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

AB-8447
File: 20-366318 Reg: 04058221

7-ELEVEN, INC., KAMBIZ F. BIUKI, and FIROUZEH FOROUGHIBIUKI,
dba 7-Eleven Store # 2136-18866
3227 North Glenoaks Boulevard, Burbank, CA 91504,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 2, 2006
Los Angeles, CA

ISSUED MAY 10, 2006

7-Eleven, Inc., Kambiz F. Biuki, and Firouzeh Foroughibiuki, doing business as 7-Eleven Store # 2136-18866 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days 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., Kambiz F. Biuki, and Firouzeh Foroughibiuki, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, 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 June 9, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 5, 2000. On October 26, 2004, the Department filed an accusation against appellants charging that, on June 11, 2004, their clerk, Mandip Singh (the clerk), sold an alcoholic beverage to 19-year-old Natalie Avedissian. Although not noted in the accusation, Avedissian was working as a minor decoy for the Burbank Police Department at the time.

At the administrative hearing held on April 22, 2005, documentary evidence was received, and testimony concerning the sale was presented by Avedissian (the decoy), the clerk, and co-licensee Kambiz F. Biuki.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants filed an appeal contending that the Department violated their right to discovery under Government Code section 11507.6; violated their right to due process by an ex parte communication; and failed to prove compliance with rule 141(b)(5)[2].

DISCUSSION

I

Appellants assert in their brief that their pre-hearing motion seeking discovery of all decisions certified by the Department over a four-year period "where there is therein a finding or an effective determination that the decoy at issue therein did not display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense," was improperly denied. Appellants allege that ALJ Gruen,

[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.

who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellants failed to show that the requested items were relevant or would lead to admissible evidence.[3]

Appellants spend much of their brief arguing that the provisions of the Civil Discovery Act (Code Civ. Proc., §§ 2016-2036) apply to administrative proceedings before the Department, a contention this Board rejected in numerous cases in 1999 and 2000. One of those cases, *The Southland Corporation/Rogers* (2000) AB-7030a, is representative of the Board's response to this argument:

> "[T]he exclusive right to and method of discovery as to any proceeding governed by [the APA]" is provided in §11507.6. (Gov. Code, §11507.5.) The plain meaning of this is that any right to discovery that appellants may have in an administrative proceeding before the Department must fall within the list of specific items found in Government Code §11507.6, not in the Civil Discovery Act. . . . . [¶] In addition, §11507.7 requires that a motion to compel discovery pursuant to §11507.6 "shall state . . . the reason or reasons why the matter is discoverable *under that section* . . . ." [Emphasis added.] [¶] Therefore, we believe that appellants are limited in their discovery request to those items that they can show fall clearly within the provisions of §11507.6.

Appellants' arguments in the present appeal, repeating, almost verbatim, the arguments made in 1999 and 2000, are no more persuasive today than they were six or seven years ago.

Appellants argue they are entitled to the materials sought because they will help them "prepare its [sic] defense by knowing . . . what factors have been considered by the Department in deciding how a decoy's appearance violated the rule" so that they

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[3]The only documents in the record related to this contention are appellants' Request for Discovery and the Department's Response to [Appellant's] Motion to Compel. The record includes neither the alleged Motion to Compel nor the purported order by ALJ Gruen. No documents were included as exhibits to appellants' brief. This failure of evidence would be a sufficient basis in itself to reject appellants' contention in this appeal.

can compare the appearance of the decoy who purchased alcohol at their premises with the "characteristics, features and factors which have been shown in the past to be inconsistent with the general expectations . . . of the rule." (App. Br. at pp. 13, 14.) They assert that decisions in which decoys were found not to comply with rule 141(b)(2) "could assist the ALJ in this case by comparison." (*Id.*, p. 13.) However, appellants do not explain how an ALJ is expected to make such a comparison.

It is conceivable that each decoy who was found not to display the appearance required by the rule had some particular attribute, or combination of attributes, that warranted his or her disqualification. We have considerable doubt, however, that any such attributes, which an ALJ would only be able to examine from a photograph or written description, would be of any assistance in assessing the appearance of a different decoy who is present at the administrative hearing.[4]

The most important attribute at the time of the sale is probably the decoy's facial countenance, since that is the feature that confronts the clerk more than any other. Yet, it is, in every case, an ALJ's overall assessment of a decoy's appearance that matters, not simply a focus on some narrow aspect of a decoy's appearance.

