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

AB-9386
File: 47-518809 Reg: 13078568

BJ'S RESTAURANT, INC.,
dba BJ's Restaurant & Brewhouse
234 East Colorado Boulevard, Pasadena, CA 91101-2201,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: August 7, 2014
Los Angeles, CA

ISSUED AUGUST 20, 2014

BJ's Restaurant, Inc., doing business as BJ's Restaurant & Brewhouse (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 police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant BJ's Restaurant, Inc., appearing through its counsel, R. Bruce Evans and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated November 1, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on August 30, 2012. On May 20, 2013, the Department filed an accusation charging that appellant's clerk, Erick Cruz (the clerk), sold an alcoholic beverage to 19-year-old Samuel Hernandez on February 22, 2013. Although not noted in the accusation, Hernandez was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on September 11, 2013, documentary evidence was received, and testimony concerning the sale was presented by Hernandez; by Zhou S., a second decoy who also participated in the operation; and by Randal Milloy, a Department of Alcoholic Beverage Control agent. Appellant presented no witnesses.

Testimony established that on the date of the operation, Hernandez and Zhou, who was 15 at the time, entered the licensed premises together and proceeded to the bar counter. Agent Milloy entered and took a seat at a nearby table.

The bartender approached the two decoys and asked if they wanted anything to drink. Hernandez ordered a Bud Light beer and Zhou ordered a glass of water. The bartender retrieved a Bud Light beer and served it to Hernandez. He also served Zhou a glass of water. Hernandez paid Cruz for the beer. Cruz took the money to the register and returned with some change and a receipt, both of which he gave to Hernandez.

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) Rule 141(b)(2)[2] was violated, and (2) the record forwarded to the Department Director included ex parte communications.

DISCUSSION

I

Appellant contends that the ALJ failed to proceed in the manner required by law when he omitted consideration of the second decoy. Appellant argues that Zhou actively participated in the operation, and therefore the impact of her participation ought to have been considered as part of the rule 141(b)(2) determination.

It is settled law that the failure to raise or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (*Hooks v. Cal. Personnel Bd.* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Bd. of Med. Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Harris v. Alcoholic Bev. Control Appeals Bd.* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].)

Rule 141 and its subdivisions constitute an affirmative defense. This Board has construed the language of rule 141, subdivision (c), to mean the licensee has the burden of establishing a prima facie case that there was no compliance.

The Department directs this Board to the closing arguments at the administrative hearing, during which the following exchange took place:

> MR. EVANS: Thank you, your Honor. Respondent would submit

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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.

> that the Department has not proven the essential facts set forth in the accusation. And basically, your honor, I'm asking you to dismiss the accusation.
>
> MR. AINLEY: Anything specific, or just the general comment?
>
> MR EVANS: I'll leave it as a general comment, your Honor.

(RT at pp. 47-48.) Based on this, the Department contends that the issue of Zhou's impact on the decoy operation was waived. (Reply Br. at pp. 4-6.) It argues that while Zhou did appear and testify about her actions, appellant asked no questions of her during cross-examination. (*Id.* at p. 5.) According to Department, "the appellant never even suggested that [Zhou's] presence affected the operation in any material manner whatsoever or that it resulted in the operation being conducted in an unfair manner. Understandably, the ALJ did not otherwise address the presence of [Zhou] other than he did in the Decision." (*Id.* at p. 6.)

In the decision below, however, the ALJ addressed Hernandez's appearance in the decision and concluded that he "displayed the appearance which could generally be expected of a person under 21 years of age." (See Findings of Fact ¶¶ 10-11.) Moreover, he made factual findings regarding Zhou's presence and actions. (See Findings of Fact ¶¶ 4-9.) These are findings relevant only to a rule 141(b)(2) defense, but the ALJ's decision to include them does not necessarily establish that the matter was properly raised below.

A thorough examination of the record establishes that appellant did question both Hernandez and Agent Milloy regarding Zhou's presence and actions, (see RT at pp. 25, 37-38), but never once argued — or even implied — that her involvement violated any subdivision of rule 141. In fact, appellant never raised Hernandez's appearance as an issue, either. Rule 141 is an affirmative defense — in must be raised

and argued. That did not happen in this case, even when the ALJ questioned appellant's "general comment" during closing arguments.

Even the most generous reading of the transcript indicates the defense was waived. The ALJ's findings on Hernandez's appearance were simply superfluous.

