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

AB-9393
File: 20-483133 Reg: 13078738

7-ELEVEN, INC. and ARMAN CORPORATION,
dba 7-Eleven #2171 13965B
12041 Bryant Street, Yucaipa, CA 92399,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 4, 2014
Los Angeles, CA

ISSUED OCTOBER 1, 2014

7-Eleven, Inc. and Arman Corporation, doing business as 7-Eleven #2171 13965B (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. and Arman Corporation, appearing through their counsel, R. Bruce Evans and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Davis W. Sakamoto.

---

[1]The decision of the Department, dated November 19, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 10, 2009. On June 21, 2013, the Department filed an accusation against appellants charging that, on April 26, 2013, appellants' clerk, MD Shafiqur Rahman (the clerk), sold an alcoholic beverage to 19-year-old Christina Almanza. Although not noted in the accusation, Almanza was working as a minor decoy for the San Bernardino Sheriff's Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on October 2, 2013, documentary evidence was received and testimony concerning the sale was presented by Almanza (the decoy) and by Susan Gardner, a Department of Alcoholic Beverage Control agent. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises and proceeded to the coolers, where she selected a 24-ounce can of Bud Light beer. The decoy took the beer to the register. There were no customers in line. The decoy set the beer on the counter.

The clerk asked the decoy for her identification. The decoy handed the clerk her California driver's license. The clerk looked at the identification for several seconds, then handed it back. The decoy paid for the beer and received some change. The clerk bagged the beer. The decoy picked up the beer and exited the premises.

At no time did the clerk ask the decoy any age-related questions, nor did he question any of the information on her driver's license.

During the course of the administrative hearing, counsel for appellants introduced an ABC investigation report pertaining to the incident. The document was marked for identification as Exhibit A. Counsel for appellants also introduced two

additional exhibits. At the close of the hearing, the ALJ reviewed the exhibits. The Department was asked if it had any objection to Exhibit A, and counsel for the Department replied that it did not. Nevertheless, counsel for appellants explicitly declined to offer Exhibit A into evidence.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed this appeal contending: (1) Exhibit A, the ABC investigation report produced by appellants, was improperly included in the administrative record provided to the Department Director in his decisionmaking capacity, and therefore constitutes an ex parte communication, and (2) the ALJ disregarded evidence and arguments in support of appellants' rule 141(b)(2) defense.

DISCUSSION

I

Appellants contend their own Exhibit A, an ABC investigative report pertaining to the incident that they themselves withdrew as evidence, was impermissibly included in the administrative record forwarded to the Department Director; and therefore reversal of the Director's decision against them is warranted because that document was an ex parte communication.

The federal Administrative Procedure Act, upon which the California Administrative Procedure Act is modeled, defines an ex parte communication as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." (5 U.S.C. § 551(14).) California case law and the state's Administrative Procedure Act (APA) recognize two kinds of ex parte communications that are improper and frequently lead to reversal of an administrative

decision when they occur.

First, there is "off the record" communication from a party or representative of the party to an agency decisionmaker. As the California Supreme Court explains about this type of ex parte communication, the APA does not "permit prosecutors and other adversarial agency employees to have off-the-record contact about substantive issues with the agency head, or anyone to whom the agency head delegates decisionmaking authority, during the pendency of an adjudicative proceeding." *(Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Quintanar*) (2006) 40 Cal.4th 1, 10 [50 Cal.Rptr.3d 585].) In the words of the Legislature: "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. (Gov. Code § 11430.10(a).) Subdivision (b) of this section states: "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."

Second, there is improper "extra-record information," about which the Court has long held:

> Administrative tribunals exercising quasi judicial powers which are required to make a determination after a hearing cannot act on their own information. Nothing may be treated as evidence which has not been introduced as such, inasmuch as a hearing requires that the party be apprised of the evidence against him in order that he may refute, test and explain it.

