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

AB-8384
File: 20-215052 Reg: 04057714

7-ELEVEN, INC., KATY P. LO, and SAM T. LO, dba 7-Eleven Store # 2136-18000
16860 Sherman Way, Van Nuys, CA 91406,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: December 1, 2005
Los Angeles, CA

ISSUED: JANUARY 26, 2006

7-Eleven, Inc., Katy P. Lo, and Sam T. Lo, doing business as 7-Eleven Store # 2136-18000 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with five of those days stayed on the condition that appellants operate discipline free for one year, for their 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 appellants 7-Eleven, Inc., Katy P. Lo, and Sam T. Lo, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Claire C. Weglarz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated December 30, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued in May 1979. On July 28, 2004, the Department filed an accusation against appellants charging that, on April 7, 2004, appellants' clerk, Buta Singh (the clerk), sold an alcoholic beverage to 18-year-old Ana Cruz. Although not noted in the accusation, Cruz was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on October 15, 2004, documentary evidence was received and testimony concerning the sale was presented by Cruz (the decoy), by Los Angeles police officer Adam Hollands, by the clerk, and by co-licensee Sam T. Lo.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants filed an appeal contending: (1) The Department violated appellants' due process rights by an ex parte communication, (2) rule 141(b)(5)[2] was violated, and (3) rule 141(a) was violated.

DISCUSSION

I

Appellants assert the Department violated their 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. Appellants 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.

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[2]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations and to the various subdivisions of that section.

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 motion 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 here collectively as "*Quintanar*" or "the *Quintanar* cases").[3]

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.

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[3]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 response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. *(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

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.

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 appellants at the hearing. Appellants have 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 appellants have 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 appellants, it appears to us that appellants received the process that was due to them 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, appellants are 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. Appellants' motion is denied.

II

Rule 141(b)(5) requires, after a sale to a minor decoy, that the "officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages." Appellants contend that this decoy operation did not strictly comply with rule 141(b)(5) as required by *Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Bd*. (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126]. They assert that "at no time did the minor accuse the clerk of selling alcoholic beverages to her in a face-to-face fashion as strictly required by Rule 141(b)(5)." (App. Br. at p. 15.) Specifically, they allege the rule was violated because the decoy did not say any words to the clerk, the decoy and the clerk were not directly facing each other (the ALJ described them as in a "semi-facing" position in the photograph documenting the identification), and the decoy said she pointed at the clerk when the photograph was taken because she was told to by one of the officers. This failure to comply with the rule, appellants state, results in a complete defense to the violations charged.

Additionally, appellants allege the Department failed to make a prima facie showing that the citation was issued after the face-to-face identification and the evidence proves that the citation was issued before the face-to-face in violation of rule 141(b)(5).

Finding of Fact 7 deals with the decoy's identification of the clerk:

> 7. In a short time the minor returned to the store with the beer in the company of back-up police officers. At the front door to the premises approximately 12 feet from the check-out counter, the minor was asked to identify the person who sold her the beer, and she pointed out the clerk. Thereafter the officers had clerk Singh step away from the checkout counter and advised him that he had sold beer to a minor. A photograph was then taken with the clerk and the minor standing next to one another in a semi-facing position (see exhibit 1).

> An officer then asked the minor who had sold her the beer and the minor responded by pointing a finger at the clerk. The clerk's contention that no such face-to-face identification ever took place is not consistent with the evidence and is rejected.

Conclusion of Law 11 addresses the testimony and the credibility of the witnesses with regard to the decoy's identification of the clerk:

> 11. With respect to 141(b)(5), the store clerk's spotty recollection of events as well as that of the police officer testifying for the complainant, left doubt as to the credibility of their respective testimony. The clerk claimed that the face-to-face identification took place after the citation was issued contrary to the requirements of the rule.
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> However the minor's testimony was persuasive and internally consistent with the evidence. After initially identifying the clerk while standing at the front door approximately 12 feet from the clerk at the sales counter, the clerk stepped away from the counter and while standing side-by-side facing one another, the minor identified the clerk as the seller of the beer prior to the clerk being cited for a violation. A violation of the rule was not established.

