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

AB-9537
File: 21-539575; Reg: 14080983

BEVERAGES & MORE, INC.,
dba BevMo
1700 J Street,
Sacramento, CA 95811,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 7, 2016
Sacramento, CA

ISSUED MAY 2, 2016

Appearances: *Appellant:* John W. Edwards II, of Hinman & Carmichael LLP, as counsel for Beverages & More, Inc., accompanied by Douglas L. Christman, General Counsel for Beverages & More, Inc.
Respondent: Dean Lueders, as counsel for the Department of Alcoholic Beverage Control.

OPINION

Beverages & More, Inc., doing business as BevMo, appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 5 days for giving away free goods in connection with the sale or distribution of alcoholic beverages, a violation of Business and Professions Code section 25600, subdivision (a)(1).

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 10, 2014. On August 13, 2014, the Department instituted a three-count accusation against appellant charging that on June 13, 2014, appellant gave away free goods in connection with the sale or distribution of alcoholic beverages — to wit, gift bags valued at $50 (count 1), waffles (count 2), and coffee (count 3).

At the administrative hearing held on May 5, 2015, documentary evidence was received and testimony concerning the violation charged was presented by Department Agent Israel Hernandez; appellant's store manager, Kenneth Garcia; appellant's marketing director, Mark Ryan; and appellant's district manager, Michael Lyons. Appellant also offered the testimony of David Bennett, an expert witness on the marketing and grand opening practices of type-21 licensees, but his testimony was excluded by the administrative law judge (ALJ) for lack of relevance. (RT at pp. 90-91.)

Testimony established that on June 13, 2014, as part of a grand opening celebration, appellant gave a gift bag to each of the first 500 persons to enter the premises. (Count 1.) The gift bags contained a beer koozie,[2] a recipe book, Bloody Mary mix, a cocktail shaker, two glasses, salt, olives, cocktail napkins, a wine bottle opener, breath mints, and a Bloody Mary recipe card. (RT at p. 13; Exh. 2, attach. 4.) No purchase was required to keep the gift bag. (RT at p. 47.)

On the same day, beginning at 8 a.m., appellant served waffles and coffee outside the premises to anyone who asked for them. (Counts 2 and 3.) The store

[2]A fabric or foam sleeve designed to thermally insulate a beverage container such as a can or bottle. (Wikipedia, "Koozie" <https://en.wikipedia.org/wiki/Koozie> [as of Mar. 16, 2016].)

opened at 9 a.m., but those who wanted free waffles and coffee did not need to enter the store as a condition of availing themselves of those goods. (RT at pp. 12, 25, 27, 41.)

Department Agents Hernandez and Shepard investigated the activities at the grand opening in plain clothes, and did not identify themselves as Department agents at any time during their investigation. (RT at p. 24.) They arrived at 8 a.m., observed the serving of waffles and coffee, then entered the premises at 9 a.m., and each received a gift bag. (RT at pp. 24-27.)

After the hearing, the Department issued its decision which determined that the violation charged in count 1 was proved and no defense was established. Counts 2 and 3 were dismissed. The Department's prosecuting counsel moved for reconsideration of the decision on counts 2 and 3, but that motion was denied.

Appellant then filed a timely appeal raising the following issues: (1) the free gift bags were not provided "in connection with" the sale or distribution of alcohol, (2) the Department arbitrarily prosecuted appellant for conduct which is common for type 21 licensees, (3) the Department exceeded its jurisdiction and abused its discretion in violation of appellant's right to engage in commercial speech, and (4) the Department improperly excluded expert witness testimony. Issues 1 and 2 will be discussed together.

DISCUSSION

I

Appellant contends the free gift bags were not provided "in connection with" the sale or distribution of alcohol. (App.Br. at pp. 4-7.) Appellant contends the Department arbitrarily prosecuted appellant for conduct which is common for type 21 licensees

(App.Br. at p. 8), and that "[t]o the extent that BevMo is constrained from using common, effective marketing techniques for its new stores while competitors continue to use those techniques, it will have been put at a distinct but unjustifiable competitive disadvantage. (*Id*. at p. 10.)