(*La Prade v. Dept. of Water & Power* (1945) 27 Cal.2d 47, 51-52 [162 P.2d 13].) "The action of such an administrative board exercising adjudicatory functions when based

upon information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing." (*English v. City of Long Beach* (1950) 35 Cal.2d 155, 158 [217 P.2d 22].) *Quintanar* stressed the importance of "record exclusivity. 'The decision of the agency head should be based on the record and not on off-the-record discussions from which the parties are excluded.'" (40 Cal.4th at p. 11.)

The common vice to both types of ex parte communication — "off the record" and "extra-record" — is that the adverse party is deprived of the opportunity to know about the information or evidence ("notice") and respond — rebut, refute, or have it ruled inadmissible ("hearing") — essential elements of procedural due process. "The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.'" (*Mathews v. Eldridge* (1976) 424 U.S. 319, 348 [96 S.Ct. 893]; accord *Today's Fresh Start, Inc. v. Los Angeles Co. Office of Ed.* (2013) 57 Cal.4th 197, 212 [159 Cal.Rptr.3d 358].)

This case presents the alleged problem of the second category of ex parte communication: extra-record information; except here appellants themselves introduced the investigative report to which they now object as an "ex parte communication" requiring reversal of the Department's decision. Something seems suspiciously wrong, suggesting a summary of what the record shows about how this specific extra-record report got into and now figures in this case.

Appellants introduced the investigative report in preparation for cross-examination of Agent Gardner, along with two other exhibits. (RT at p. 19.) The document was marked for identification as Exhibit A. (RT at pp. 19-20.) Counsel for appellants proceeded to briefly question Agent Gardner regarding Exhibit A. (RT at p.

20.)

Before closing arguments, the ALJ addressed all exhibits, including appellants' Exhibit A. The following exchange took place:

> THE COURT: And while we're at it, Mr. Sakamoto, do you have any objection to [Exhibits] A or B?
>
> MR. SAKAMOTO: No.
>
> THE COURT: I'm assuming you're offering them, Mr. Evans?
>
> MR. EVANS: Well, yes, your Honor. But I would also — partially. I'd ask that the DVD that the witness testified about also be marked as Exhibit C.
>
> THE COURT: Okay. I can do that.
>
> (Respondent's Exhibit C was marked for identification by the Court.)
>
> MR. EVANS: And I would request that Exhibits B and C only be moved into evidence.
>
> THE COURT: B?
>
> MR. EVANS: B-1, B-2, and C.
>
> THE COURT: B-1, B-2, and C. You're not offering A?
>
> MR. EVANS: No, sir.

(RT at p. 46.) Exhibit A was then included in the documents provided to the Department director in his decisionmaking capacity.

It would be absurd under the aforementioned facts for this Board to rule in appellants' favor and hold that a party could produce a document at hearing, request that it be marked for identification only, conduct questioning based on the document, then successfully appeal on the grounds of ex parte communication because the document was included in the record. Appellants cannot, by any stretch of reason, claim they were unaware of their own exhibit, or that they were deprived of the

opportunity to be heard regarding its contents. Notice to appellants and an opportunity for them to be heard, the *sine qua non* of due process, is implicitly met by appellants' act of introducing the document at hearing. Apart from logical constraints, the potential for manipulation and abuse should the Board give any credence to this tactic cannot be cabined.

The Board is troubled by the recent uptick in challenges to Department decisions claiming taint from ex parte communications — mostly "extra record" — that ignore what we have explained is necessary for an ex parte communication to violate due process and require reversal: the inability of the opposing party to respond. (See, e.g., *7-Eleven, Inc./Khanmohamed* (2014) AB-9383.) This aligns with the *Quintanar* holding:

> 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].)

(*Quintanar*, *supra*, 40 Cal.4th at pp. 11-14, 17, emphasis added.)

