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

AB-7690
File: 20-270950 Reg: 00048427

7-ELEVEN, INC. and PERRY A. BURGES dba 7-Eleven Store #13563
197 Palm Avenue, Imperial Beach, CA 91932,
Appellants/Licensees
v.
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 17, 2001
Los Angeles, CA

ISSUED DECEMBER 12, 2001

7-Eleven, Inc. and Perry A. Burges, doing business as 7-Eleven Store #13563 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Robert Wonnell, having sold an alcoholic beverage to Melinda Blakley-Bowen, a minor decoy, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Perry A. Burges, appearing through their counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele Wong.

---

[1]The decision of the Department, dated August 17, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 26, 1992. On March 6, 2000, the Department instituted an accusation against appellants charging a violation of Business and Professions Code §25658, subdivision (a).

An administrative hearing was held on June 21, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Leslie Pond ("Pond") and by Blakley-Bowen ("the decoy") concerning the sale in question.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and that appellants had failed to establish a defense under Department Rule 141.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the Department's Request for Disqualification of Administrative Law Judge constituted an unlawful ex parte communication; (2) appellants' cross-examination of the decoy was improperly restricted; and (3) the Administrative Law Judge erred in resolving the discrepancies in the testimony of the Department witnesses.

DISCUSSION

I

At some indeterminate time prior to the commencement of the administrative hearing in this matter,[2] the Department filed with the Administrative Law Judge a nine-

[2] The Department document is dated June 21, 2000. The hearing commenced at 1:08 p.m. on that same day.

page document entitled "Request for Disqualification of Administrative Law Judge." [3] Its existence was first disclosed when the Administrative Law Judge informed counsel that he had premarked certain exhibits (exhibits 1 through 5 and A), of which this document (marked as Exhibit 3) was one, and asked whether there were objections to their receipt in evidence.

Counsel for appellants represented that he and his office had previously been unaware of the existence of the document, expressed his doubts that there was any proof the document had been served on appellants, and asked for a copy. The Administrative Law Judge first asked Department counsel if he was willing to give appellants' counsel a copy. Department counsel refused. The Administrative Law Judge then advised appellants' counsel that he was free to request a copy from AHO (presumably referring to the Administrative Hearing Office within the Department), stating that "there's really no provisions that I know of that require that the Department serve a copy of it on the Respondent's counsel prior to the hearing." [RT 5.]

Appellants' request for a continuance so their attorney could review and address the motion was denied, as was the request for disqualification itself. Appellants now contend that the request for disqualification constituted an unlawful ex parte communication, requiring reversal. Appellants cite certain provisions of the Government Code directed at ex parte communications, the texts of which are set forth in a footnote herein.[4]

---

[3] A copy of the Request is included in the appendix.

[4] Government Code §11430.10 provides, in part:

The document in question consists of a three and one-half page memorandum in which the Department discusses certain rulings made by Administrative Law Judge Echeverria in four disciplinary proceedings, and a five-page declaration by Department attorney Jonathon E. Logan, expanding upon the matters referred to in the memorandum portion of the document and adding comments about an additional

---

> "While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication."

Government Code §11430.50 provides:

> "(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;
>
> (2) If the communication is oral, a memorandum stating the substance of the communication, any response made by the presiding officer, and the identity of each person from whom the presiding officer received 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 the discretion to allow the party to present evidence concerning the subject of the communication, including the discretion to reopen a hearing that has been concluded."

thirteen matters handled by Judge Echeverria.[5] It is an understatement to say that, in both the memorandum and in the declaration, the Department and Department counsel are highly critical of evidentiary rulings and factual determinations made by Judge Echeverria.

Attorney Logan appeared specially for the purpose of arguing the disqualification request. He offered no explanation for his unwillingness to furnish opposing counsel a copy of the disqualification request. When Judge Echeverria ruled that the request was denied for failure to set forth sufficient reasons for disqualification, attorney Logan stated, without explanation, that the Department did not intend to seek review of the decision.

The Department argues that appellants were not prejudiced, based on the fact appellants sought no relief under Government Code §11430.50, subdivision (c). Given the nature of the request, we think that the relief afforded by that section would have been meaningless, and appellants did not waive their objection to what had occurred by not resorting to §11430.50, subdivision (c).

There is no doubt in our minds that appellants were prejudiced by what occurred, and that the decision must be reversed. But, even if we did not hold that view, we would still find it necessary to express our strong disapproval of the conduct of the Department. The Department's extraordinary action of challenging the impartiality -

---

[5] Two of the cases cited in the memorandum were the subject of appeals to the Appeals Board. In 7-Eleven/Williams (April 12, 2001) AB-7591 (Department Reg. No. 99-047346), the Appeals Board affirmed the finding of a sale-to-minor violation, but remanded the case to the Department with directions that the appellants be afforded their discovery rights. The decision in 7-Eleven/Uppal (AB-7599) was issued June 20, 2000.

and, indeed, the integrity[6] - of its own administrative law judge was nothing more than a blatant and unjustified attempt to intimidate Judge Echeverria, whose rulings in certain cases apparently do not sit well with the Department. The Department's action placed Judge Echeverria in an untenable position. Even if he were to deny the motion, as he did, he had to know he was under scrutiny by the Department - his employer - and under pressure to alter his views to be more in line with Department thinking, regardless of the law.

