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

AB-8560
File: 20-359339 Reg: 05060739

7-ELEVEN, INC., HARVINDER KAUR KHAIRA , and MANMOHAN SINGH KHAIRA
dba 7-Eleven #2237-15883C
1045 Old Oakdale Road, Modesto, CA 95355,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 5, 2007
San Francisco, CA

ISSUED JUNE 12, 2007

7- Eleven, Inc., Harvinder Kaur Khaira, and Manmohan Singh Khaira , doing business as 7-Eleven #2237-15883C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk, Daniel Schwerdt, having sold a six-pack of Coors Light beer to Christopher J. Dole, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7- Eleven, Inc., Harvinder Kaur Khaira, and Manmohan Singh Khaira, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated April 20, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 2, 1999. The Department instituted an accusation against appellants on September 19, 2005, charging the sale of an alcoholic beverage to a minor on May 28, 2005.

An administrative hearing was held on February 15, 2006, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and that no affirmative defense had been established under Business and Professions Code section 25660 or Department Rule 141(a) and (b)(2).

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the findings are not supported by substantial evidence; and (2) the Department violated the APA's prohibition against ex parte communications.

DISCUSSION

I

Appellants assert that Finding of Fact 10 is not supported by substantial evidence. Appellants say that it "blatantly misquoted and distorted" the testimony of appellant's clerk in order to ruin his credibility and support the conclusions of the proposed decision.

Appellants single out two sentences of Finding of Fact 10 (in italics) of the proposed decision:

> Clerk Schwerdt testified at the hearing. He had worked at Respondents' Licensed Premises since March 2005. He remembered the sales transaction to decoy Dole. *He recalled checking Dole's ID and did not recall it having a red stripe, although he said he should have noticed it since it is very prominent. He did not recall it having the photograph on the right side. He did not recall what date of birth was on the ID, but he recalled checking for the year of birth, either 1984 or 1987.* He said he checked Dole's ID because he has seen people 35

> years of age who appear to be 15 years of age and people 15 years of age who appear to be 35 years of age. He looked Dole over and noticed his "stature" and how "he carried himself." He also noticed whether Dole was "hesitant" to show his ID. Schwerdt said he formed the opinion that Dole looked 21 years of age as he "carried himself well."

Appellants theorizes that the decoy must have used a false ID that did not have a red stripe, since the clerk testified that he did not recall seeing a red stripe on the license presented to him by the decoy.

> Q. The amount of time you looked at the ID, do you think you would have noticed it if it was there?
>
> A. Definitely. It's very prominent. (RT 35.]

Appellants claim that "the only reasonable conclusion" that can be drawn from this testimony "is that the red stripe was not on Dole's ID." (App. Br., page 5.)

Appellants' major premise is that the clerk testified truthfully and the decoy did not. The decoy testified that he produced his true California driver's license (Exhibit 4), that it did have a red stripe and the words "21 IN 2007" on it. The administrative law judge (ALJ) examined the original of Exhibit 4 and the black and white copy, which clearly displays the existence of the stripe, and noted that the photocopy appeared to be an accurate copy of the original except for certain entries which were blacked out.

The ALJ chose to accept the testimony of the decoy over that of the clerk, finding no evidence that the decoy possessed or displayed false identification. Appellants offer only their bald assertion that a search of the decoy after the transaction might have disclosed the existence of a false ID. The decoy had been searched before the operation began. There is nothing to indicate a second search would have produced a different result. We agree with the ALJ that there is no requirement in Rule 141 that the decoy's ID be shown to the clerk after the transaction has concluded.

That part of the finding that the clerk did not recall the ID having the photograph on the right side may, in fact, be incorrect, since the clerk's reference to the "placement of the picture, the smaller picture" could well have embraced both the larger and the smaller of the pictures. However, we do not believe the weight of the ALJ's finding is in any way diminished by this possible misinterpretation of the clerk's testimony.

The same is true of appellants' claim that the ALJ mischaracterized the transcript when stating that the clerk did not recall the date of birth on the ID. The clerk's answer to the question whether he recalled the date of birth on the ID was less than precise: "You always check for '84. '84 or '87 if he was buying alcohol. He wasn't buying tobacco. He was buying alcohol, so '84." Appellants have picked that part of the clerk's answer which best fits their theory of the case, and ignore the fact that the answer as a whole could well have been heard to say what the ALJ thought it said.

We find no substantial merit in appellants' challenge to Finding of Fact 10.

II

Appellants have filed a motion to augment the administrative record with any form 104 (Report of Hearing) included in the Department's file, and have filed a supplemental brief regarding the recent decision of the California Supreme Court in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [50 Cal.Reporter 3d. 585] (*Quintanar*).

On November 13, 2006, the California Supreme Court held that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. (Quintanar, *supra*, 40 Cal.4th 1.) In *Quintanar*, the

Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access to the report of hearing, establishing, the court held, "that the reports of hearing were provided to the agency's decision maker." *(Id.* at pp. 15-16.)

In the present case, appellants contend a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar* has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.[2]

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[2] The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

ORDER

The decision of the Department is affirmed as to issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[3]

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

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

[3]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.