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

AB-9398
File: 20-395537 Reg: 13078701

7-ELEVEN, INC. and SIRISUT CORPORATION,
dba 7-Eleven #2174
225 Orange Avenue, Long Beach, CA 90802,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED SEPTEMBER 30, 2014

7-Eleven, Inc. and Sirisut Corporation, doing business as 7-Eleven #2174 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 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 Sirisut Corporation, appearing through their counsel, Ralph Barat Saltsman and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated December 13, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' present off-sale beer and wine license was issued on January 21, 2003. The principals of Sirisut Corporation previously held a license under their own names, in conjunction with 7-Eleven, Inc. That license was issued on July 28, 1989.

On June 13, 2013, the Department filed an accusation against appellants charging that, on September 14, 2012, appellants' clerk, Evenstar Dacanaylong (the clerk), sold an alcoholic beverage to 19-year-old Anthony Perry. Although not noted in the accusation, Perry was working as a minor decoy for the Long Beach Police Department at the time.

At the administrative hearing held on October 24, 2013, documentary evidence was received and testimony concerning the sale was presented by Perry (the decoy) and by Eric Hooker, a Long Beach Police officer. Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the licensed premises, selected a six-pack of Bud Light beer from the coolers, and took it to the counter. At the time, there were approximately six patrons inside the premises, and the decoy had to wait in line behind one person.

When it was the decoy's turn, the clerk scanned the beer and asked to see the decoy's identification. The decoy handed his California driver's license to the clerk, who looked at it for a couple of seconds, then handed it back. The clerk told the decoy the price of the beer, and the decoy paid. The clerk handed the decoy some change and bagged the beer. The decoy then left the premises.

In the course of the administrative hearing, the Department submitted a total of nine exhibits, all of which were marked for identification. At the close of the hearing, counsel for the Department noted that Exhibits 5 and 6, both prior accusations, had

been dismissed. The Department sought admission of all exhibits except 5 and 6. The ALJ reviewed the remaining exhibits and offered appellants the opportunity to object to each exhibit in turn. Appellants, however, were given no opportunity to respond to Exhibits 5 and 6. Ultimately, the ALJ noted that Exhibits 5 and 6 were not admitted into evidence, but would remain marked for identification. Both exhibits were later included in the record provided to the Department Director in his decisionmaking capacity.

The Department's decision determined that the violation charged was proved and no defense was established. The ALJ determined appellants' disciplinary history warranted mitigation of the standard penalty, and imposed a 10-day suspension.

Appellants then filed this appeal contending (1) the ALJ ignored evidence and arguments in support of appellants' defenses under rule 141, subdivisions (a) and (b)(2), and (2) the record provided to the Department Director in his decisionmaking capacity included ex parte communications — specifically, Exhibits 5 and 6.

DISCUSSION

I

Appellants contend that the ALJ "completely failed to consider the overwhelming evidence" indicating that the decoy's appearance did not comply with the appearance requirements of rule 141(b)(2). (App.Br. at p. 7.) Moreover, appellants argue that the ALJ misapplied the legal standard of rule 141(a) when he determined that the number of patrons in the store did not render the operation unfair.

Rule 141 provides, in relevant part:

> (a) 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 . . . and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness.

> (b) The following minimum standards shall apply to actions filed pursuant to Business and Professions Code Section 25658 in which it is alleges that a minor decoy has purchased an alcoholic beverage:
>
> ¶ . . . ¶
>
> (2) 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.

(Cal. Code Regs., tit. 4, § 141.) Rule 141 provides an affirmative defense; as such, the burden of proof rests with the licensee.

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 reasonably, result. [Citations.]

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Appellants claim that the ALJ failed to consider evidence showing that the decoy's "large tattoo which was partially displayed during the operation and minimal nerves when purchasing the alcoholic beverages from the clerk cast severe doubt on the foundation from which the ALJ made his decision." (App.Br. at p. 7.)