Section 25600(a)(1) of the Business and Professions Code provides:

> No licensee shall, directly or indirectly, give any premium, gift, or free goods *in connection with the sale or distribution of any alcoholic beverage*, except as provided by rules that shall be adopted by the department to implement this section or as authorized by this division.

(Emphasis added.)

The Department found the gift bags violated this statute even though no purchase of alcohol was required. (App.Br. at p. 4.) People who received the gift bags at the grand opening were free to purchase alcohol, non-alcoholic items, or nothing at all — they still got to keep the gift bag. (*Ibid*.) A purchase, however, has not been found to be a determinative factor in deciding whether a violation of 25600(a)(1) has occurred:

> [The] argument that the prohibition upon giveaways set forth in section 25600 does not apply unless a purchase is involved is rebutted by the 1983 amendment to that section and this court's decision in *Miller Brewing Co. v. Department of Alcoholic Beverage Control, supra*, 204 Cal. App. 3d at page 15. The prohibition applies to the total business of merchandising, including advertising and promotional efforts. (*Ibid*.)

(*Coors Brewing Co. v. Stroh* (2001) 86 Cal.App.4th 768, 776 [103 Cal.Rptr.2d 570], citing *Miller Brewing Co. v. Dept. of Alcoholic Bev. Control* (1988) 204 Cal.App.3d 5, 15 [250 Cal.Rptr. 845].)

Appellant's stated goal in giving away the gift bags was explained by its marketing director as follows:

> We give these away to again create a strong first impression, to

> inform people about our brand, to give them a keepsake to take home and remind them about the brand and hopefully create some interest and awareness of both the brand and make them want to come back in the future.

(RT at p. 61.) Appellant's marketing director also testified it is a common practice for type 21 licensees to give away free products to their customers, not only during grand openings, but as a general common practice. (RT at pp. 64-65.) At oral argument, appellant's counsel noted that logoed merchandise is given away as a good will gesture that will hopefully influence consumers' future shopping habits.

Agent Hernandez testified he had never been asked to investigate any other grand opening, and he did not know of any other type 21 licensee who had been charged with violating section 25600 for providing free goods at a grand opening. (RT at pp. 18-19.) Appellant's counsel argued that, to his knowledge, this is the only prosecution ever brought against a type 21 licensee for giving away logoed merchandise at a grand opening, and it has put appellant at a competitive disadvantage. He noted that section 25600 does not distinguish between grocery stores, convenience stores, or other types of type 21 licensees, and that the enforcement here was arbitrary and capricious.

The ALJ reached the following conclusions regarding the gift bags:

> I
>
> The gift bags
> Respondent argued that its giving away the 500 gift bags was not in connection with the sale or distribution of alcoholic beverages because the purpose was to "introduce a new store to the public." This argument is rejected.
>
> According to the California Court of Appeal, "the term 'distribution' as used in section 25600 must be afforded the broad definition advocated by the Department, that is, 'the process by which commodities get to final consumers, including storing, selling, shipping and advertising' (citation omitted), or 'the marketing or merchandising of commodities' with

> 'merchandising 'being defined as 'sales promotion as a comprehensive function including market research, development of new products, coordination of manufacture and marketing, and effective advertising and selling' (Citation omitted)." Miller Brewing Company v. Alcoholic Beverage Control (1988) 204 C.A.3d 5, 15, 250 Cal.Rptr. 845.
>
> Applying the above definition of "distribution," the Court concluded that "section 25600 confers on the Department authority to prohibit Miller (Brewing Company) from donating concert tickets identifying Miller as the sponsor of the concert and jackets bearing logos of a Miller product and the concert, as the donations would constitute gifts or free goods donated in connection with the 'distribution,' or [']merchandising' or 'advertising,' of alcoholic beverages." Miller Brewing Company, cited above, at 15.
>
> In the present case, the gift bags and many of the items in the bags identified Respondent as the donor. Most of the items in the bags are items typically used in connection with the consumption of alcoholic beverages. And, Respondent's advertisement clearly connected the giving of the gift bags with the advertising, marketing, or promotion of alcoholic beverages.
>
> Applying the Miller Court's conclusion, the Department had the authority, pursuant to Business and Profession Code Section 25600, to prohibit Respondent from giving away the gift bags, as the giving away of those bags would be "in connection" with the distribution of alcoholic beverages. It follows, then, that Respondent's giving away of those bags was a violation of Business and Professions code Section 25600(a)(1). Count 1 of the Accusation.
>
> The fact that Respondent also sells non-alcoholic beverage items and has a greater profit margin from those sales does not negate the fact that the giving of the gift bags was "in connection with the sale or distribution of alcoholic beverages."

