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

AB-9437
File: 20-446111 Reg: 13078686

7-ELEVEN, INC. and THOMAS LEROY CHRISTENSON,
dba 7-Eleven 2131-16057
1102 East Washington Avenue, El Cajon, CA 92019,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 5, 2015
Los Angeles, CA

ISSUED FEBRUARY 24, 2015

7-Eleven, Inc. and Thomas Leroy Christenson, doing business as 7-Eleven 2131-16057 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days, with 5 days conditionally stayed, because their clerk sold an alcoholic beverage to a minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances include appellants 7-Eleven, Inc. and Thomas Leroy Christenson, through their counsel, Ralph Barat Saltsman and Jennifer L. Oden of the law firm Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated April 23, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 28, 2006. On June 12, 2013, the Department filed an accusation against appellants charging that, on April 9, 2013, appellants' clerk, William Fiscus (the clerk), sold an alcoholic beverage to 18-year-old Jonathon Young. Although not noted in the accusation, Young was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on February 19, 2014, documentary evidence was received and testimony concerning the sale was presented by Young (the decoy); by Olun Graves, a Department agent; and by co-licensee Thomas Christenson.

Testimony established that on the date of the operation, the decoy entered the licensed premises alone and proceeded to the beer coolers, where he selected a six-pack of Bud Light beer in bottles. He took the beer to the sales counter and waited in line behind two customers. When it was his turn, the decoy placed the beer on the counter.

The clerk asked the decoy for his identification. The decoy produced his California driver's license, which showed his actual date of birth as well as a red stripe indicating "AGE 21 IN 2015." The clerk briefly looked at the identification, returned it to the decoy, rang up the beer, stated the price, accepted the money tendered by the decoy and returned some change, and then bagged the beer. The clerk did not ask the decoy any age-related questions. After paying for the beer, the decoy exited the premises and contacted Department agents.

The Department's decision determined that the violation charged was proved and no defense was established. In light of mitigating evidence, the ALJ assigned a penalty of ten days' suspension, with five days conditionally stayed for one year

provided no cause for discipline arise during that time.

Appellants then filed an appeal contending (1) the ALJ improperly disregarded appellants' argument that the level of activity in the premises unfairly interjected itself into the transaction, in violation of rule 141(a),[2] and (2) the record provided to the Department Director in his decisionmaking capacity contained an ex parte communication — to wit, a withdrawn Department exhibit.

DISCUSSION

I

Appellants contend that the ALJ failed to make any findings or reach any conclusions regarding their rule 141(a) defense, which turned on testimony indicating that the premises were busy. During closing arguments, appellants insisted that the "level of busyness [*sic*] in the store interjected itself into the operation and caused it to be unfair" (RT at p. 72).

Rule 141(a) requires "fairness" in the use of minor decoys:

> A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensee, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

Rule 141 provides an affirmative defense, and the burden of proof lies with appellants. (*Chevron Stations, Inc.* (2015) AB-9445; see also *7-Eleven/Lo* (2006) AB-8384.)

This Board has acknowledged that, under truly rare circumstances,

> It is conceivable that in a situation which involved an unusual level of patron activity that truly interjected itself into a decoy operation *to such an extend that a seller was legitimately distracted or confused, and the law*

[2]References to rule 141 and its subdivisions are to section 141 of the California Code of Regulations, and to the various subdivisions of that section.

> *enforcement officials sought to take advantage of such distraction or confusion*, relief would be appropriate.

(*Tang* (2000) AB-7454, at p. 5, emphasis added; see also *Equilon Enterprises* (2001) AB-7765, at p. 4.) Thus, the level of business in a premises is *only* relevant to a rule 141 defense if the licensee can show first that seller was "legitimately distracted or confused," and second, that law enforcement "sought to take advantage of such distraction or confusion." (*Ibid.*) Anything less and appellants have failed to uphold their burden of proving the affirmative defense.

During closing arguments, appellants made the following offer of proof:

> Respondent[s] would contend that the accusation should be dismissed. Specifically, Respondents contend that there's a violation of Rule 141(A) [*sic*] in that the conduction [*sic*] was not conducted in a fashion that promotes fairness.
>
> We heard testimony from Agent Graves and Mr. Christenson, the Licensee, that upon entering Agent Graves observed five to six customers inside. The decoy, Young, testified that he waited in line behind at least two. Agent Graves also stated that he observed Mr. Young wait in line behind two customers. And per Mr. Christenson's testimony, he admitted that he was so busy that day that the books were usually done hours before but they were not because of the level of patron activity in the store. With that, we would state that the level of busyness [*sic*] in the store interjected itself into the operation and caused it to be unfair.

