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

AB-8827
File: 21-440879 Reg: 07066631

CIRRUS INVESTMENTS, INC., dba Liquor King
141 East Imperial Highway, La Habra, CA 90631,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 7, 2009
Los Angeles, CA

ISSUED AUGUST 18, 2009

Cirrus Investments, Inc., doing business as Liquor King (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Cirrus Investments, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 15, 2006. On August 6, 2007, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 19-year-old Michael MacCubbin on April 21, 2007. MacCubbin was working as a minor decoy for the Department at the time.

At the administrative hearing held on November 20, 2007, documentary evidence was received and testimony concerning the sale was presented by MacCubbin (the decoy) and by Department investigator Kimberly Wachowski. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed an appeal contending: (1) The Department did not provide an accurate and complete record of the administrative proceeding, and (2) the decoy's appearance violated rule 141(b)(2)[2] and the Department's use of such a decoy violated rule 141(a).

DISCUSSION

I

Appellant contends the Department's decision must be reversed because the Department certified two different sets of documents as the "true, correct and complete record." This makes it impossible, appellant argues, to know whether all of the documents were reviewed by the decision maker.[3] Additionally, appellant asserts that

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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.

[3]Appellant's concern that the ultimate decision maker might not have reviewed "the key documents" before adopting a proposed decision is unnecessary. It has long been the rule under section 11517 of the Administrative Procedure Act (Gov. Code, §§ (continued...)

by certifying two different sets of documents, the Department violated Appeals Board rule 188 (4 Cal. Code Regs., § 188) and the Department's General Order 2007-09.

Appellant's contention arises from the omission from the initial certification of documents concerning appellant's unsuccessful motion to compel discovery. The documents related to the motion were distributed to the parties and the Appeals Board under the second certification.

This issue in this case is identical to that raised in a large number of cases heard previously by the Board where there have ostensibly been two certified records. The Board has treated the issue as one involving a procedural error which seldom justifies reversal. (*Garfield Beach LLC* (2009) AB-8767). Reversal is particularly unjustified here because appellant has not identified any prejudice flowing from the error.

The only documents omitted from the original certification were related to appellant's motion to compel discovery, which sought information about decoys in other cases. It is unreasonable to think these documents, whether or not part of what the decision maker reviewed, would have had any bearing on the merits of the case when it was before the Department. Similarly, the documents have no bearing on the present appeal, at least none that has been pointed out to this Board. Appellant has raised no issue in its appeal related to the discovery motion.

In any event, the second certification supplying the missing documents was filed by the Department almost three months prior to the filing of appellant's opening brief.

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[3](...continued)
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].

Appellant has not claimed any documents are missing from the supplemented record, and offers only speculation that documents not properly part of the record were included with the documents available to the decision maker.

It is obvious from the two certifications, when read together, that the second certification was intended to supplement the original certification. What occurred appears to be nothing more than a clerical oversight in failing to designate a supplemental filing as such. The Department has simply furnished the Appeals Board with a complete record in two parts.

Since all the appropriate documents have been certified by the Department, albeit in two separate packages, there has been no violation of either Appeals Board rule 188 or Department General Order 2007-09.

This case is nothing like *Circle K Stores, Inc*. (2007) AB-8597, where the certified record contained potentially prejudicial documents that clearly should not have been included.

II

Appellant contends the Department did not establish that the decoy displayed the appearance that could generally be expected of a person under the age of 21, as required by rule 141(b)(2) and, by using a decoy who appeared to be over the age of 21, the Department did not conduct the decoy operation "in a fashion that promotes fairness," as required by rule 141(a).

Appellant's argument consists of describing the same physical and non-physical characteristics and experience of the decoy that the administrative law judge (ALJ) did in the Department's decision, but reaching the opposite conclusion. Whether the decoy's appearance complies with rule 141(b)(2) is a question of fact to be determined

by the trier of fact. The ALJ determined that the decoy in this case complied with the rule and appellant has not shown that determination to be unreasonable or an abuse of discretion. As we have said innumerable times before, we will not second-guess the ALJ in such a situation.

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 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.