(Determination of Issues, ¶ I.)

Appellant contends the *Miller* case is distinguishable on its facts and has been substantively changed by subsequent case law. Factually Miller is distinguishable because there appellant, a producer, gave away concert tickets and jackets bearing its logo. Since Miller Brewing Company's only product is beer, the Court found this promotion was done for the purpose of (or in connection with) the marketing or advertising of an alcoholic beverage — specifically, Miller beer — even though the

items being given away were nonalcoholic beverage merchandise. In the instant case, BevMo sells many products other than alcohol and, unlike in *Miller*, no item in the gift bags was for the promotion of a particular brand or manufacturer of alcoholic beverages. (App.Br. at p. 6.)

By the Department's logic, appellant argues, no licensee could ever give away any item bearing the logo of a type 21 licensee, because the promotion could potentially result in the sale of alcohol. (*Ibid*.) As appellant notes:

> There is no principled distinction between the Department's holding regarding BevMo's logoed items and grocery bags, coffee cups, plastic cups or other items bearing the logo of any Type 21 licensee, all of which are commonly given away at Grand Openings, at other charity and community events sponsored by Type 21 licensees and as a normal business practice.

(*Ibid*.)

The ALJ found "[m]ost of the items in the bags are items typically used in connection with the consumption of alcoholic beverages." (Determination of Issues, ¶ I) Appellant contends, however, the items in the gift bags have multiple uses, not necessarily associated with the consumption of alcoholic beverages:

- The logoed bag itself was an insulated carry bag suitable for lunches, snacks, etc.
- A welcome card that references BevMo's entire product line, including the "& More" category;[fn.]
- 2 logoed plastic beverages [*sic*] glasses suitable for any cold drink, whether alcoholic or not;
- A logoed plastic beverage shaker, suitable for making nonalcoholic drinks, such as smoothies, as well as cocktails;[fn.]
- A bottle of Bloody Mary mix and salt, which can be, and often is, consumed without alcohol as a Virgin Mary;
- A recipe book, which contained recipes for alcoholic cocktails, and non-

alcoholic “mocktails”, as well as party foods;[fn.]

- A logoed bottle opener with a corkscrew;
- A beverage koozie used [to] keep canned beverages cold; the Department refers to it as a “beer koozie,”[fn.] but it is equally useful for nonalcoholic beverages, such as canned sodas and iced tea;
- A pack of olives;
- A pack of napkins; and
- A tin of mints.

(App.Br. at pp. 6-7.) Appellant maintains a violation should not be found just because these items *could* be used in conjunction with the consumption of alcohol.

The purpose of section 25600 has been identified as follows:

> The purpose of the [ABC] Act is to promote temperance in the use and consumption of alcoholic beverages (Bus. & Prof. Code, § 23001), a purpose that is accomplished, in part, by the limitations set forth in section 25600. The typical scenario prohibited by section 25600 is one where an enticement, such as a gift, free goods, or "something extra," is given in exchange for the purchase of alcohol because this either (1) encourages a person who does not ordinarily imbibe to purchase and drink alcohol in order to obtain the "enticement," or (2) encourages a person who already drinks alcohol to purchase and imbibe more than usual to obtain more free goods or gifts.