II

Appellant contends that "written statements" were included with the photographic portions of Exhibits 2 and 3 in the administrative record provided to the Department Director, and constitute an ex parte communication.

An ex parte communication is broadly defined as "[a] generally prohibited communication between counsel and the court when opposing counsel is not present." (Black's Law Dictionary (7th ed. 1999) p. 597.) Section 11430.10 of the Government Code provides, in relevant part:

> (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.
>
> (b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

Section 11430.70 extends the prohibition on ex parte communications to agency heads:

> (a) Subject to subdivision (b) and (c), the provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

The California Supreme Court, in *Quintanar*, read section 11430.70 to hold that ex parte communications are forbidden not only during the trial stage, but at any point in the course of adjudication, including the decisionmaking phase. (*Dept. of Alcoholic*

Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Quintanar) (2006) 40 Cal.4th 1, 11-14 [50 Cal.Rptr.3d 585]; see also *Chevron Stations, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6] [ex parte hearing reports require reversal even where Department accepts the ALJ's decision].)

Section 11430.50 provides guidance where a presiding officer (or agency head, pursuant to section 11430.10(a)) receives an improper written communication:

> (a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:
>
> > (1) If the communication is written, the writing and any written response of the presiding officer to the communication.
> >
> > ¶ . . . ¶
>
> (b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.
>
> (c) If a party requests an opportunity to address the communication within 10 days after receipt of the notice of the communication:
>
> > (1) The party shall be allowed to comment on the communication.
> >
> > (2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

Thus, the proper remedy, when a decision maker receives an unsolicited ex parte communication, is to immediately lift the veil of secrecy and give the opposing party an opportunity to respond.

In *Quintanar*, the court reversed the Department's orders largely because of the secretive nature of the hearing reports:

> The Department implies no remedy is necessary because any submission was harmless; according to the Department, the decision maker could have inferred the contents of the reports of hearing (to wit, a summary of the hearing and requested penalty) from the record. We are

> not persuaded. First, because the Department has refused to make copies of the reports of hearing part of the record, despite a Board order that it do so, whether their contents are as innocuous as the Department portrays them to be is impossible to determine. Second, although both sides no doubt would have liked to submit a secret unrebutted review of the hearing to the ultimate decision maker or decision maker's advisors, only one side had that chance. The APA's administrative adjudication bill of rights was designed to eliminate such one-sided occurrences.

(*Quintanar*, *supra*, 50 Cal.Rptr. 3d at p. 17.)

Notably, *Quintanar* closed with an observation that the Department's post-hearing reports were, in fact, permissible, provided the Department complied with the requirements of section 11430.50:

> The APA bars only advocate-decision maker ex parte contacts, not all contacts. Thus, for example, nothing in the APA precludes the ultimate decision maker from considering posthearing briefs submitted by, and served on, each side. The Department if it so chooses may continue to use the report of hearing procedure *so long as it provides licensees a copy of the report and the opportunity to respond.* (Cf. § 11430.50 [contact with presiding officer or decision maker must be public, and all parties must be afforded opportunity to respond].)

(*Ibid.*, emphasis added.)

In *City of Pleasanton*, the court of appeals interpreted this passage from *Quintanar* to mean that "under the APA the agency decision maker cannot properly solicit or receive *private, ex parte* advice from the personnel who serve as adversaries in the case." (*City of Pleasanton v. Bd. of Admin. of the Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 533 [149 Cal.Rptr.3d 729], emphasis in original.) Thus, as a matter of law, the decisionmaking body in *City of Pleasanton* was not precluded from receiving a written prosecutorial analysis and recommended disposition as part of a public agenda packet that *also* included the opposing party's analysis and recommendations. (*Ibid.*) The court of appeals laid out guidelines for when such

communications are permissible:

> [D]ue process . . . does not in general preclude the advocate for the agency staff's position from communicating with and making recommendations to the agency decision maker or the decision maker's advisors about the substance of the matter as long as (1) no part of the communication is made ex parte, (2) the administrative appellant is simultaneously afforded at least the same opportunity to communicate with the decision maker as the staff advocate, and (3) the decision maker is not subject to the advocate's authority or direction.

(*Id.* at p. 536.)

At oral argument, however, appellant clarified that its argument turned not on the legal principles of notice and opportunity to be heard that typically govern ex parte communication, but rather on the language of a Department General Order. Appellant relies on a tortured reading of this Board's previous holdings to construct an entirely subjective doctrine of ex parte communication based on what the appellant can "reasonably expect" will be forwarded to the Director.

