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

AB-8859
File: 47-6660 Reg: 07065827

ABBJOHN, INC., dba Pancho's Restaurant
3615 Highland Avenue, Manhattan Beach, CA 90266,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 7, 2009
Los Angeles, CA

ISSUED AUGUST 20, 2009

ABBJohn, Inc., doing business as Pancho's Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for five days, all of which were stayed during a probationary period of one year, for its waitress 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 ABBJohn, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Alicia Ekland, 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 March 17, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on July 1, 1977. In 2007, the Department filed an accusation charging that appellant's waitress, Chantal Gonsalves, sold an alcoholic beverage to 19-year-old Timothy Patterson on March 16, 2007. Patterson was working as a minor decoy for the Manhattan Beach Police Department at the time.

At the administrative hearing held on December 5, 2007, documentary evidence was received, and testimony concerning the sale was presented by Patterson (the decoy) and by Richard Hatten, a Manhattan Beach police officer. The record remained open thereafter until January 30, 2008, when the waitress, Gonsalves, testified.

Patterson entered the licensed premises about 8:30 p.m. with another decoy, Ryan Yee. They sat at a table and waitress Gonsalves asked what they wanted to drink. Patterson ordered a Bud Light beer and Yee asked for water. Gonsalves brought a glass of beer for Patterson and a glass of water for Yee. Gonsalves did not ask Patterson his age or for identification.

Manhattan Beach police officers then approached Gonsalves and told her she had served a minor. Patterson later identified Gonsalves as the person who served beer to him.

Gonsalves testified that she did not ask for identification or the decoy's age because she assumed the decoy was over 25. She assumed this because she was 25 and she thought he looked older than she was. She also said that Yee did not order anything, but told her he was waiting for a friend.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no violation of rule 141(a)[2] or 141(b)(2), or any other affirmative defense, was established.

Appellant filed an appeal contending: (1) the Department provided an incomplete record to the Appeals Board; (2) rule 141(a) was violated, and (3) the administrative law judge (ALJ) improperly admitted into evidence a report that was not provided to appellant during discovery.

DISCUSSION

I

Appellant contends the Department's decision must be reversed because the Department certified two different sets of documents as the "true, correct and complete record." This makes it impossible, appellant argues, to know "whether all of the key documents were reviewed in writing the Proposed Decision and in the later certification of that decision" by the Department. Additionally, appellant asserts that by certifying two different sets of documents, the Department violated Appeals Board rule 188 (4 Cal. Code Regs., § 188) and the Department's General Order 2007-09.

Appellant's contention arises from the omission from the initial certification of documents concerning appellant's unsuccessful motion to compel discovery. The documents related to the motion were distributed to the parties and the Appeals Board under the second certification.

This issue in this case is identical to that raised in a large number of cases heard previously by the Board where there have ostensibly been two certified records. The

[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.

Board has treated the issue as one involving a procedural error which seldom justifies reversal. (*Garfield Beach LLC* (2009) AB-8767). Reversal is particularly unjustified here because appellant has not identified any prejudice flowing from the error.

The only documents omitted from the original certification were related to appellant's motion to compel discovery, which sought information about decoys in other cases. It is unreasonable to think these documents, whether or not part of what the decision maker reviewed, would have had any bearing on the merits of the case when it was before the Department. Similarly, the documents have no bearing on the present appeal, at least none that has been pointed out to this Board. Appellant has raised no issue in its appeal related to the discovery motion.

In any event, the second certification supplying the missing documents was filed by the Department almost three months prior to the filing of appellant's opening brief. Appellant has not claimed any documents are missing from the supplemented record, and offers only speculation that documents not properly part of the record were included with the documents available to the decision maker.

It is obvious from the two certifications, when read together, that the second certification was intended to supplement the original certification. What occurred appears to be nothing more than a clerical oversight in failing to designate a supplemental filing as such. The Department has simply furnished the Appeals Board with a complete record in two parts.

Since all the appropriate documents have been certified by the Department, albeit in two separate packages, there has been no violation of either Appeals Board rule 188 or Department General Order 2007-09.

This case is nothing like *Circle K Stores, Inc*. (2007) AB-8597, where the certified record contained potentially prejudicial documents that clearly should not have been included.

II

Rule 141(a) requires that law enforcement agencies conduct decoy operations "in a fashion that promotes fairness." Appellant contends that this provision was violated by the use of two decoys at appellant's premises and the Department's failure to have the second decoy attend the administrative hearing.

A number of cases involving two decoys have been heard by the Appeals Board. The Board has said in those cases that, "the real question to be asked . . . is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law." (*7-Eleven, Inc./Janizeh Corporation* (2002) AB-7790.)