(*People ex rel. Dept. of Alcoholic Bev. Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1197 [128 Cal.Rptr.2d 861] (*Miller*).)

We do not find the purpose of section 25600 furthered by prohibiting the gift bags at issue here, when the promotion is of the store brand rather than of alcoholic beverages, and the “enticement” of the gift bag does not require the purchase of alcohol, nor encourage anyone to buy and/or imbibe alcohol. (See *ibid.*)

As in any case involving statutory interpretation,

> [O]ur fundamental task is to determine the Legislature's intent so as to effectuate the law's *purpose*. (*People v. Lewis* (2008) 43 Cal.4th 415, 491 [75 Cal.Rptr.3d 588, 181 P.3d 947].) "We begin with the text of the statute as the best indicator of legislative intent" (*Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 844 [69 Cal.Rptr.3d 96, 172 P.3d 402), but we may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results (*Ornales v. Randolph* (1993) 4 Cal.4th 1095, 1105 [17 Cal.Rptr.2d 594, 847 P.2d 560]).

(*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27 [109 Cal.Rptr.3d 329], emphasis added.) After all, "if a statute is to make sense, it must be read in the light of some assumed *purpose*. A statute merely declaring a rule, with no purpose or objective, is nonsense." (Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed* (1950) 3 Vand.L.Rev. 395, 400, emphasis added, reprinted in Singer, *Statutes and Statutory Construction* (6th ed. 2000) § 48A:08, p. 639.) It is through this lens that the Board must scrutinize the Department's interpretation.

The ALJ found "Respondent's advertisement clearly connected the giving of the gift bags with the advertising, marketing, or promotion of alcoholic beverages." (Determination of Issues, ¶ I.) The ad in question, shown in Exhibit A, includes alcoholic beverages. It also lists wine and beer tastings, advertises tastings for nonalcoholic products, and includes a discount coupon valid on alcoholic as well as nonalcoholic products. The receipt of a gift bag is not, however, contingent on the purchase of any of these items — the announcement that the first 500 individuals coming to the store will receive a free gift bag simply appears in the same ad as these other items. The question for the Board then is whether a grand opening advertisement stating free gift bags will be given to the first 500 customers in a grand opening

advertisement, which also advertises a variety of alcoholic and non-alcoholic products, a sufficient nexus to the sale or distribution of alcoholic beverages to constitute a violation of section 25600? We think the nexus here is not sufficient to constitute a violation.

The Department's decision notes that 90 percent of appellant's total sales come from alcohol and that 60 percent of appellant's floor space is devoted to alcoholic beverages. (Findings of Fact, ¶ II.) The decision also notes that the ad in "announced 'grand opening deals' on seven kinds of alcoholic beverages." (Findings of Fact, ¶ IV.) If these were the determinative factors, however, *anything* that BevMo might give away would automatically be considered "in connection with the sale or distribution of alcoholic beverages," and the ALJ specifically said this is not the rule. (See Determination of Issues, ¶ II.)

The ALJ dismissed counts 2 and 3 of the accusation, for the giving away of free coffee and waffles, by saying:

> If merely giving away coffee and waffles by Respondent, outside of the store, an hour before the store opened, to anyone who came by and asked for them, is a violation of Business and Professions Code Section 24500(a)(1), then anytime that Respondent gave anything away would also be a violation. Such a scenario would make the words "in connection with the sale or distribution of alcoholic beverages" meaningless.

(Determination of Issues, ¶ II.) By his own admission, the ALJ confirms that appellant is not in violation no matter what they give away because, as he says, "[s]uch a scenario would make the words 'in connection with the sale or distribution of alcoholic beverages' meaningless." (*Ibid.*) In other words, the ALJ acknowledges the fact that licensees *are* permitted to give away some free goods.

