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

AB-9545
File: 20-439694; Reg: 15082201

7-ELEVEN, INC., CHARANJIT KAUR, and SATNAM SINGH,
dba 7-Eleven Store 2173-16480C
14627 Prairie Avenue,
Lawndale, CA 90260,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 5, 2016
Los Angeles, CA

ISSUED JUNE 6, 2016

Appearances: *Appellants:* Jennifer Oden, of Solomon Saltsman & Jamieson, as counsel for appellants 7-Eleven, Inc., Charanjit Kaur, and Satnam Singh.
Respondent: Jonathan Nguyen and Jacob Rambo, as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Charanjit Kaur, and Satnam Singh, doing business as 7-Eleven Store 2173-16480C, appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for 10 days because their clerk sold an alcoholic beverage to a Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 26, 2006. On April

[1]The decision of the Department, dated September 18, 2015, is set forth in the appendix.

3, 2015, the Department filed an accusation against appellants charging that, on February 7, 2015, appellants' clerk, Jethro Francis (the clerk), sold an alcoholic beverage to 19-year-old Ryan Steele. Although not noted in the accusation, Steele was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

Prior to the administrative hearing, on April 21, 2015, appellants filed a Request for Discovery pursuant to Government Code section 11507.6 seeking the contact information for the decoy. On May 15, 2015, appellants received the Department's response to the discovery request providing the address for the Department's Lakewood office for contacting the decoy. On May 22, 2015, appellants sent a letter to the Department asking to meet and confer on the basis that the Department's discovery response was incomplete, specifically requesting the decoy's telephone number and home address. The Department's reply was received on May 27, 2015. The Department explained that pursuant to *Mauri Restaurant Group* (1999) AB-7276, providing the address of the law enforcement agency under which the decoy acted complies with Government Code section 11507.6. (*Id.* at p. 8.) Appellants filed a Motion to Compel Discovery (Exh. A) on May 29, 2015, and the Department filed its opposition to the motion on June 3, 2015. (Exh. 2.) Oral argument was heard telephonically on July 2, 2015, and the motion was denied by the administrative law judge (ALJ). No written order was prepared.

At the administrative hearing held on July 14, 2015, documentary evidence was received and testimony concerning the sale was presented by Steele (the decoy) and by Department Agent Mark Reese. Appellants presented no witnesses.

Testimony established that on the date of the operation Agent Reese entered the licensed premises, followed shortly thereafter by the decoy. The decoy went to the

coolers where he selected a six-pack of Bud Light beer. He took the beer to the register. The decoy placed the beer and a $20 bill down on the counter. The clerk scanned the beer, picked up the money, handed some change to the decoy, and then bagged the beer. The decoy exited the premises, followed by Agent Reese.

The decoy later returned to the premises with several agents and conducted a face-to-face identification of the clerk who had sold him the beer, after which the clerk was issued a citation.

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

Appellants then filed a timely appeal contending: (1) the ALJ abused his discretion by denying appellants' motion to compel disclosure of the decoy's actual address; (2) the ALJ violated appellants' due process rights by interfering with their right to present a meaningful case; and (3) the Department failed to proceed in the manner required by law by omitting and failing to analyze the characteristics of the decoy argued in appellants' 141(b)(2)[2] defense.

DISCUSSION

I

Appellants contend that the ALJ abused his discretion by denying appellants' motion to compel disclosure of the decoy's actual address. (App.Br. at pp. 6-7.)

Government Code section 11507.6 provides in pertinent part:

> After initiation of a proceeding in which a respondent or other party is entitled to a hearing on the merits, a party, upon written request made to another party, prior to the hearing and within 30 days after service by

[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.

> the agency of the initial pleading or within 15 days after the service of an additional pleading, is entitled to (1) obtain the names and addresses of witnesses to the extent known to the other party . . .

Appellants maintain section 11507.6 entitles them to the decoy's *personal* address and phone number. In response to appellants' motion, the Department supplied the address and phone number for the Department's Lakewood office — the office that conducted the decoy operation.