A related, but more specific concern, however, is that this is the second such claim made on the basis of substantially similar procedural facts before this Board, by the same counsel. (See *7-Eleven, Inc./Samra* (2014) AB-9387.) In *7-Eleven, Inc./Samra*, we rebuked counsel, explaining the gravamen of the offense and why we countenanced against any repetition of it:

> [W]e are deeply troubled by a statement made by appellants' counsel at oral argument, to the effect that appellants pursued an ex parte communication defense based on their own exhibit in order to test the Department's compliance with its General Order. (See Department of Alcoholic Beverage Control, General Order 2007-09 (August 10, 2007) [addressing which documents shall be internally forwarded to the

> Department Director].) This implies that appellants' introduction of the document at hearing, their request that the document *not* be admitted into evidence, and their subsequent claim of ex parte communication were merely a litigation strategy designed to manufacture a defense. If so, counsel for appellants have patently violated the California Rules of Professional Conduct. Rule 5-200(B) states:
>
> > In presenting a matter to a tribunal, a member:
> >
> > (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law.
>
> The Business and Professions Code, section 6068(d), reiterates the rule:
>
> > It is the duty of an attorney to do all of the following:
> >
> > (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.
>
> If appellants indeed introduced the exhibit in order to test the Department or to open the door to an ex parte communication defense, then they have deceived a tribunal by means of artifice. This Board will not tolerate such manipulation. Should counsel persist in this conduct, we will not hesitate to refer the matter to the California State Bar for proper sanctions.

(*7-Eleven, Inc./Samra* (2014) AB-9387, at p. 6.)

We are less certain two instances of raising the same ex parte communication challenge based on one's own withdrawn exhibit evince a disturbing "pattern," than reminded of the aphorism, "fool me once, shame on thee; fool me twice, shame on me." Lest this latest gambit by counsel be mistaken for a merely clever, albeit losing, litigation strategy, the Board emphasizes we will not be "fooled," neither before (see *7-Eleven, Inc./Samra*, *supra*), nor now, nor in the future. This is our last warning against use of this ridiculously deceptive tactic: do not introduce evidence at hearing, then withdraw it and, should it happen to be transmitted on the record as an exhibit, claim it as an ex parte communication requiring reversal. In other words, "three strikes and

you're out." We assume all counsel who appear before the Board are, or should be, aware of the perils of making this frivolous claim under the circumstances described, and will conduct themselves accordingly. At the least, this behavior — counsel misfeasance — warrants a report to the State Bar; at most, more severe sanctions. (See *Garfield Beach CVS/Longs Drug Stores Cal.* (2013) AB-9258, at pp. 6-7.)

II

Appellants contend that the ALJ failed to properly consider the photographs of the decoy taken on the date of the operation. These photographs, they claim, prove that the decoy was wearing makeup during the operation. Appellants argue that the photographs of the decoy are the best evidence of the decoy's appearance under the circumstances presented to the seller, and that the ALJ's failure to properly consider them constitutes reversible error.

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. [Citations.] We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor an appellate court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable result. [Citations.] The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1439, 1437 [13 Cal.Rptr.3d 826].)

Rule 141, subdivision (b)(2), restricts the use of decoys based on appearance: "The 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." The rule provides an affirmative defense, and the burden of proof lies with appellants.

Appellants contend that the ALJ failed to consider photographic evidence of the decoy's appearance on the date of the operation. (App.Br. at pp. 7-8.) They argue that, had the ALJ examined the photographs, he "would see that the minor still had remnants of eye make-up on at the time of the decoy operation." (App.Br. at p. 8.) They contend that this is supported by the decoy's own testimony, as she testified that "she was focused on removing all the dark eye make-up prior to the operation commencing." (*Ibid.*) Thus, appellants' case asks two questions: whether the decoy was wearing makeup, and whether the ALJ's findings regarding the decoy's makeup were factually erroneous.