Appellant argues that "the statute requires a causal nexus between the free goods and the sale or distribution of alcohol" (App.Br. at p. 5) and that count 1 was sustained without identifying any such a nexus for the gift bags — except that some of the items in the gift bag *could* be connected to the consumption of alcohol, and the advertisement announcing the gift bag give-away appeared on the same page as an ad for alcohol. We agree with appellant that this lack of nexus constitutes an abuse of discretion. "'Abuse of discretion' in the legal sense is defined as discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered. [Citations.]" (*Brown v. Gordon* (1966) 240 Cal.App.2d 659, 666-667 [49 Cal.Rptr. 901].)

In sum, there is an insufficient nexus between the gift bags and the sale or distribution of alcohol to establish a violation of section 25600. Simply because the items in the gift bag *could* be used in conjunction with the consumption of alcohol does not automatically made these gift bags a free gift in connection with the sale of alcoholic beverages. Secondly, just because the appellant is primarily in the business of selling alcoholic beverages does not completely prohibit it from offering something for free — as the ALJ found with respect to the coffee and waffles.

The Department argues that the nexus requirement should be read broadly and since the ad in which the gift bags were announced also advertised alcohol, the nexus to sales of alcohol has been established. They rely on *Miller,* which states:

> Hence the term "distribution" as used in section 25600 must be afforded the broad definition advocated by the Department, that is, "the process by which commodities get to final consumers, including storing, selling, shipping and advertising" (Webster's New World Dict. of the American Language (2d ed. 1968) p. 410), or "the marketing or merchandising of commodities" with "merchandising" being defined as "sales promotion as

> a comprehensive function including market research, development of new products, coordination of manufacture and marketing, and effective advertising and selling" (Webster's New Collegiate Dict. (9th ed. 1983) pp. 368, 742).
>
> Accordingly, section 25600 confers on the Department authority to prohibit Miller from donating concert tickets identifying Miller as the sponsor of the concert and jackets bearing logos of a Miller product and the concert, as the donations would constitute gifts or free goods donated in connection with the "distribution," or "merchandising" or "advertising," of alcoholic beverages.

(*Miller*, supra at p. 15.) We decline to read *Miller* as broadly as the Department interprets it — as prohibiting any and all gifts of logoed items when the logo on the gift is that of a type 21 licensee. By this logic, all promotional gifts with a logo would be prohibited for holders of a type 21 license. We believe *Miller* must be read more narrowly, as prohibiting free goods which actually advertise an alcoholic beverage or brand of alcohol.

Simply because the free gifts *could* be used for the consumption of alcohol, or happen to share advertising space with other ads which do advertise alcohol, is an insufficient nexus to constitute a violation of section 25600. Furthermore, the purpose of section 25600 is not achieved by prohibiting the gift bags at issue here — when the promotion is of the store brand rather than of alcoholic beverages and consumers are not encouraged to purchase or imbibe more alcohol than usual in order to obtain one of the bags.

Count 1 must be dismissed.

III

Appellant contends the Department exceeded its jurisdiction and abused its discretion in violation of appellant's right to engage in commercial speech.

As the Board has stated previously, it is outside our jurisdiction to rule on the constitutionality of a statute. The California Constitution provides:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
> (b) To declare a statute unconstitutional;
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

(Cal. Const., art. III, § 3.5.)

While appellant contends it is not challenging the constitutionality of the statute *per se*, but merely the Department's application of it, we remain mindful that sound legal reasons countenance against the Board jumping into this fray. To begin with, as the Supreme Court has observed, we "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, [we] will decide only the latter. [Citation.]" (*Ashwander v. TVA* (1935) 297 U.S. 288, 347 [56 S.Ct. 456] (conc. opn. of Brandeis, J.)

Related to this cautionary principle is the well-founded rule that if there are two possible constructions of a statute, one that may render it constitutionally suspect and another that would save it from unconstitutionality, the Board has a duty to choose the latter. "[A] statute should be construed to avoid all doubts as to its constitutionality." (*United States ex rel. Atty. Gen. v. Delaware & Hudson Co.* (1909) 213 U.S. 366, 407–408 [29 S.Ct. 527, 535–536].) "If feasible within bounds set by their words and

purpose, statutes should be construed to preserve their constitutionality." (*In re Howard N*. (2005) 35 Cal.4th 117,132 [24 Cal.Rptr.3d 866].)