Nothing in the testimony of any of the witnesses indicated that Yee, the second decoy, did anything to distract Gonsalves or impair her ability to comply with the law. Gonsalves did not say she was distracted or confused by Yee; she simply misjudged the age of the decoy. There was no unfairness in having the second decoy there.

Appellant relies on several prior Board decisions involving decoy operations where another person accompanied the decoy: *7-Eleven, Inc./Smith* (2001) AB-7740; *Hurtado* (2000) AB-7246; and *Mauri Restaurant Group* (1999) AB-7276. In the first two cases the Board disapproved "active participation" by the second person, finding that such participation was sufficiently likely to be misleading as to make the decoy operations unfair. In the present case, there was no "active participation" by Yee.

In *Mauri Restaurant Group*, *supra*, the minor decoy told the maitre d' and the waiter at the restaurant, untruthfully, that he was going to have dinner, that he was waiting for friends, and that he was staying at the nearby Hyatt hotel. The Board concluded that the decoy's conduct, as a whole, could "fairly be equated with a misrepresentation as to his age." The Board explained:

> What was the effect of the decoy's misrepresentation? It resulted in his being seated at a table in the dining room, where the decoy then told the waiter he was waiting for other people . . . , which was also untrue, and was calculated to mislead the waiter into thinking the decoy was a bona fide patron.
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> ¶ . . .¶
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> It is one thing for a decoy to not volunteer information that might alert a seller to the fact that the decoy is not of legal age. It is quite another for a decoy to volunteer false information to induce exactly the opposite, as the events in this case illustrate.

It is quite obvious that, even if Yee did tell the waitress he was waiting for a friend, that statement had none of the potential to mislead as did the decoy's statements in *Mauri Restaurant Group*.

The presence of a second person with the decoy does not per se cause a violation of the rule. Rule 141 provides an affirmative defense, and it is up to the appellant to show that the rule was violated. Appellant has not done so.

Appellant also alleges that the hearing was "inherently unfair" because the Department failed to produce Yee at the hearing, leaving no record of Yee's appearance and how it might have affected the appearance of the decoy. However, as discussed above, Yee was not the decoy nor was he an active participant in the decoy operation. He did nothing to distract or confuse the waitress. There is no evidence that his appearance had any effect on how the decoy appeared to the waitress. There simply was no reason for Yee to be present at the hearing.

III

Appellant contends it was unfairly surprised by the Department's failure to provide the Sheriff's Department laboratory report before the hearing and that the report should not have been admitted into evidence. The report states the result of an analysis of a sample of the beer served to the decoy.

During cross-examination of officer Hatten, appellant's counsel ascertained that the officer took a sample of the beer served to the decoy, the sample was submitted to the Sheriff's Department crime laboratory for analysis, a report of the chemical analysis was prepared by the laboratory, and the Department's attorney received a copy of that report earlier on the day of the hearing. Appellant's counsel asked to review the report, since the Department had not provided it during discovery. After reviewing the one-page report, appellant's counsel asked to have it marked as Exhibit B. He then had the officer describe the procedure used to submit the sample for testing.

Appellant's counsel did not move to have the report admitted into evidence, but when he declined to do so, the Department moved to have it admitted. Appellant objected, arguing that the Department should have provided the report earlier than the middle of the hearing. The ALJ pointed out that the Department attorney could not have provided the report sooner because she had just received it herself. The report was admitted into evidence as Exhibit B.

During closing argument on the second day of the hearing (January 30, 2008), appellant asserted that the proceeding had been "tainted" by the failure of the Department to provide the chemical analysis report to appellant before the hearing started or at least before officer Hatten testified. Appellant's counsel stated that not having the report earlier "severely affected" his ability to cross-examine the officer.

It is true that the report was discoverable, and perhaps the Department could have given the report to appellant earlier in the hearing. However, even if we assumed, for argument's sake, that it was error to admit the report into evidence, that would not support reversing the Department's decision.

"Error alone, however, does not warrant reversal. 'The burden is on the appellant, not alone to show error, but to show injury from the error.' (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 325, p. 335, italics omitted.)" *(Robbins v. Los Angeles Unified School Dist*. (1992) 3 Cal.App.4th 313, 318 [4 Cal.Rptr.2d 649].)

Appellant does not, and cannot, show it was prejudiced or injured by admission of the report into evidence. The only possible use of the report would be to establish that the decoy was served an alcoholic beverage. Since appellant did not contest the fact that the decoy was served beer, the presence or absence of the report could make no difference. In addition, even if appellant had disputed that an alcoholic beverage was served, the testimony of the decoy, the officer, and the waitress constituted substantial evidence supporting such a finding.

ORDER

The decision of the Department is affirmed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.