The Department maintains section 11507.6 only entitles appellants to *an* address — that the statute does not compel disclosure of a residential address. (Reply Br. at p. 7.) They argue that since the decoy was employed by the Department, and that, in his role as decoy, he was an agent of the Department, it was reasonable to supply only the Department's contact information. (*Ibid.*) Furthermore, they argue, "[n]umerous statutes codify the Department's duty as a law enforcement agency to withhold the home address of individuals working for law enforcement." (*Id* at p. 7, citing Penal Code §§ 832.8, 1328.5, 1328.6.)

Appellants maintain the plain language of section 11507.6 requires the Department to disclose the decoy's contact information "to the extent known" to the Department. And that, since the Department was in possession of the decoy's home address it should have been provided to appellants. (App.Br. at p. 7.)

It is the Department's position that appellants were not entitled to this information nor were they prejudiced by being denied the decoy's personal address and phone number, because no attempt was made by appellants to actually contact the minor. (Reply Br. at p. 7.) Since the decoy *could* have been contacted through the Lakewood office, but was not, appellants cannot now claim that the address provided was not useful. We agree.

Appellants have not shown how the refusal of the Department to provide the decoy's personal contact information prevented them from preparing a diligent and thorough investigation, or prevented them from preparing a response and defense to the accusation. The discovery required by Government Code section 11507.6 was provided and motion was properly denied by the ALJ. While appellants are entitled to an address for the decoy, they are not entitled to the decoy's home address.

On a final note, appellants urge the Board to overrule its decision in *Mauri Restaurant Group*, *supra* — the case in which the Board held that providing the address of the law enforcement agency under which the decoy acted complied with Government Code section 11507.6. The Department maintained at oral argument that the Board does not have the authority to overrule decisions in other cases. We are perplexed as to what the Department means by this. At oral argument the Department's General Counsel rose to explain that this argument, referenced as it is to a "decision in another case" meant the "law of the case," and that, accordingly, all the Department was saying was this Board could not go back and reverse a final decision with respect to the parties to that dispute. That, of course, goes without saying; it is indisputable.

But to be perfectly clear, if this Board believed our decision on the law in *Mauri* or any other matter was no longer warranted, either because of changed law, circumstances or both, we have the authority to reconsider that decision; and have reversed past decisions for legal reasons explaining why we have done so. Whether our decisions are (indisputably) "persuasive authority" for the points of law explicated in a factual context, or (apparently disputable) "binding precedents" for the legal principles stated, the Board expects them to be followed and, when relevant, called to our attention in counsel's briefs. Failure of counsel to cite in their briefs to the Board's

pertinent decisions will not assist them in argument. For the orderly and predictable resolution of appeals, this Board will continue to rely on its previous rulings unless a change in law is necessitated by extenuating changes in controlling law or circumstances. That goes for our decision in *Mauri*, which appellants have not persuaded us was legally wrong.

II

Appellants contend that the ALJ violated appellants' due process rights by interfering with their right to present a meaningful case. (App.Br. at p. 9.)

Government Code section 11513, subdivision (b) states in pertinent part that "each party has the right to rebut the evidence against him or her." Appellants argue that "due process requires full and fair administrative hearings that provide respondents with a meaningful opportunity to present their case." (App.Br. at p. 9., citing *Petrus v. State Dept. of Motor Vehicles* (2011) 194 Cal.App.4th 1240, 1244 [123 Cal.Rptr.3d 686].)

We reach our decision on this issue with absolutely no help from the Department. The Department's brief failed to address this issue, and simply ignored it entirely. We find this most unhelpful.