We are confronted here with countervailing arguments and purported authority from appellant and respondent. Respondent's brief relies, as mentioned, primarily, if not exclusively, on *Miller* for its position that appellant's act of giving away gift bags violates Business and Professions Code section 25600. Appellant, in contrast, inform us that much has happened in the law respecting the right to freedom of commercial speech that the *Miller* court never considered when it wrote its opinion 28 years ago — developments most recently expressed in controlling opinions such as *Sorrell v. IMS Health, Inc.* (2011) 564 U.S. 552 [131 S. Ct. 2653] (*Sorell*), *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468 [101 Cal.Rptr.2d 470], and others cited in *Retail Digital Network v. Applesmith* (9th Cir. 2016) 810 F.3d 638 and our own recent decision[s] discussing some of these authorities in, *inter alia*, *Silver Oak Wine Cellars L-Pship* (March 22, 2016) AB-9496 at pp. 32-34. These judicial opinions make clear that a *heightened*, as opposed to an *intermediate* scrutiny standard, now applies to statutes like section 25600 that regulate and impinge on commercial speech involved in advertisements touting free gift bags not tied to the purchase of alcoholic beverages. That heightened scrutiny, similar to "strict scrutiny" in equal protection analysis, essentially means strict in theory but fatal in fact unless, as here, the Board interprets narrowly the "close causal connection" requirement animating section 25600.

Contrary to respondent's apparent belief that this Board should shut its eyes to these *post-Miller* authorities, and instead accept the Department's argument that *Miller,* as interpreted by the Department, is controlling (Resp. Br. at pp. 4-5), we are duty bound to judicially notice and follow opinions of the Supreme Court and other courts

that specifically bear on this issue. Accordingly, we construe section 25600 consistent with *Sorell* and the other aforementioned authorities, to avoid any unconstitutionality, by abstaining from an overly broad interpretation or application of it which would bar the giving away of the particular gift bags in the circumstances found here.

The Board is constrained to observe that we reached our decision in this matter with little or no help from the Department's briefing, which was woefully inadequate and unhelpful. The Department's brief devotes a scant two paragraphs to the issue of how to deal with the thorny constitutional issue presented, simply admonishing the Board to ignore it, and cites only one relevant judicial opinion – *Miller* – and no Board decisions pertinent to the issues presented. The Department tries to dodge the underlying constitutional issue in this case by wrongly characterizing appellant's position as "asking the Board to refuse to enforce section 25600," instead of appellant's actual request that the Board interpret that section consistent with more recent and binding opinions besides *Miller* from courts we are obliged to heed. It is beyond cavil that the Board must follow and adhere to the reasoning and holdings of judicial opinions from higher courts than the intermediate appellate court's timeworn interpretation of section 25600 in *Miller*.

The Department's apparent recent adoption (pursuant to guidance from its Chief Counsel) of a "canned, cut-and-paste word processor copied brief" approach in cases before the Board[3] ill-serves the taxpayers of California because these briefs are bereft

[3] At oral argument the Department attorney appearing before the Board, who has presented more than adequate briefs in past cases, was asked by the Board why his briefs in this and other cases then before us were so similar in format and content and in sharp contrast to his past briefing; he admitted this new approach was a "different direction" imposed by his superiors.

of the qualities of any "good" respondent's brief (the usual position of the Department in an appeal):

> [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.) Respondent's "canned brief" in this case and others plainly contravenes this well-considered advise.[4]

Perhaps the Department takes the stance it does partly because of its belief that our decisions have no precedential value, which would explain why in the latest round of "canned briefs"[5] (in all of their first three plus pages) omit any reference to pertinent decisions of this Board while reminding us of our limited authority to do much of

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[4] We attach to this opinion as Exhibits A and B, respectively, respondent's brief in this case and another similar "canned brief" it filed in an entirely different case argued on the same day as this one, *Garfield Beach CVS, LLC* (AB-9530) to show — for the edification of counsel and any appellate court that may consider review of this case — what concerns the Board.