In fact, the ALJ considered this evidence at length:

> 4. Anthony Perry was born on October 3, 1992. He served as a minor decoy during an operation conducted by Long Beach P. D. On September 14, 2012. On that date he was 19 years old.
>
> 5. Perry appeared and testified at the hearing. On September 14, 2012, he was 5'7" tall and weighed 130 pounds. He wore a blue, red, and white

> plaid button-up shirt, jeans, and a pair of Vans. His hair was cut short and he was clean shaven. Perry has a tattoo across his upper left arm. A small portion of this tattoo was visible below the end of his shirt sleeve when he was inside the Licensed Premises. His appearance at the hearing was similar, except that he was one inch taller and 31 pounds heavier.
>
> [¶ . . . ¶.]
>
> 10. September 14, 2013 was Perry's first time working as a decoy. On that date he went to eight locations; the Licensed Premises and two others sold alcoholic beverages to him. He had been a member of the Long Beach Search and Rescue team for approximately two years prior to this incident. As a member of the team, he interacted with the Long Beach Fire Department and Long Beach P. D. The training he received included rescue techniques, CPR, radio codes, and search patterns.
>
> 11. Perry 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 [the clerk] at the Licensed Premises on September 14, 2012, Perry 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 ¶¶ 4-5, 10-11.) Based on these findings, the ALJ rejected appellants' arguments:

> 6. With respect to rule 141(b)(2), the Respondents argued that Perry's physical build, mature demeanor, and tattoo gave him the appearance of a person over the age of 21. This argument is rejected. Perry's build and level of maturity were perfectly consistent with that of a young man under the age of 21. The tattoo, a small portion of which was visible, did not change that, particularly since there is no evidence that [the clerk] even noticed the tattoo. In short, Perry had the appearance generally expected of a person under the age of 21.

(Conclusions of Law ¶ 6.)

Appellants also direct this Board to testimony from the decoy at the administrative hearing — at which the decoy was 21 years of age — indicating that he felt he looked substantially similar on the date of the operation. (See RT at p. 31.) According to appellants, because the decoy was 21 on the date of the administrative

hearing, and because the decoy himself believed he looked substantially similar on the date of the operation, the only logical inference available to the ALJ was that the decoy looked 21 on the date of the operation.

There are two flaws in appellants' argument. First, the ALJ is the finder of fact, not the decoy. The ALJ is in no way bound by the decoy's opinion of his own appearance — indeed, he may choose to ignore the decoy's self-assessment entirely.

Second, appellants rely on the unfounded assumption that, because the decoy was chronologically over 21 at the administrative hearing, he necessarily *appeared* over 21 — that is, that the decoy's physical appearance was necessarily consistent with his actual age. This is a mystifying assumption indeed, as appellants' defense is predicated entirely on the assertion that the decoy did *not* appear his actual age on the date of the operation. Appellants' assumption is, of course, untenable. Even if the decoy's appearance was absolutely unchanged between the operation and the administrative hearing, the ALJ could still reasonably conclude that the decoy looked under 21 years of age.

Ultimately, the ALJ concluded that the decoy's appearance was "similar, except that he was one inch taller and 31 pounds heavier," and that "he 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, 11.) We see no error in these findings.

Finally, appellants contend that the ALJ misinterpreted the law when he concluded the decoy operation was conducted fairly under rule 141(a). (App.Br. at pp. 7-8.) Appellants direct this Board to the following portion of the decision below:

With respect to the number of patrons inside the Licensed Premises, this

> appears to be little more than an attempt to revive the long-discredited rush hour defense. All licensees much comply with the law no matter how busy they are, including taking all steps necessary to prevents sales of alcohol to minors. The mere fact that a decoy enters a premises while it is busy (assuming that six people constitutes "busy") does not relieve the Respondents of this duty or render the decoy operation unfair. This is particularly true given the complete absence of any evidence that Long Beach P.D. sought to "take advantage" of the situation. The decoy operation was conducted in a fair manner, consistent with rule 141(a).

