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

AB-8249
File: 20-214382 Reg: 03055523

7-ELEVEN, INC., ALICE W. CHOU, and JACK S. CHOU dba 7-Eleven #2133-16127
20832 Vanowen Street, Canoga Park, CA 91306,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 3, 2005
Rehearing June 2, 2005
Los Angeles, CA

ISSUED AUGUST 25, 2005

7-Eleven, Inc., Alice W. Chou, and Jack S. Chou, doing business as 7-Eleven #2133-16127 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk, Ninna Edirisinghe, having sold a 24-ounce bottle of Corona beer to Roman Figueroa, 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., Alice W. Chou, and Jack S. Chou, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department made pursuant to Government Code section 11517, subdivision (c), dated February 9, 2004, is set forth in the appendix, together with the proposed decision issued by the administrative law judge (ALJ).

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 18, 1980. On July 31, 2003, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on November 5, 2003, at which time oral and documentary evidence was received. Subsequent to the hearing, the ALJ issued a proposed decision which found that the charge of the accusation had been established, no affirmative defense had been established, and which ordered a suspension of 10 days. The Department, acting pursuant to Government Code section 11517, subdivision (c), adopted the proposed decision in all respects except as to penalty, and ordered the 10-day suspension stayed in its entirety, subject to one year of discipline-free operation.

Appellants have filed a timely appeal in which they contend that the ALJ erred by failing to consider the decoy's prior experience in decoy operations when he concluded that the decoy presented the appearance required by Rule 141(b)(2).[2] Appellants also claim they were denied due process when the Department attorney made a Report of Hearing available to the Department's decision maker.

DISCUSSION

I

Appellants contend that the ALJ erred in failing to consider the decoy's prior

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[2] Rule 141(b)(2) (4 Cal. Code Regs., §141 subd. (b)(2)) provides:

> The decoy shall 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.

Rule 141(c) provides that a failure to comply with the rule shall be a defense to any action brought under Business and Professions Code section 25658.

experience as a decoy in concluding that the decoy presented the appearance required by Rule 141(b)(2). Appellants point to the decoy's experience in five or six decoy operations, in the course of which he visited approximately 100 establishments, and his employment in a civilian student capacity by the Los Angeles Police Department. They argue that, because of this experience, he was comfortable and not nervous while in appellants' store. Appellants also assert that a "big, puffy jacket" made him appear larger than his actual size while in the store.

The ALJ made the following findings with respect to the appearance of the decoy (Finding of Fact D-1-3):

> The overall appearance of the decoy including his demeanor, his poise, his size, his mannerisms and his physical appearance were consistent with that of a person under the age of twenty-one years and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation.
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> 1. The decoy is [a] tall and slender male who is five feet ten and one half inches in height and who weighs approximately one hundred forty-five pounds. On the date of the sale, he was clean-shaven, his hair was short and he was wearing the same blue jeans and gray T-shirt that he was wearing at the hearing. However, he was also wearing a plaid flannel jacket on the day of the sale because of the cold weather that day. The photograph depicted in Exhibit 2 was taken on the day of the sale and it depicts how the decoy was dressed and how he looked on that day.
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> 2. The decoy testified that he volunteered as a decoy, that he started working part-time as a civilian student worker for the Los Angeles Police Department in July of 2002 performing mostly clerical work, that he had participated in approximately five or six prior decoy operations and that he was comfortable with the decoy operation.
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> 3. After considering the photograph depicted in Exhibit 2, the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.
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> The decoy testified that the clerk did not ask him his age or for his identification.

The only conversation between them consisted of the clerk's stating the price of the

beer.

The clerk, whose testimony the ALJ deemed not credible, testified that he mistook the decoy for another customer he thought was 24 or 25, who comes into the store two times a week. The clerk also testified that the decoy was waiting at the counter while the clerk was addressing a problem with the store microwave. He acknowledged, however, that he had time to request identification, but elected not to do so.

We find it difficult to accept appellants' contention that the ALJ failed to consider the decoy's prior experience as a decoy, when the subject is specifically addressed in his proposed decision. It is also difficult to understand how the decoy's comfort level enhanced his apparent age when the record indicates he never spoke to the clerk.

We have said many times that we are not inclined to substitute our judgment for that of the ALJ on the question of the decoy's apparent age, absent very unusual circumstances, none of which are present here. In the appeal of *Idrees* (2001) AB-7611, we said:

> As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies, and making the determination whether the decoy's appearance met the requirement of Rule 141, that he or she possessed 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.
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> This Board is not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy did not have the appearance required by the rule, and an equally partisan response that she did.

Similarly, this Board has previously addressed the contention that a decoy's experience necessarily made him or her appear to be over the age of 21. The Board rejected this type of contention in *Azzam* (2001) AB-7631:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.

Appellants ignore the language in *Azzam*, *supra*, which makes clear that there must be evidence presented that the decoy's experience actually made the decoy appear to be 21 years of age or older. The ALJ apparently saw no evidence of this at the hearing and appellants have not pointed to any evidence that might tend to support their assertion.

II

Appellants assert the Department violated their right to procedural due process when the attorney representing the Department at the hearing before the ALJ (the advocate) 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 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").[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. In each of the three cases involved in *Quintanar*, the administrative law judge (ALJ) had submitted a proposed decision to the Department that dismissed the accusation. In

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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.)

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 them in this administrative proceeding. Under these circumstances, and with the potential of 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.

ORDER

The decision of the Department is affirmed.[4]

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

[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.