Appellants' specific quibbles with regard to the face-to-face identification do not, singly or in combination, show a violation of rule 141(b)(5). The rule does not specify any particular means of identification that the decoy must use, so the lack of "words of identification" by the decoy is of no consequence. Similarly, it makes no difference for purposes of rule 141(b)(5) in this case that the decoy was instructed to point to the clerk, even if that were the only reason she did it.

Appellants cite no authority for their assertion that "strict adherence" to the rule means the decoy and the clerk can only be considered "face to face" if they are directly facing each other. However, appellants are not really insisting on strict adherence to the rule, but rather an inappropriately literal interpretation of the words "face to face."[4]

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[4]Appellants state in their brief that "the California legislature affirmatively chose to add the term 'face-to-face' to this subsection of Rule 141." The California Legislature, however, did not choose the wording. Rule 141 is not a statute enacted by the Legislature, but a regulation promulgated and adopted by the Department under the

The same rules of construction used to interpret statutes apply when interpreting regulations. (*Farm Sanctuary, Inc. v. Dept. of Food & Agriculture* (1998) 63 Cal.App.4th 495, 505-506 [74 Cal.Rptr.2d 75]; *Goleta Valley Community Hospital v. Dept. of Health Services* (1983) 149 Cal.App.3d 1124, 1129 [197 Cal.Rptr. 294].) The words of a regulation must be given their "usual and ordinary meaning," the goal being "to determine the intent of the adopting authority." (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2003) 109 Cal.App.4th 1687, 1695-1696 [1 Cal.Rptr.3d 339].) If there is any ambiguity in the terms used, "we examine the context in which the language appears" and "consider the core objective of the regulation [citation] and its history and background." (*Id*. at p. 1696.)

Appellants' position appears to be that the "usual and ordinary meaning" of "face-to-face" is limited to a situation in which the two people involved are squarely facing each other, looking directly at each other, and intent on, and fully aware of, each others' actions and words. We disagree because appellants' restrictive interpretation of the phrase does not constitute its usual and ordinary meaning, nor does it reflect the context or core objective of the regulation.

A dictionary provides the usual and ordinary meanings of words. Following are a few examples of definitions of the expression "face-to-face":

- Webster's Third New International Dictionary (1986): "within each other's sight or presence : involving close contacts : in person"
- The American Heritage Dictionary (4th ed. 2000): (adj.) "Being in the presence of another; facing"; (adv.) "In person; directly"
- The American Heritage Dictionary of Idioms (1997): "In each other's presence, opposite one another; in direct communication." "Confronting each other"

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mandate of Business and Professions Code section 25658, subdivision (f). The mandate did not include use of the term "face-to-face."

The dictionary definitions focus on the parties being in each other's presence, rather than being directly opposite each other. We believe this comports with the ordinary meaning of the phrase.

The Appeals Board provided this definition of "face to face" in the context of rule 141(b)(5) in *Chun* (1999) AB-7287:

> the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Not only is this definition in accord with the dictionary definitions, it takes into consideration the context of a decoy operation, where the safety of the decoy is a concern, and the face-to-face identification is merely one part of the overall situation, not some theatrical accusation. The core objective of rule 141 is fairness to licensees when decoys are used to test their compliance with the law. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board*, *supra*, 109 Cal.App.4th at p. 1698.) Rule 141(b)(5) is concerned with both identifying the seller and providing an opportunity for the seller to look at the decoy again, soon after the sale. (*Ibid*.) It does not require a direct "face off" to accomplish these purposes. Regardless of whether the clerk heard what the decoy said to the officer, he had the opportunity to look at the decoy again. The opportunity is all that needs to be provided; if the opportunity is provided, but the clerk does not take advantage of the opportunity, the rule is not violated.

Appellants contend that they are entitled to a complete defense to the accusation because the Department did not make a prima facie showing of compliance with rule 141(b)(5). They assert that the officer first testified that the citation was issued before the decoy re-entered the premises to make the identification; then testified that, in

general, issuing a citation was the last thing the officers did before leaving the premises; and the ALJ stated that the officer did not remember what happened.