In the wake of *Quintanar*, the Department issued a General Order outlining the documents to be included in the record provided to the Director: "The Administrative Hearing Office shall forward proposed decisions, together with any exhibits, pleading and other documents or evidence *considered by the administrative law judge*, to the Hearing and Legal Unit which shall forward them to the Director's Office without legal review or comment." (Dept. of Alcoholic Bev. Control, General Order 2007-09 (August 10, 2007), emphasis added.) By its plain language, the Department's order excludes documents *not* considered by the ALJ. According to the Department, its General Order is intended solely to govern internal policy. A violation of the General Order might therefore lead to internal discipline or civil litigation, but cannot supply grounds for reversal before this Board.

We agree insofar as the General Order is not law. Where the record shows that an appellant received both notice of a document and an opportunity to be respond to it, a violation of the General Order alone provides no basis for relief under an ex parte communication theory.

In fact, a review of our previous cases shows that the General Order and the expectations it creates are *only* relevant for purposes of determining whether there was notice and an opportunity to respond. In *Garfield Beach CVS* (2014) AB-9355, for example, we held that the language of the Department's General Order could very well have led the appellants to forgo a detailed response to a Department exhibit because it had no reason to believe the document would be considered by the ALJ or forwarded to the Director. (See *id.* at pp. 15-16.) The relevant factor was *not* the appellant's subjective expectations alone, but whether those expectations, as created by the Department's General Order, misled the appellants into silence and thus deprived them of the opportunity to respond. (*Id.* at p. 16; see also *Lee* (2014) AB-9359.) Our previous ex parte communication decisions do *not* create a new pathway to relief based solely on the language of the General Order — nor could they, because the General Order is not law.[3] The Department's harmless violation of its own General Order does not require reversal.

In the case at hand, the documents at issue were described by the ALJ and then marked into evidence as Exhibits 2 and 3. (RT at pp. 16-18.) Both Hernandez and Agent Milloy were questioned in detail about the photographs. (RT at pp. 16-19, 33-35.)

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[3]Nevertheless, we encourage the Department to rework the language of its General Order to maximize transparency and discourage unnecessary appeals.

Exhibit 2 contains a photograph of Hernandez holding a Bud Light beer and standing beside the bartender. (See Exhibit 2.) Above the photograph is the ABC logo, along with a report number, an assignment number, and a page number. (*Ibid.*) Beneath the photograph is a caption, reading "Side by side photograph of Decoy Hernandez and suspect CRUZ, taken by Agent Mathos on 02/22/2013." (*Ibid.*) Below the caption is an informational section labeled "ABC USE ONLY" that contains the licensee name, license number, address, and DBA, along with the Investigator's ID and office unit. (Exhibit 2.)

Exhibit 3 contains two photographs of Hernandez — to the left, a photograph from the waist up, and to the right, a full-body photograph. Above the photographs is the underlined heading "Attachment 3." Below the photographs is a caption reading "Two photographs of Decoy Hernandez taken prior to the operation on 02/22/2013 by Agent Mathos."

At the close of the hearing, counsel for appellant objected, in part, to Exhibits 2 and 3, and the ALJ agreed to a limited exclusion:

> MR. EVANS: With respect to Exhibits 2 and 3, I have no objections to the photos; but the additional writing below the photos which there was no testimony on, I would object to that writing being considered.
>
> MR. AINLEY: Mr. Sakamoto, I think the objection's well taken. I'm not about to start cutting up exhibits. Is it okay if I admit them but for the limited purpose of the photographs on each?
>
> MR. SAKAMOTO: The exhibit is only comprised of the photograph, not the accompanying text.

(RT at pp. 45-46.)

This case has much in common with *7-Eleven, Inc./Khanmohamed* (2014) AB-9383, in which this Board held that excluded exhibits did not constitute ex parte

communications because "appellants were aware of both documents and responded to them in detail." (*Id.* at p. 9.) That case offers broad guidance: a document cannot constitute an ex parte communication if it was introduced at the hearing, openly discussed, and ultimately excluded following an objection by opposing counsel. Under such circumstances, there is no concern of surprise or unfairness.

Here, there was extensive questioning about the exhibits and an objection from appellant's counsel which led to the exclusion of the captions. Appellant cannot argue that it lacked notice or the opportunity to respond — the record establishes that appellant was aware of the captions and did in fact respond to them. The captions were therefore properly included in the record supplied to the Director.

ORDER

The decision of the Department is affirmed.[4]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, 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.