It is settled law that a judge's rulings on legal issues do not constitute a valid ground for disqualification.

> "Where the charge of bias is made because of a prior ruling of the judge against a party, in the same or a related trial, it will usually fail. A judge may not properly try a case where he has formed partisan opinions from outside sources, but a trial judge will normally and properly form opinions on the law, the evidence and the witnesses, from the presentation of the case. These opinions and expressions thereof may be critical or disparaging to one party's position, but they are reached after a hearing in the performance of the judicial duty to decide the case and do not constitute a ground for disqualification."

(2 Witkin, California Procedure, Courts, §119, page 156 (9th ed.), citing Kreling v. Superior Court (1944) 25 Cal.2d 305, 310 [153 P.2d 734].)

---

[6] The Department's flat assertion in the request for disqualification (Exhibit 3, page 4) that "ALJ Echeverria has recently been made aware of his rate of Appeals Board reversals and it is felt that his dismissal of decoy cases is his way of stemming his rate of reversal" is subject to no other interpretation but that Judge Echeverria has decided cases on other than their respective merits. We find it interesting, and disturbing, that this assertion appears not in counsel's declaration, but in a memorandum supposedly speaking on behalf of the Department itself. We find equally disturbing other suggestions and innuendoes in the Department's papers to the effect that Judge Echeverria has shown favoritism to certain defense counsel. Needless to say, at least from this Board's perspective, such suggestions are unfounded.

Much of the Department's criticism of Judge Echeverria relates to his refusal to adopt the Department position that, when a clerk who has sold an alcoholic beverage to a minor pleads guilty to that misdemeanor offense in criminal court, the clerk's plea is admissible in the Department's disciplinary proceeding and entitled to conclusive weight. As the Department puts it,

> "The guilty pleas is conclusive as to the elements of [Business and Professions Code] §25658(a). The Department argue[s] that the person named in the accusation still had to be connected to the premises, and with a showing of Rule 141 compliance, the case was over." (Request, page 3.)

To put it bluntly, the Department is dead wrong. And inexcusably so.

The Department misunderstands the difference between an act in the scope and course of employment - the sale of an alcoholic beverage - and an act which is not in the scope and course of employment - a court plea to a criminal charge. The latter is hearsay as to the employer.

As Mr. Witkin explains in his treatise, to impose liability on the principal or employer,

> "it is essential that the agent or employee be acting for the principal within the scope of his employment; i.e., engaged in work he was employed to perform, during his working hours."

(2 Witkin, Summary of California Law, Agency and Employment, §126, page 121 (9th Ed.)

It cannot be said that the clerk was engaged in work he was employed to perform when he entered his guilty plea. There is no reason to believe he was directed by his employer (or, as in most cases, his former employer) to enter such a plea. Indeed, it is conceivable that the employer would have preferred that the clerk defend against the charge.

In all probability, the employer was not even present when the plea was entered. While it may be assumed that he would have learned of the plea at some time prior to the hearing, it is doubtful he would have been in a position to influence the clerk's action. In addition, there is always the possibility that the plea was exchanged for an agreement that the clerk would be treated leniently. All in all, there is simply no reason in law to charge the employer with the consequence of the plea.

The cases the Department cites are simply not in point. They are cases where the person who entered the guilty plea is attempting to relitigate the underlying facts in a later action, or in some other manner contradict facts admitted by the plea's admission of every element of the charged offense. (See, e.g., People v. Westbrook (1996) 43 Cal.4th 220 [51 Cal.Rptr.2d 1], in which a defendant's plea of guilty to a charge of manufacturing a specified quantity of methamphetamine was held a bar to his challenge to a sentence enhancement based upon the quantity manufactured.)

It is unfortunate that the matter was allowed to proceed as it did. Had Department counsel not refused to furnish a copy of the disqualification request to opposing counsel, and had opposing counsel been given the opportunity to be heard before the hearing was concluded, we might have been convinced that the potential for prejudice had been dissipated. But that did not occur. Instead, the hearing went forward in an atmosphere in which the presiding judge's competence and integrity had been questioned by the agency which employed him, and the licensee's attorney was kept in the dark.

We are unwilling to affirm a decision rendered in such circumstances. We in no way suggest that Judge Echeverria issued a decision which he did not believe justified. Nonetheless, we think that due process and the interest of justice require that a new

hearing be conducted, before a new administrative law judge. We think this is necessary to purge this case of what we consider totally unacceptable conduct on the part of the Department.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for such further proceedings as may be necessary in light of the comments herein.[7]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[7] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.