Appellants cite three Appeals Board decisions: *The Southland Corporation & R.A.N., Inc.* (1998) AB-6967; *Rahman* (2000) AB-7412; and *The Von's Corporation* (2002) AB-7819 (*Vons*). Appellants refer to the first two for their statements that the Department must make a prima facie showing of compliance with the law before the licensee must show that law enforcement did not comply. In the third case, *Vons*, appellants state that the Board "more narrowly framed the Department's obligation in this regard," and they quote the standard definition of "prima facie" that the Board included in its opinion. Putting that sentence (in italics in the following quotation) in context, however, reveals that *Vons* repudiates not only the first two cases appellants cite, but appellants' argument as well:

> Appellant asserts that the Department must, at the outset, "demonstrate that there is substantial evidence to conclude that the decoy operation was conducted in a fair manner," before appellant is required to present any evidence that the decoy operation was conducted unfairly. Appellant misunderstands the differing natures of the various burden-of-proof standards. The requirement of "substantial evidence" to support a Department decision is the standard used by this Board, and the appellate courts, when reviewing a decision. The ultimate burden of persuasion at the administrative hearing is the preponderance of the evidence. *The Department's initial burden of producing evidence, however, is merely to make a prima facie case, that is, to produce sufficient evidence to support a finding in its favor in the absence of rebutting evidence.*
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> Appellant cites this Board's decision in *The Southland Corporation/R.A.N.* (1998) AB-6967, in support of its contention that the Department failed to meet its burden of proof. The appellants in *7-Eleven/Azzam* (2001) AB-7631, also cited that Board decision when they argued that the Department had not met its burden of proving that Rule 141(b)(5) had been complied with because no specific evidence was presented of the sequence of events to show that the face-to-face identification was made before the selling clerk was cited. The Board rejected that argument, saying,

> "In our view, once there has been affirmative testimony that the face to face identification occurred, the burden shifts to appellants to demonstrate why it did not comply with the rule, i.e., that the normal procedure, for the issuance of a citation following the identification of the accused, was not followed. We are unwilling to read our decision in The Southland Corporation/R.A.N. as expanding the affirmative defense created by Rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule."

We reiterate here that a Rule 141 defense requires evidence that there was a violation of the rule.

The evidence presented by the Department in the present case was clearly sufficient to allow the ALJ to conclude that the violation had occurred and that the decoy operation was conducted fairly; it was appellant's burden at that point to present evidence rebutting that evidence. If appellant chose not to present any evidence, but to rely solely on its mistaken belief that the Department had not met its initial burden of producing evidence, it has no basis for complaint on appeal.

Many Appeals Board opinions have repeated the ideas expressed in *Vons*, *supra*. The Board opinions in *7-Eleven, Inc. & Veera* (2003) AB-7890, *7-Eleven, Inc. & Bal* (2002) AB-7872, and *7-Eleven, Inc. & Saulat* (2002) AB-7862, quoted and followed the same language from *Azzam* that *Vons* did. In *7-Eleven, Inc. & C Bar J Ranch, Inc.* (2002) AB-7800, *7-Eleven, Inc. & Singh* (2002) AB-7792, and *7-Eleven, Inc. & Gonser* (2001) AB-7750, the Board reminded the appellants that rule 141 provided an affirmative defense that required evidence that the rule was not complied with, and that speculation does not satisfy an appellant's burden of proof.

In *7-Eleven, Inc. & Mandania* (2002) AB-7828, the Appeals Board rejected the same argument appellants make here:

> Appellants argue that a strict application of Rule 141, as required by the holding in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126], obligates the Department to prove that the issuance of the citation followed the face to face identification.

> Appellants are mistaken. Rule 141 is an affirmative defense, and the burden of proof is on the licensee. Since the record is silent as to when the citation was issued, appellants have not satisfied their burden. It should be noted that appellants could have resolved the issue by simply asking their witness about the sequence of events.