(RT at pp. 71-72.) Appellants presented no evidence or argument that officers acted improperly or took advantage of the circumstances. Indeed, the number of customers seems to have had absolutely no effect on the course of the transaction beyond the decoy's relatively short wait in line. Moreover, appellants neither argued nor attempted to show that the clerk was "legitimately confused or distracted" — nor could they, for without the clerk's testimony, any argument to that effect is rank speculation.

Appellants failed not only to prove, but to even *argue*, the elements necessary to show that the level of patron activity was at all relevant to a rule 141(a) defense. Given

that appellants' defense is characterized entirely by an absence of proof, it is unsurprising that the ALJ resolved it within the following summary conclusion of law:

> There was compliance with Rule 141(b)(2), with Rule 141(b)(5) of Chapter 1, Title 4, California Code of Regulations and with Rule 141 in general as set forth in Finding II. *Furthermore, the evidence did not establish that the decoy operation was conducted in an unfair manner*.

(Determination of Issues II, emphasis added.) If appellants wish to see a more in-depth analysis than this, they must supply evidence in support of their affirmative defense.

II

Appellants contend that the Department's Exhibit 4, a photograph of a six-pack of Bud Light beer in bottles, was withdrawn by Department counsel at hearing and that its inclusion in the administrative record forwarded to the Department director therefore constitutes an ex parte communication meriting reversal.

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.

This Board has recently confronted a number of cases involving allegations of ex parte communication. As we have noted elsewhere, the hallmark of an ex parte communication is 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].)

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Quintanar)* (2006) 40 Cal.4th 1, 11-14 [50 Cal.Rptr.3d 585], emphasis added.)

Recently, in *7-Eleven, Inc./Sirisut Corp.* (2014) AB-9398, this Board addressed a case bearing some factual similarity to appellants'. In it, two of the Department's exhibits — Exhibits 5 and 6, both prior accusations — were marked for identification, but were not discussed in the course of testimony. (*Id.* at p. 11.) At the close of the hearing, counsel for the Department commented, "I just realized that priors 5 and 6 are actually accusations that were dismissed." (*Ibid*.) The ALJ went on to inquire whether appellants had any objection to the remaining exhibits, but offered them no opportunity to respond to Exhibits 5 and 6. (*Id.* at pp. 11-12.) The ALJ then observed that "Exhibit 5 and 6 remain marked for identification but are not in evidence." (*Id.* at p. 12.) Nevertheless, Exhibits 5 and 6 were both included in the record provided to the Department Director in his decisionmaking capacity.

This Board reversed. We observed:

> The Department's position relies on the assumption that Exhibits 5 and 6 were either "admitted" or "rejected." A review of the record shows that they were not — at best, they were voluntarily withdrawn. The difference is significant: where an exhibit is admitted or rejected, the opposing party has had the opportunity to respond to the exhibit and to object to its admission, if desired. Those remarks become part of the record. The ALJ then considers the exhibit and makes an evidentiary ruling to admit or

> exclude — which may, in turn, be reviewed on appeal, with reference to the objections and responses made at the original hearing. Thus, a properly admitted or excluded exhibit offers the appellants both notice and an opportunity to be heard, and cannot be characterized as an ex parte communication.

(*Ibid.*)

This case differs in one significant respect: appellants arguably *did* respond to Exhibit 4. In fact, they went so far as to state the grounds for their objection:

> ADMINISTRATIVE LAW JUDGE: Any objections to the exhibits, Ms. Carr?
>
> MS. CARR: No objections to 2, 3, or 5, but I would object to 4. I don't believe there was any testimony regarding Exhibit 4.
>
> [¶ . . . ¶]
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> ADMINISTRATIVE LAW JUDGE: Okay. Since there's no objections to 2, 3, and 5, 2, 3, and 5 will be admitted into evidence.
>
> MR. SAKAMOTO: Okay.
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> (Exhibits 2, 3, and 5 were received in evidence.)
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> ADMINISTRATIVE LAW JUDGE: And actually there was no testimony regarding Exhibit 4. So —
>
> MR. SAKAMOTO: So we can withdraw. That's fine.
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> ADMINISTRATIVE LAW JUDGE: Okay. I'll indicate it as being withdrawn.

