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

AB-8319
File: 21-44338 Reg: 04056714

MR. S LIQUOR MARTS, INC., dba Liquor Mart
13583 Whittier Boulevard, Whittier, CA 90605,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JULY 8, 2005

Mr. S Liquor Marts, Inc., doing business as Liquor Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for its 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 appellant Mr. S Liquor Marts, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David Sakamoto.

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[1]The decision of the Department, dated July 15, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 2, 1979. On February 23, 2004, the Department filed an accusation against appellant charging that, on November 19, 2003, appellant's clerk, Arturo Bañuelos (the clerk), sold an alcoholic beverage to 18-year-old Anna Ipina. Although not noted in the accusation, Ipina was working as a minor decoy for the Whittier Police Department at the time.

At the administrative hearing held on May 24, 2005, documentary evidence was received, and testimony concerning the sale was presented by Ipina (the decoy) and by Officer Aaron Ruiz of the Whittier Police Department.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense was established.

Appellant filed an appeal making the following contentions: 1) Appellant should have been granted a continuance; 2) the audiotape recording of the decoy's transaction in appellant's premises was intentionally destroyed by the Whittier Police Department before the hearing; and 3) appellant's right to procedural due process was violated by the Department allowing communication between its advocate at the hearing and its decision maker.

DISCUSSION

I

On May 12, 2004, appellant served a subpoena duces tecum on the Whittier Police Department (WPD) for any audiotapes made of this decoy's purchase of alcoholic beverages on November 19, 2003, at appellant's premises and at an Arco AM/PM about half an hour earlier. The declaration in support of the subpoena stated that the tape was material to appellant's defense because it "may establish a pattern

and practice of the Decoy's activities in violation of Rule 141" and it "could be used to impeach" the decoy's testimony. The response to the subpoena was due May 21, 2004, but the WPD did not respond in any way, and appellant states that its inquiries about the status of the subpoena were unsuccessful. On May 24, 2004, appellant requested a continuance of the hearing scheduled for May 25, 2004, so that it could enforce the subpoena by an action for contempt pursuant to Government Code section 11455.20. Chief administrative law judge Michael B. Dorais, in a telephone conference with counsel for appellant and the Department, denied the continuance.

Appellant contends the decision must be reversed because denial of its request for continuance caused it to be "unjustly and capriciously denied its right to enforce its administrative subpoena." This issue apparently involves only the audiotape of the decoy's purchase at the Arco AM/PM that took place about 30 minutes before the decoy purchased beer at appellant's premises.

Pursuant to Government Code section 11524, the administrative law judge (ALJ) has the right to grant a request for continuance for good cause. There is no absolute right to a continuance; one is granted or denied at the discretion of the ALJ, and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198]; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)

The party requesting a continuance must show good cause for the continuance. The Government Code does not specify what will constitute "good cause," but guidance is provided by provisions in the Code of Civil Procedure dealing with continuances.

Section 595.4 of the Code of Civil Procedure provides that a request for continuance "on the ground of the absence of evidence" must show "the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it." A party requesting a continuance in order to obtain evidence must show what it expects the evidence to prove. (*Johnson v. Fassett* (1955) 132 Cal.App.2d 871, 873 [283 P.2d 281].) A belief that evidence favorable to one's position might be discovered does not automatically justify granting a continuance; that is up to the discretion of the ALJ. (*Wiler v. Firestone Tire & Rubber Co*. (1979) 95 Cal.App.3d 621, 628 [157 Cal.Rptr. 248]; *Johnston v. Johnston* (1941) 48 Cal.App.2d 23, 26 [119 P.2d 158].)

In the present case, appellant's counsel was asked by the ALJ what he expected the audiotape to establish and the following discussion took place [RT 83]:

> MR. LABIN: Well, seeing that we haven't heard it, we don't know what it will establish.
> THE COURT: So you don't – you're not suggesting it will establish anything, you're just saying it might?
> MR. LABIN: Well, it would allow us to use it for impeachment purposes for –
> THE COURT: To impeach what?
> MR. LABIN: To impeach [the decoy's] testimony as –
> THE COURT: On what subject?
> MR. LABIN: Well, without hearing the tape I don't know what it says. By hearing the tape we would be able to determine if after my cross-examination of her whether I could use material from that tape to impeach her.
> THE COURT: So it's purely speculative as to how it might be used, what it might say. In other words, I mean, it would be one thing if Mr. Bañuelos came in and sat down here and said she announced to me that she was 23 years old, and you asked her that question and she said I never said such a thing. If you had a tape that said or didn't say that, then maybe you've got something. But I don't have any of the predicate. I don't have any evidence from you that disputes what she testified to, right?
> MR. LABIN: Well.
> THE COURT: True?
> MR. LABIN: That is true.
> THE COURT: So there is nothing to impeach.

MR. LABIN: Well, we don't --
THE COURT: Right?
MR. LABIN: I would not agree with that --
THE COURT: And you're not talking about a tape from this transaction, you're talking about a tape from a different transaction . . . .

It does not appear that ALJ Dorais made an unreasonable decision in denying the continuance. As ALJ McCarthy pointed out to counsel in the dialogue quoted above, there was little or no possibility that the tape would produce anything useful for impeachment of the decoy's testimony, one of the grounds upon which appellant based its subpoena duces tecum.

The other ground stated in the subpoena was to "establish a pattern and practice of the minor decoy's activities in violation of Rule 141." Simple logic tells us that it takes more than the activity at one other premises to establish a "pattern and practice."

At best, appellant's justification for requesting the audiotape is speculative. There is no indication that the tape would have provided material evidence and thus, no good cause for granting a continuance to try to enforce the subpoena. We find no reason to question the denial of the continuance request.

II

Appellant contends that the decision should be reversed because the audiotape of the transaction at appellant's premises was destroyed by the WPD before the hearing, and appellant was not able to review its contents. Appellant alleges it was "irreparably prejudiced in its ability to defend itself" because the WPD destroyed "this critical piece of evidence."

Appellant cites no legal authority for its contention that reversal is required because of the destruction of the audiotape. Even if it could find some legal theory to support its contention, the evidence shows that there was no audible conversation on

the tape because of loud music that the tape apparently picked up instead. There could not possibly be any prejudice to appellant by the destruction of the tape.

In certain instances, sanctions may be imposed for law enforcement's destruction of evidence. The California Supreme Court has explained that the prosecution's duty to preserve evidence is set out in *California v. Trombetta* (1984) 467 U.S. 479 [104 S.Ct. 2528, 81 L.Ed.2d 413] and *Arizona v. Youngblood* (1988) 488 U.S. 51 [109 S.Ct. 333, 102 L.Ed.2d 281]. These decisions held that, in order to sustain a charge of failure to preserve evidence, the defendant "must show the exculpatory value of the evidence at issue was apparent before it was destroyed, . . . that the defendant could not obtain comparable evidence by other reasonable means[, and] must also show bad faith on the part of the police in failing to preserve potentially useful evidence." *(People v. Frye* (1998) 18 Cal.4th 894, 943 [959 P.2d 183; 77 Cal.Rptr.2d 25].) It is very clear to us that these requirements are not satisfied here.

III

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]

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

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

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.

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 for 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]

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

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[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.