We know from our own experience that appellants' attorneys represent well over half of all appeals this Board hears. We must assume, therefore, that the vast bulk of the information they seek is already in the possession of their attorneys. This, coupled with the questionable assistance this information could provide to an ALJ in assessing the appearance of a decoy present at the hearing, persuades us that ALJ Gruen did not abuse his discretion in denying appellant's motion.

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[4] In all cases charging sale-to-minor violations the Department must produce the minor involved unless the minor is deceased or too ill to be present, or the minor's presence is waived by the respondent. (Bus. & Prof. Code, § 25666.)

II

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.

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 in this decision collectively as "*Quintanar"* or "the *Quintanar* cases").[5]

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.

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[5]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.)

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.

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.

III

Appellants contend the Department failed to prove that there was compliance with rule 141(b)(5), which provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Appellants argue that there was a failure of proof because the decoy purchased a six-pack of Bacardi Silver O from their clerk, but the decoy did not identify who sold her the Bacardi Silver O; according to appellants, the record shows that the minor identified a clerk who sold *beer* to her. Appellants argue that the parties stipulated at the hearing that Bacardi Silver O is a malt beverage, not beer, and since not all malt beverages are beer, the decoy did not identify the clerk who sold Bacardi Silver O to her.

Appellants' contention is based on the following exchange between Mr. Ainley, counsel for the Department, and the decoy during direct examination:

> Q When the officer asked you to identify the person who sold you the *beer*, what did you do?
> A I pointed out the clerk who had sold it to me.

[RT 13, italics added.]

Since appellant did not raise this as an issue at any time during the administrative proceeding below, we may consider the issue waived. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, p. 444.) Even if we were to consider it, we would not find appellants' argument persuasive.

The decoy did not testify that the person she identified sold her beer; rather, the attorney questioning her misspoke by referring to her purchase as "beer" when asking her about how she identified the clerk. The decoy testified earlier that she "entered back into the store and identified the clerk who had sold me the *alcohol*." [RT 11 (italics added).] Shortly before the question relied upon by appellants, counsel for the Department asked the decoy what the police officer asked her after she re-entered the premises with the officers. She replied: "He asked me to point out the person who had sold me the *alcohol*." [RT 13 (italics added).]

Obviously, the decoy understood the question as referring to the alcoholic beverage she had purchased, which had been established to be Bacardi Silver O. No other alcoholic beverage was mentioned during the hearing, nor was any other clerk. It would be unreasonable and improper to construe the attorney's misstatement in his question as an affirmative statement by the decoy that she had identified a clerk who sold beer to her, rather than the clerk who sold Bacardi Silver O to her.

Given our conclusion above, it is not necessary for us to decide whether Bacardi Silver O would be considered beer under the Alcoholic Beverage Control Act (ABC Act).

However, appellants' unsupported statement that beer is a malt beverage, but not all malt beverages are beer, appears to us to be incorrect, given the definition of beer in Business and Professions Code section 23006:

> "Beer" means any alcoholic beverage obtained by the fermentation of any infusion or decoction of barley, malt, hops, or any other similar product, or any combination thereof in water, and includes ale, porter, brown, stout, lager beer, small beer, and strong beer but does not include sake, known as Japanese rice wine.

Although "malt beverage" is not defined in the ABC Act, we assume that it was and is being used in this case to mean an alcoholic beverage made by the fermentation of a liquid containing malt. By its terms, the statute defines "beer" as "*any* alcoholic beverage" resulting from fermentation involving malt; therefore, all malt beverages would appear to be, for purposes of the ABC Act, beer.

In any case, there is no question that the clerk sold an alcoholic beverage to the decoy or that the decoy correctly identified the clerk who sold an alcoholic beverage to her. Under the circumstances, it makes no difference whether it was called a malt beverage or malt liquor or beer. There was no violation of rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[6]

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

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[6]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.