Appellants are attempting to resurrect a long-dead notion, and it appears that much of the impetus for their attempt comes from their reading of *The Southland Corporation/R.A.N.*, *supra*. We have struggled with the anomaly of that appeal for a number of years and have attempted to bring the troublesome language of the opinion into line with the rest of the Board's opinions. It has become obvious to us that this approach requires the Appeals Board to address and reject, over and over again, contentions such as appellants make here. This promotes neither fairness nor justice. Therefore, to the extent that *The Southland Corporation/R.A.N.* is seen as imposing on the Department an initial burden of proof with regard to the affirmative defense of rule 141 before an appellant has presented any evidence of a violation of that rule, it is overruled.

Appellants' contention must be rejected on a factual basis as well. In Conclusion of Law 11, the ALJ rejected the testimony of the clerk upon which appellants' argument relies. The ALJ relied instead on the decoy's testimony that she identified the clerk before he was cited for the violation, which he found to be "persuasive and internally consistent with the evidence." It is the province of the trier of fact, not this Board, to resolve evidentiary conflicts and assess witness credibility.

Appellants have not shown that rule 141(b)(5) was violated.

III

Rule 141(a) requires that law enforcement agencies conduct decoy operations "in a fashion that promotes fairness." Appellants contend that this provision was violated because the decoy operation was conducted during a time that law enforcement officials knew, or should have known, that appellant's premises was busier

than usual. The store was busy, according to appellants, because there was only half an hour left in which to buy California State Lottery tickets for a very large jackpot.

Appellants raised this issue at the administrative hearing and it is addressed in the Department's decision in Findings of Fact 12 and 13:

> 12. It is contended on the part of the respondents that the decoy operation was not conducted in a manner which promotes fairness (Rule 141(a)), and that the clerk was required to sign the citation prior to the face-to-face identification (Rule 141(b)(5)). It is claimed that the police took unfair advantage of the licensees by conducting a minor decoy operation at a time when they knew or should have known that the premises was very busy serving approximately 10 patrons lined up at the check-out stand waiting for service.
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> 13. While the evidence demonstrated that the premises was quite busy, there is nothing in the record of a design or plan on the part of the police to entrap the licensees to commit a violation or of an intent to exploit the situation or take advantage of the licensees by timing the operation to coincide with heavy business activity at the premises.

The ALJ discussed the fairness issue in his Conclusions of Law, with paragraphs 9 and 10 being the most pertinent:

> 9. In Circle K Stores (April 11, 2001, AB-7476), the Appeals Board held that the prevention of sales to minors requires a certain level of vigilance on the part of the sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy. However the opinion went on to say that it is conceivable that, where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate.
>
> 10. Unlike the facts in Circle K, where there appeared to be only 4 patrons in line and the officer did not think the store was crowded, in the case at bar there is no dispute that the store was rather crowded and busy serving approximately 10 patrons. There was an unusual level of patron activity because of the impending lottery drawing, and as a result the clerk was distracted from the transaction with the minor as evidenced by the findings of fact.

> However, there is no evidence to suggest that law enforcement officials sought to take advantage of such distraction and it asks too much of law enforcement to predict the time of day that, for a particular premises, would fairly be considered "rush hour" in deciding when and where to conduct a minor decoy operation. There was no demonstrable showing of unfairness in the conduct of the decoy operation.

Appellants' argument is simply to insist that the officers knew or should have known that the Lottery sales would be particularly distracting just before the cutoff for purchasing tickets, especially in light of the large jackpot.

In *7-Eleven, Inc. & Veera*, *supra*, the appellant argued that the decoy operation was unfair partly because the store was busy with people wanting to buy lottery tickets. The Board turned to the language of *Circle K*, cited in the Department's decision (*ante*, FF 9) in responding to the argument:

> This Board addressed the "rush hour defense" in *Circle K Stores, Inc.* (2001) AB-7476, saying:
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> > The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy.
> >
> > We believe it asks too much to require law enforcement to predict the time of day that, for a particular premises, would fairly be considered "rush hour."
> >
> > It is conceivable that, where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate. This does not appear to be such a situation.

The ALJ addressed this contention and rejected it, as shown above, in accord with this Board's prior decisions. We think his analysis was sound and find it unnecessary to add anything to or comment further on his analysis and conclusion.

ORDER

The decision of the Department is affirmed.[5]

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

[5]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.