The ALJ, for his part, made the following relevant findings:

> 4. Christina Almanza was born July 29, 1993. She served as a minor decoy during an operation conducted by Department of Alcoholic Beverage Control agents and San Bernardino Sheriff Deputies on April 26, 2013. On that day Almanza was 19 years old.
>
> 5. Almanza appeared and testified at the hearing. She stood about 5 feet 7 inches tall and weighed approximately 120 pounds. Her hair was shoulder length and pulled back into a ponytail. When she visited Respondents' store on April 26, 2013, Almanza wore a white tank top covered by a red "Diamond Life" t-shirt, blue jeans and sandals. (See Exhibits 2, 3A, 3B, B1, and B2.) Almanza's height and weight have remained the [*sic*] about the same since the date of the operation. At Respondents' Licensed Premises on the date of the decoy operation, Almanza looked substantially the same as she did at the hearing.
>
> [¶ . . . ¶]
>
> 9. Decoy Almanza appears her age, 19 years of age at the time of the decoy operation. Based on her overall appearance, *i.e.*, her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance/conduct in front of clerk Rahman at the

> Licensed Premises on April 26, 2013, Almanza displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to clerk Rahman. Almanza appeared her true age.

(Findings of Fact ¶¶ 4, 5, 9.) We are satisfied that the ALJ examined the photographs, as he references them in his findings. It is true, of course, that he does not refer to the decoy's makeup, but this Board has repeatedly observed that an ALJ is not required to provide a "laundry list" of factors he found inconsequential. (See, e.g., *7-Eleven, Inc./Niaz* (2014) AB-9352 at p. 4; *7-Eleven, Inc./Patel* (2013) AB-9237; *Circle K Stores* (1999) AB-7080.)

In any event, the ALJ addressed the decoy's makeup in his Conclusions of Law:

> 5. Respondents' counsel argued that decoy Almanza appeared older than 21 years of age and therefore Rule 141(b)(2) was violated. Counsel referenced the photo exhibits and suggested that Almanza was in fact wearing make-up that made her appear older than 21. This argument is rejected.
>
> Agent Gardner testified that when Almanza arrived at the police station before the decoy operation she was wearing make-up. Gardner told Almanza that she had to remove the make-up prior to going out on the decoy operation. Gardner testified that Almanza went to the restroom and removed her make-up.
>
> Decoy Almanza testified the same as Agent Gardner regarding the make-up. Almanza testified that she washed off her make-up except for her eye brows. This testimony and the photos was the only evidence presented. Both witnesses were credible. Clerk Rahman did not testify. There is no evidence to establish that Almanza appeared older than her true age.

(Conclusions of Law ¶ 5.)

It is worth noting what the ALJ did and did not rule. He did *not* reach a conclusion whether the decoy had any remnants of makeup on her eyes. He *did* find testimony from Agent Gardner and the decoy credible, insofar as Gardner asked the decoy to remove her makeup, and the decoy did so — and, in fact, appellants do not

challenge the credibility of either Agent Gardner or the decoy on this point. (See App.Br. at pp. 7-8.) Most significantly, he rejected appellants' argument that the decoy was "wearing makeup *that made her appear older than 21*." (Conclusions of Law ¶ 5.) He never found that the decoy was wearing no makeup whatsoever — only that she was not wearing makeup that would cause her appearance to violate the rule. Finally, he concluded that none of appellants' evidence showed that Almanza appeared older than her true age.

This Board is not the finder of fact, and it is not entitled to reexamine the evidence. However, even if we were to do so, and perhaps even yield to appellants' insistence that the decoy's eyes still bore some remnants of makeup, this alone would not lead to the conclusion that the decoy appeared over 21. In fact, nowhere in appellants' brief do they argue how the presence of makeup might have affected the decoy's appearance, nor do they challenge the ALJ's ultimate ruling that the decoy appeared her true age. We do not see — and appellants do not explain — how revisiting the photographs and scrutinizing the decoy's face for residual makeup might persuade us that the decision below is flawed.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[2]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.