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

AB-9533
File: 21-411624 Reg: 14081783

MTANOS HAWARA and SUSAN ISSA HAWARA,
dba Mega 9 Liquor
716 Tennessee Street, Redlands, CA 92374,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 3, 2016
Los Angeles, CA

ISSUED APRIL 19, 2016

Appearances: *Appellants:* Michelangelo Tatone, of Solomon Saltsman & Jamieson, as counsel for appellants Mtanos Hawara and Susan Issa Hawara, doing business as Mega 9 Liquor.
Respondent: Kerry K. Winters as counsel for the Department of Alcoholic Beverage Control.

OPINION

Mtanos Hawara and Susan Issa Hawara, doing business as Mega 9 Liquor (appellants), 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 police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 7, 2004. On December 31,

[1]The decision of the Department, dated August 5, 2015, is set forth in the appendix.

2014, the Department filed an accusation against appellants charging that, on August 16, 2014, appellants' clerk, Rouba Helwani (the clerk), sold an alcoholic beverage to 19-year-old Sadie Campos. Although not noted in the accusation, Campos was working as a minor decoy for the Redlands Police Department at the time.

At the administrative hearing held on June 10, 2015, counsel for appellants requested that the hearing be videotaped. (RT at pp. 7-9.) A videographer had accompanied appellants to the hearing. (App.Br. at p. 5.) Appellants argued that videotape would "provide a more accurate record in the event that there's an appeal." (RT at p. 7.) They paraphrased this Board's previous commentary on the issue:

> The Appeals Board has said that when the ALJ's decisions happen to be lacking in the sufficient findings, they are unable to determine whether there was sufficient evidence presented or whether there was substantial evidence presented at the hearing, and so we think that a videotaped hearing will provide this necessary lack that sometimes happens.

(RT at p. 8; see also *Garfield Beach CVS* AB-9178a, at p. 7, fn. 2.)

Appellants further argued that Government Code section 11512, subdivision (d), only requires parties' consent for audiorecordings, and does not apply to videorecordings. (RT at pp. 8-16.)

The Department responded that section 11512(d) does indeed require the consent of the parties for videorecording. (RT at p. 17.) It argued that while the APA does not define "electronically," the common sense meaning of the word incorporates videorecordings. (*Ibid*.) It argued further that videorecordings are intimidating for minor decoy witnesses; that the Appeals Board is bound by the factual findings below and does not need a videotape; and that the videorecording proposed by appellants could not properly be entered into evidence. (RT at pp. 17-18.) Accordingly, the Department declined to consent to appellants' request. (RT at p. 18.)

Appellants countered that the proposed videorecording was not a piece of evidence requiring admission or rejection, but simply another form of transcript. (RT at pp. 18-19.)

The ALJ treated appellants' request as a motion and ultimately rejected it. (RT at pp. 9, 21.) He noted that court reporters, unlike appellants' videographer, are certified and licensed (RT at pp. 19-20), and that those levels of stringency are not "satisfied by simply having someone set up a camera." (RT at p. 20.) He further rejected appellants' interpretation of the word "electronically" in section 11512(d), and accepted that the "common meaning" of the word includes videorecordings. (RT at p. 21.) He therefore denied appellants' motion.

The administrative hearing proceeded with only a stenographic reporter.

Documentary evidence was received and testimony concerning the sale was presented by Campos (the decoy) and by Michael Merriman, a Redlands 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 Budweiser beer, and took it to the counter. She set the beer down, and the clerk asked to see her ID. The decoy handed her driver's license to the clerk, who looked at it. The clerk then handed the ID back to the decoy and finished ringing up the sale. The decoy paid for the beer, then exited with it.

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

Appellants then filed this appeal contending: (1) The ALJ erred in denying appellants' request to videotape the administrative hearing, and (2) the ALJ failed to address his reasons for denying appellants' request in the decision below. These issues will be addressed together.

DISCUSSION

Appellants contend that the ALJ erred in denying their request to videotape the administrative hearing. Appellants reiterate their interpretation of the word "electronically" as used in section 11512(d) of the Government Code. (App.Br. at p. 6.) They direct this Board to uncited legislative history for support. (*Ibid.*) According to this interpretation, the Department's objection was irrelevant, because the videorecordings do not fall under the statute.

Moreover, appellants apply, by analogy, the law and policy surrounding videotaped depositions, and insist that "videotaping makes the witness more candid, it provides a far better record of the examination than any transcript or audiotape, and a witness can be requested to demonstrate or 'act out' what happened." (App.Br. at p. 6, citing *Emerson Electronics Co. v. Sup. Ct.* (1997) 16 Cal.4th 1101, 1109, fn. 3.) Appellants argue that because they demonstrated good cause for videotaping the proceedings, the denial of the request constituted reversible error. (App.Br. at p. 6.)

Appellants cite a footnote in which this Board noted the policy arguments in favor of videotaping administrative hearings: "Perhaps the time is now ripe for making digital recordings of all administrative hearings for review by the Board so that we can decide for ourselves whether the record of evidence presented is sufficient to support findings essential to the determination of legal issues." (*Garfield Beach CVS/Longs Drug Stores Cal., LLC* (2014) AB-9178a, at p. 7, fn. 2.)

Finally, appellants contend that the ALJ abused his discretion by failing to explain in his decision why he denied appellants' request. Appellants argue that he was required by *Topanga* to make findings and to "bridge the analytic gap between the raw evidence and ultimate decision or order." (App.Br. at p. 8, citing *Topanga Assn. for a Scenic Community*

v. County of Los Angeles (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].) They claim that "because there was no adequate record made by the ALJ for this Board to decide the issue on, this Board is unable to review the decision" to deny appellants' request. (App.Br. at p. 9.)

Section 11512(d) of the Government Code dictates reporting procedures for administrative hearings: "The proceedings at the hearing shall be reported by a stenographic reporter. However, upon the consent of all the parties, the proceedings may be reported electronically."

This Board has recently received a slew of briefs premised on the same interpretation of section 11512(d) — specifically, that the word "electronically" was intended by the legislature to encompass only audiorecordings, and that a videorecorded transcript may be allowed — even absent a party's consent — provided it does not *replace* the stenographic transcript.

In the earliest of these appeals, we articulated our support for the notion of videorecorded transcripts generally, but nevertheless rejected appellants' strained interpretation of the statute:

> According to the plain language of the statute, the consent of both parties is required before an administrative hearing may be reported by videorecording, and that videorecording — along with audiorecording and all other recording methods that invariably depend on electricity — fall under the definition of "electronically." Because consent could not be obtained, denial of appellants' request was proper as a matter of law.

(*7-Eleven, Inc./Arman Corp.* (2016) AB-9535, at p. 8.) The law has not changed, and the facts in this case are, for purposes of this issue, indistinguishable. We therefore repeat our conclusion that "we cannot find error in the ALJ's refusal to allow the production of a video transcript, particularly where the videographer is paid by one party, and the other party has

unequivocally exercised its statutory right to decline." (*Id.* at p. 21.)

Unless the legislature modifies section 11512(d) or a higher court shines a brighter light on its meaning, we consider this legal issue duly resolved.

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.