.g., Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

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 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.