(Conclusions of Law ¶ 7.) Appellants argue that this conclusion is flawed because rule "141(a) does not require a showing of intent in establishing an operation was conducted in an unfair manner." (App.Br. at p. 8.)

It is true that a decoy operation may be unfair under the rule without a showing of intent. In the case of a busy store (often known as the "rush hour defense"), however, this Board has held that, without more, the simple fact that a premises is "busy" cannot render a decoy operation unfair. There are strong public policy concerns justifying this rule: "When commerce reaches the point where the desire not to inconvenience customers overrides the important of preventing sales of alcoholic beverages to minors, the public safety and morals of the people fo the State of California will be irreparably injured." (*The Vons Company, Inc.* (2001) AB-7788 at p. 4.) The general rule is simple: there is no "rush hour" defense. The licensee has exactly the same responsibility to prevent sales to minors regardless of the number of patrons on the premises.

We have recognized in previous cases, however,

> that there may be circumstances where a truly incapacitating level of activity, coupled with an intent on the part of officers to take advantage of the situation, might merit relief:
>
> > It is conceivable that, where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion,

relief might be appropriate.

> (*Circle K Stores, Inc.* [(2000) AB-7476] at p. 5.) Such an exception would require "persuasive evidence of something associated with the timing of the decoy operation that truly *prevents* a seller from acting with circumspection when faced with the possibility that a prospective purchaser of alcoholic beverages is a minor." (*The Vons Company, Inc., supra*, at p. 4, emphasis added.)

(*7-Eleven/Hundal* (2013) AB-9231.) This limited exception merely recognizes that a busy premises may, in certain limited situations, provide an opportunity for law enforcement abuse. It is important to recognize, however, that it is *law enforcement abuse* of legitimately distracting circumstances that violates rule 141(a), and not the distracting circumstances themselves. Mere distraction is no defense to a sale-to-minor charge.

Where, as here, no law enforcement abuse is alleged, the general rule applies: there is no rush-hour defense. If the line to buy beer wrapped all the way around the block, it still would not alter a licensee's responsibility to prevent sales to minors.

II

Appellants contend that Exhibits 5 and 6, both dismissed accusations, were improperly included in the administrative record forwarded to the Department Director, and therefore constitute ex parte communications 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) at 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 an

> 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*, reinforced the language of section 11430.70 and further held 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].)

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 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.

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 the 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 [contacts with presiding officer or decision maker must be public, and all parties must be afforded opportunity to respond].)

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

In *Garfield Beach CVS* (2014) AB-9355, this Board addressed the first in a growing series of cases alleging ex parte communication. At the administrative hearing, an ABC investigation report was marked for identification, but was neither admitted nor rejected. (*Id.* at p. 3.) Indeed, no further reference was made to the document whatsoever. (*Ibid.*) The document was then included in the administrative record forwarded to the Department Director in his decisionmaking capacity. (*Ibid.*)

This Board held that the inclusion of the report constituted an ex parte communication. We took note of a Department General Order that provided internal direction for ABC staff regarding the contents of the record provided to the Director. (Dept. of Alcoholic Bev. Control, General Order 2007-09 (August 10, 2007).) According to the General Order, "The Administrative Hearing Office shall forward proposed

decisions, together with any exhibits, pleadings 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." (*Ibid.*) Because the document was merely marked for identification, we held that the appellants had no notice that it would be reviewed by the Director, and had no opportunity to respond to it. Without notice and an opportunity to respond, the document constituted an ex parte communication meriting reversal.

It is worth emphasizing that the General Order is *only* relevant for purposes of determining whether an appellant received sufficient notice and the opportunity to respond. In *Garfield Beach CVS*, 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 they 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* simply whether the appellants subjectively expected the Director to see the investigation report, 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.)