(RT at pp. 56-57.) Appellants, for their part, counter that the Department's withdrawal deprived them of the opportunity to *fully* respond to Exhibit 4.

Factually, this is a borderline case, but we find the potential for abuse great enough to rule that the inclusion of Exhibit 4 in the administrative record forwarded to the Department Director in his decisionmaking capacity constituted an ex parte communication. The Department's withdrawal of the exhibit — even if made as a gesture of concession to appellants' argument — had the effect of immediately

silencing further discussion. Had Exhibit 4 *not* appeared in the record provided to the Director, we might find no flaw in this course of events. Inexplicably, however, the Department — the *very same agency* that withdrew the exhibit at hearing, thus truncating appellants' response and precluding a clear evidentiary ruling — chose to forward the withdrawn exhibit to its Director for decisionmaking purposes.

The potential for abuse is, we believe, evident. Were we to affirm, Department attorneys would have the power to stifle argument, prevent exclusion of evidence, and ensure that their own exhibits reach the Director's desk untouched by an appealable evidentiary ruling.

By reversing, we are admittedly taking a more stringent stance on ex parte communications than would be required in a court setting. (See, e.g. *People v. Clark* (2011) 52 Cal.4th 856, 987 [131 Cal.Rptr.3d 225] [reversal not required where ex parte communication shown to be harmless beyond reasonable doubt].) In the court setting, however, the adversaries are wholly separate from the adjudicator; neither party possesses structural advantages that inherently place it in a better position to manipulate the decisionmaker.

The Department, however, is a unitary agency that integrates investigative, prosecutorial, and adjudicative functions into one administrative body. We must therefore be on heightened alert for procedural circumstances that threaten due process. The California supreme court, in a case involving another unitary agency, observed:

> When, as here, an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. (*Withrow v. Larkin* (1975) 421 U.S. 35, 46 [43 L.Ed.2d 712, 912 S.Ct. 1456].) A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party. (*People v. Harris*

> (2005) 37 Cal.4th 310, 346 [33 Cal.Rptr.3d 509, 118 P.3d 545]; see *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025 [119 Cal.Rptr.2d 341, 45 P.3d 280] ["When due process requires a hearing, the adjudicator must be impartial."].) Violation of this due process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situation "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Withrow v. Larkin*, *supra*, at p. 47.)

(*Morongo Band of Mission Indians v. Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737 [88 Cal.Rptr.3d 610] [holding that the APA does not bar an attorney from acting in an advisory capacity in one case while concurrently serving an adversarial role in an unrelated case].)

It is true that counsel for appellants managed *some* response to Exhibit 4 before the Department withdrew it. A limited response, however, is insufficient, particularly where it deprives appellants of an appealable evidentiary ruling and — most egregiously — where the document, though withdrawn, nevertheless appears before the Department Director. Were this merely a circus of clerical errors in a purely adversarial superior court, we might find the inclusion of Exhibit 4 harmless. But here, *the Department* withdrew the exhibit, *the Department* cut appellants' objection off, *the Department* foreclosed the evidentiary ruling, and *the Department* nevertheless included its own Exhibit 4 in the record provided to its own Director in his decisionmaking capacity. In light of the Department's past — in particular, the troubling facts underlying *Quintanar*, *supra* — the Department's inclusion of its own withdrawn exhibit in the record as provided to the Director presents a circumstance in which the probability of actual bias is simply too high to tolerate.

At oral argument, counsel for the Department suggested that its various offices are working to comply with this Board's ex parte communication rulings, including the

proper treatment of withdrawn exhibits as defined in *7-Eleven, Inc./Sirisut Corp.*, *supra.* Unfortunately, the result of this effort is that procedures governing compilation of the administrative record differ depending on the office. While we applaud the Department for taking steps in the right direction, we believe procedural due process — particularly in the management of evidence — requires a certain degree of consistency between offices. We therefore repeat our admonition: "In the interest of fairness, the Department must change its internal procedures." (*7-Eleven, Inc./Sirisut Corp*., at p. 13.) Until such time as the Department has its proverbial ducks in a predictable row, we will continue to hold it accountable for its procedural shortcomings.

ORDER

The decision of the Department is reversed.[3]

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

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[3]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.