> [R]espondent's brief should be written from an entirely different perspective than appellant's brief, reflecting certain points unique to respondent's role in the appellate process. . . [It] should be written with the . . . goal that it be selected over appellant's brief as the [Board's] "roadmap" to the appeal. It should therefore be a completely self-contained document that explains every aspect of the appeal – including the facts, the procedural history, the issues presented, and the applicable law. The Board is not apt to use a respondent's brief as its primary guide if the brief omits explanation of a crucial fact of the case, thus requiring the [Board] to refer to appellant's opening brief to fill in the "gaps." [¶] Each point raised by appellant should be addressed by respondent, even if the point is patently meritless and thus easily rebutted by a sentence or two.

(Eisenberg, et.. al., *CALIFORNIA PRACTICE GUIDE: CIVIL APPEALS AND WRITS* (Rutter ed. 2015), ¶ 9.65-9:68.)

In *Petrus*, *supra,* due process was found to have been denied when blood alcohol results were provided only moments before a trial — denying that party an opportunity to prepare a rebuttal case. In the instant case, appellants maintain that the Department's withholding of the decoy's home address also denied appellants the opportunity to present a meaningful case and rebut the evidence against them. The cases cited by appellants in support of this argument derive entirely from the realm of criminal law, and are not too helpful in an administrative setting.

As the court found in *Cimarusti*, administrative and criminal proceedings are quite different:

> Petitioners contend that as an element of their due process right to a fair hearing, they had a prehearing right to contact the wards personally. They rely on a criminal case that held that . . . a criminal defendant's attorney or investigator has a right to contact the victim and request an interview, although the victim has no obligation to give one. [Citation.] Petitioners' analogy to criminal cases is inapt.
>
> Generally, there is no due process right to prehearing discovery in administrative hearing cases, and particularly no constitutional right to take depositions. The scope of discovery in administrative hearings is governed by statute and the agency's discretion. [Citations.]
>
> Petitioners' contention that they were denied due process is unpersuasive. Petitioners have been provided with the wards' prior statements. At the hearing, which will be conducted in accordance with the Administrative Procedure Act . . . , petitioners can call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any relevant matter even if not covered on direct examination, impeach witnesses, and rebut evidence. . . . The statutory prehearing discovery and hearing procedures are sufficient to satisfy petitioners' due process rights. [Citation.]

(*Cimarusti v. Sup. Court* (2000) 79 Cal.App.4th 799, 808-809 [94 Cal.Rptr.2d 336].)

Unlike the *Petrus* case, *supra*, where information was provided moments before

the hearing — thus depriving the party of an opportunity to prepare a defense — no information was withheld in this case. Appellants were provided with an address for the decoy, photographs of the decoy, and a photograph of the decoy with the clerk. In addition, counsel for appellants was able to cross-examine the decoy during the hearing.

Having said that, however, appellants *are* entitled to make a request to interview the decoy, and that request should be in writing and delivered to the law enforcement agency (or district office) that conducted the decoy operation. In the event the law enforcement agency (or district office) fails to forward such a written request to the decoy, the possibility exists that this could present grounds for reversal on due process grounds in another matter. The facts in this matter, however, do not support such a reversal. While the Board is aware of appellants' concern about its inability to more fully investigate decoys prior to the administrative hearing, the streamlined processes and statutory limitations of the APA are simply not helpful to appellants.

III

Appellants contend that the Department failed to proceed in the manner required by law by omitting and failing to analyze the characteristics of the decoy argued in appellants' 141(b)(2) defense. Appellants maintain the decoy's training and participation as an Explorer and his experience as a decoy gave him a confident demeanor and an appearance of maturity. (App.Br. at p. 12.)

Rule 141(a) provides:

> A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, 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.

To that end, rule 141(b)(2) provides:

> 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.

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

This Board is bound by the factual findings in the Department's decision so long as those findings 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 1429, 1437 [13 Cal.Rptr.3d 826].)