[5] Perhaps the Department can benefit from the lesson given first year students at the Dedman School of Law of Southern Methodist University, who heard fifteen of their professors sing the following chorus, more or less to the tune of *Achy, Breaky Heart*: "Don't use canned briefs/ Those easy, sleazy briefs/ The worst thing to do, don't you know/// And if you use canned briefs/ those easy, sleazy briefs/ Down the toilet your career will go///." (David G. Epstein &, Frederick C. Moss, *Ex Post: To Billy Ray & Bill* (*With All Due Respect*) (2004) 7 *GREEN BAG 2D* 197, 198.)

anything other than rubber-stamp decisions of the Administrative Law Judge favorable to the Department. While Board's decisions are not precedential unless this Board designates them as such (See Bus. & Prof. Code § 23083(b) and Gov. Code § 11425.60), they are nonetheless, as the Department concedes and we have made clear in previous decisions,[6] "persuasive authority." The distinction between "persuasive authority" and "precedential value" may be difficult if not impossible to explain from a practical standpoint; but so far as this Board is concerned, a party who fails to cite and discuss decisions we have rendered that are relevant to issues before us, does so at its peril. In short, we will accord such briefs the same respect and consideration they show this Board by their unresponsive and unhelpful content. And to make clear the weight to be given this decision in the future, the Board, pursuant to Gov. Code §§ 11000((a) and 11425.60, hereby designates it "as a precedent decision."[7]

IV

Appellant also contends the ALJ improperly excluded expert witness testimony when David Bennett, appellant's expert witness, was prohibited from offering testimony regarding the widespread practice of type 21 licensees giving away free merchandise at grand openings, and the reasons that they do so. (App.Br. at p. 21.)

The ALJ ruled:

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[6] See, *e.g.*, *Garfield Beach CVS, LLC v. Dept. Of Alcoholic Beverage Control*, (May 20, 2013) AB-9258 at pp. 4-5.

[7] We need not and thus do not address appellant's argument that the Department's prosecution of it for violation of section 25600 is void as "selective" or "arbitrary and capricious" enforcement of the law. We have previously observed that "selective enforcement" is predicated on "an unjustifiable standard such as race, religion, or other arbitrary classification." (*Torres v. Dept. of Alcoholic Beverage Control* (2015) AB-9510 at pp. 16-17, citing *Oyler v. Boles* (1962) 368 U.S. 448, 456 [82 S. Ct. 501].)

> I do not need this witness's testimony based on the subjects that you mentioned, which is marketing practices, which is really not even an issue in today's case, grand openings. That's not an issue in today's case. The issue is giving away of the item in question and whether the giving away was in connection with the sale or distribution of alcoholic beverages. Those are legal issues, and Mr. Bennett's opinion on that would not be relevant to today's case. We're through with this subject.

(RT at pp. 90-91.)

The trier of fact is accorded broad discretion in ruling on the admissibility of evidence, and the ruling will be reversed only if there is a clear showing of an abuse of discretion. (*Aguayo v. Crompton & Knowles Corp*. (1986) 183 Cal.App.3d 1032, 1038 [228 Cal.Rptr. 768].) "The admission or rejection of evidence by an administrative agency is not grounds for reversal unless the error has resulted in a miscarriage of justice. [Citation.] In other words, it must be reasonably probable a more favorable result would have been reached absent the error. [Citation.]" (*Lone Star Security & Video, Inc. v. Bureau of Security & Investigative Services* (2009) 176 Cal.App.4th 1249, 1254 [98 Cal.Rptr.3d 559].)

In the instant case, the ALJ made his ruling to exclude the testimony of Mr. Bennett on grounds of relevance. (RT at p. 91.) This is well within the discretion of the trier of fact. Mr. Bennett's testimony was not necessary to our decision that, as a matter of law, the "close causal connection" required of section 25600 is not satisfied by the factual record before us.

ORDER

The decision of the Department is reversed.[8]

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

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[8]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.