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

AB-8288
File: 47-182055 Reg: 03055820

ACAPULCO RESTAURANTS, INC., dba Acapulco Restaurant
1299 Lawrence Expressway, Santa Clara, CA 95051,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Arnold Greenberg

Appeals Board Hearing: April 7, 2005
San Francisco, CA
Redeliberation: May 5, 2005

ISSUED JUNE 9, 2005

Acapulco Restaurants, Inc., doing business as Acapulco Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, with all 10 days stayed, the stay to become permanent if no determination is made of a cause for discipline arising within one year from the date of the decision, for its waitress selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Acapulco Restaurants, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

---

[1]The decision of the Department, dated May 6, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on May 24, 1986. On May 19, 2003, Department investigator Natasha Del Ponte entered appellant's licensed premises to investigate possible sale-to-minor violations. As she sat at a table in the lounge area of the premises, she noticed two female patrons, later identified as Christina Jaeger and a companion, Ms. Kilkenny, who appeared to be younger than 21 years of age. She saw the waitress go to the young women's table and talk to them for a moment. The waitress then went to the bar, where the bartender mixed a Margarita, a drink made with tequila, which the waitress delivered to Jaeger. Jaeger drank some of the margarita and gave some to Kilkenny. Later, the waitress returned to Jaeger's table, and after talking to Jaeger, went to the bar and got a Dos Equis beer from the bartender. The waitress placed the beer on the table in front of Jaeger and saw her drink some of it. Neither the waitress nor the bartender asked Jaeger or her companion their ages or for identification, Jaeger did not show identification to any other of appellant's employees, and Jaeger carried no identification except her own, which showed her true age of 19.

On September 10, 2003, the Department filed an accusation against appellant charging that, on May 19, 2003, appellant's waitress, Jennifer Liles (the waitress), sold an alcoholic beverage to 19-year-old Jaeger. At the administrative hearing held on February 25, 2004, documentary evidence was received and testimony concerning the sale was presented by Jaeger (the minor) and by Department investigator Del Ponte. Appellant presented no witnesses.

Following the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense had been established. Appellant

filed an appeal contending that its due process rights were violated at the administrative hearing by the Department presenting evidence of a second violation that was not charged in the accusation. Appellant also filed a Motion to Augment Record, requesting that a document entitled "Report of Hearing" be included in the administrative record, and asserted that the Department violated its due process rights when the attorney who represented the Department at the hearing before the administrative law judge (ALJ) provided a Report of Hearing to the Department's decision maker after the hearing, but before the Department issued its decision.

DISCUSSION

I

Appellant charges that the Department violated the tenets of procedural due process by allowing in evidence about Jaeger's companion, Kilkenny, consuming an alcoholic beverage, when the accusation contained only one count alleging the sale to Jaeger. According to appellant, facts concerning Kilkenny are not relevant because evidence beyond the scope of the accusation is not relevant. Beyond that, appellant asserts, by choosing "to prove facts concerning Kilkenny and her consumption of alcoholic beverages without stating such allegations in a written accusation," the Department "affirmatively acted to deprive Appellant notice [sic] and an opportunity to respond at the administrative hearing." In addition, appellant contends, the decision "is replete with references to Kilkenny's participation," and the ALJ's dependence on these facts is "clear since those factors are delineated in the findings stated in the decision."

Even if the evidence regarding Kilkenny were irrelevant, its admission at the hearing is not a basis for reversal of the Department's decision:

> A judgment will only be reversed if the error at the trial court level resulted in a miscarriage of justice to the extent that a different result would have been probable without the error. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; Evid. Code, § 353, 354; Pool v. City of Oakland (1986) 42 Cal. 3d 1051, 1069 [232 Cal. Rptr. 528, 728 P.2d 1163].)

(Malibu Mountains Recreation, Inc. v. County of Los Angeles (1998) 67 Cal.App.4th 359, 372 [79 Cal.Rptr.2d 25]; see also, *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1054 [228 Cal.Rptr. 567] ("An administrative agency is not required to observe the strict rules of evidence enforced in the courts, and the admission or rejection of evidence is not ground for reversal unless there has been a denial of justice.")

The burden is on appellant to demonstrate that a miscarriage of justice resulted from the erroneous admission of evidence and "reversal can generally be predicated thereon only if the appellant can show resulting prejudice, and the probability of a more favorable outcome, at trial." (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 104 [87 Cal.Rptr.2d 754]; see also *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069 [232 Cal.Rptr. 528, 728 P.2d 1163].) Where a jury is not involved, erroneously admitted evidence will generally not be considered prejudicial because it is presumed that the judge relied on competent evidence in making findings and reaching a decision. (*Eldridge v. Scott Lumber Co*. (1960) 187 Cal.App.2d 457, 461 [9 Cal.Rptr 623].)

Appellant attempts to show prejudice by its contention that the ALJ relied on the evidence about Kilkenny in making his decision, as shown by the decision being "replete with references to Kilkenny's participation." Appellant points out two references to Kilkenny in the decision: in Finding III(a) ("Del Ponte noticed two youthful appearing persons seated at a table") and in Finding III(b) where Kilkenny is identified as receiving part of the margarita from Jaeger and where it is noted that neither Jaeger nor Kilkenny were asked for identification by appellant's employees. We find it impossible to believe

that appellant is serious in contending that these instances make the decision *replete* with references to Kilkenny's participation. We see nothing to indicate that the ALJ relied improperly on evidence regarding Kilkenny when he made his decision.

The record in this appeal is replete with substantial evidence supporting the findings and the decision. Appellant's attempts to create an issue of constitutional dimension out of no more than a scintilla of non-prejudicial and possibly irrelevant evidence, makes a mockery of the right to procedural due process.

II

Appellant asserts the Department violated its right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellant also filed a Motion to Augment Record (the motion), requesting that the report provided to the Department's decision maker be made part of the record. The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motions and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").[2]

---

[2]The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615 [25 Cal.Rptr.3d 821]. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. (127 Cal.App.4th 615; ___ Cal.Rptr.3d ___). The Department petitioned the

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt*, *supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the ALJ had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

California Supreme Court for review, but the Court has not acted on the petition as of the date of this decision.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellant has not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial adjudicator (and appellant has not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellant, it appears to us that appellant received the process that was due to it in this administrative proceeding. Under these circumstances, and with the potential of an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellant is not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellant's motion is denied.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[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.