In this case, the ALJ made the following factual findings concerning the decoy's overall appearance and experience:

> 5. Steele appeared and testified at the hearing. On February 7, 2015 he was 5' 8" tall and weighed 160 pounds. He wore a Quicksilver t-shirt with a brown and black sweatshirt over it, shorts, and black and gray shoes. His hair was short with some gel in it and he was clean-shaven. (Exhibits 4-6.) At the hearing his appearance was the same.
>
> [¶ . . . ¶]

> 8. Steele had been a decoy approximately five times before. He was nervous at first, although he became less nervous over time. He had been an Explorer with the Torrance Police Department for approximately one year before participating in this operation. His training as an Explorer included learning to communicate with people, how to conduct traffic stops, and how to conduct pedestrian stops. He also had been on approximately 15 ride-alongs. On February 7, 2015, Steele visited ten locations, of which three sold alcoholic beverages to him.
>
> 9. Steele appeared his age at the time of the decoy operation. Based on his overall appearance, i.e., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance and conduct in front of Francis at the License Premises on February 7, 2015, Steele displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the clerk.

(Findings of Fact, ¶¶ 5, 8-9.)

These findings prompted the ALJ to reach the following conclusion regarding appellants' rule 141 defenses:

> 5. The Respondents argued that the decoy operation at the License Premises failed to comply with rule 141(b)(2)[fn.] and, therefore, the accusation should be dismissed pursuant to rule 141(c). Specifically, the Respondents argued that Steele's training and experience as an Explorer as well as his participation in prior decoy operations gave him the appearance of a person over the age of 21. This argument is rejected. Steele's appearance was consistent with his actual age, 19 years old, at the time of sale. As set forth above, Steele had the appearance which could generally be expected of a person under 21 years of age. (Finding of Fact ¶ 9.)

(Conclusions of Law, ¶ 5.)

Appellants maintain the decoy's training and participation as an Explorer and his experience as a decoy should have been considered and analyzed by the ALJ and that his training and experience gave the decoy the appearance of an individual over the age of 21. (App.Br. at p. 12.) As the Board has said many times however:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience

> that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. *There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.*

(*Azzam* (2001) AB-7631, at p. 5, emphasis added.)

Appellants offered no *evidence* that this decoy's experience *actually resulted* in him displaying the appearance of a person 21 years old or older in this case. Indeed, evidence of how the decoy appeared from the clerk's perspective would be nearly impossible to ascertain since the clerk did not testify at the administrative hearing. In the end, all the Board is left with is a difference of opinion — appellants' versus that of the ALJ — as to the conclusion that the evidence supports. Without more, this is simply an insufficient basis upon which to overturn the determination by the ALJ. As we have stated many times, the ALJ is the trier of fact, and has the opportunity to observe the decoy as he testifies, and make the determination whether the decoy's appearance met the requirement of rule 141 that he possess 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.

As we have explained previously:

> [T]his Board is entitled to review whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. (Cal. Const. art. XX, § 22; Bus. & Prof. Code. § 23084, subd. (c) and (d).) If this Board observes that the evidence appears to contradict the findings of fact, it will review the ALJ's analysis — assuming some reasoning is provided — to determine whether the ALJ's findings were nevertheless proper. Should this Board be faced with evidence clearly at odds with the findings and no explanation from the ALJ as to how he or

> she reached those findings, this Board will not hesitate to reverse. This should not be read to require an explanation or analysis to bridge any sort of "gap"; typically, the evidence an appellant insists is essential and dispositive is either irrelevant or has no bearing whatsoever on the findings of fact. While an ALJ may better shield himself against reversal by thoroughly explaining his reasoning, he is not required to do so. The omission of analysis alone is not grounds for reversal, provided findings have been made.

(*Garfield Beach CVS, LLC/Longs Drug Stores, LLC* (2015) AB-9501, at pp. 5-6.)

Nothing in this case suggests that these principles were violated.

It is not incumbent upon the Department to demonstrate compliance with rule 141; rather, it is appellants' burden to establish the affirmative defense of rule 141 by showing that the rule was not complied with. Appellants have not done so here.

ORDER

The decision of the Department is affirmed.[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.