Here, Exhibits 5 and 6 were marked for identification. No further reference was made to either exhibit until the close of the hearing, at which point counsel for the Department asked to enter all exhibits *except* 5 and 6 into evidence. (RT at p. 45.) Though the Department did not formally request withdrawal, counsel commented, "I just realized that priors 5 and 6 are actually accusations that were dismissed." (*Ibid.*)

The ALJ then proceeded to ask for appellants' response, if any, to the remaining

exhibits. (RT at pp. 45-46.) Counsel lodged a relevance objection to three of these. (RT at p. 46.) The ALJ, however, did *not* offer appellants the opportunity to respond to exhibits 5 and 6. (See RT pp. 45-46.) Instead, he simply noted that "Exhibit 5 and 6 remain marked for identification but are not in evidence." (RT at p. 46.)

This case presents a closer issue than *Garfield Beach CVS* because counsel for the Department withdrew both exhibits upon realizing the accusations had been dismissed. The Department, in its brief, argues that the Director is entitled to view the complete record, including "all exhibits admitted or rejected" under APA procedures. (See Cal. Code Regs., tit. 1, § 1038(a).) 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 respond, and cannot be characterized as an ex parte communication.

Here, Exhibits 5 and 6 were neither admitted nor rejected, but were, at best, withdrawn at the Department's behest. Arguably, they were not a required portion of the record as defined by section 1038(a). Moreover, they were not considered by the ALJ for any purpose, even a limited evidentiary ruling. Despite the language of the Department's General Order, both exhibits were included in the administrative record.

Still, as noted above, a violation of the General Order alone is not sufficient to

prove an ex parte communication. The relevant question is whether appellants received notice and an opportunity to be heard. A review of the transcript reveals that there was no discussion of either Exhibit 5 or 6 between the initial identification and the moment counsel for the Department remarked on the fact that the accusations had been dismissed. Though appellants arguably received notice, they were never offered the opportunity to object or respond to Exhibits 5 and 6. Moreover, since the Department effectively withdrew both exhibits, the language of the General Order may have lulled appellants into the belief that these documents, which were clearly not being considered by the ALJ, would not be included in the record provided to the Director, and therefore did not require a full response or objection.

At oral argument, the Department presented a number of arguments against removing marked exhibits from the record. Some of these centered on logistics — there would be unexplained gaps, for instance, in the list of exhibits, begging the question of why they were omitted. We see a simple remedy: remove the exhibits, and modify the cover sheet to give some indication that the exhibits were withdrawn. Other arguments focused on perceived procedural impropriety: the exhibit was mentioned at the hearing, and therefore must be included in the record. However, including a document simply because it is *mentioned*, without affording the opposing party a fair opportunity to respond, opens the door to abuse. A party could insert a potentially prejudicial document simply by requesting it be marked, then withdrawing it — guaranteeing that it will be in the record, but that opposing counsel will not have the chance to respond to it.

The Department also directs this Board to section 664 of the Evidence Code, which states, “It is presumed that official duty has been regularly performed” — that is,

we must assume that the Director will understand that an exhibit has been withdrawn, and will accordingly ignore it.

The Department, however, is peculiar in that it is oversees all phases of disciplinary action — investigation, prosecution, and decisionmaking. This dramatically heightens the potential for internal abuse. We must be alert to circumstances in which the system, as developed by the Department, works against appellants. Here, we see no reason for including a withdrawn exhibit in the administrative record *except* that the Department has always included them. In the interest of fairness, the Department must change its internal procedures.

One of the hallmarks of an ex parte communication is the inability of opposing counsel to respond. Here, Exhibits 5 and 6 were withdrawn by Department counsel, and appellants were not afforded an opportunity to respond to either document. Nevertheless, both exhibits were forwarded to the Director in his decisionmaking capacity. This constitutes an ex parte communication meriting reversal.

ORDER

The decision of the Department is reversed.[2]

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

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[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.