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

AB-8261
File: 20-374324 Reg: 03055994

7-ELEVEN, INC., and VICHEA CORPORATION dba 7-Eleven Store 2174 18881
5000 Long Beach Boulevard, Long Beach, CA 90805,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED OCTOBER 13, 2005

7-Eleven, Inc., and Vichea Corporation, doing business as 7-Eleven Store 2174 18881 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Sam Heoun, having sold a 24-ounce can of Coors Light beer to Alexander Lancaster, a 15-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Vichea Corporation, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated March 4, 2004, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 10, 2001. Thereafter, the Department instituted an accusation against appellants charging that, on May 16, 2003, appellant's employee sold an alcoholic beverage to a minor.

An administrative hearing was held on January 14, 2004, 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 no affirmative defense had been established.

Appellants thereafter filed a timely appeal in which they contend that there was no compliance with rule 141(b)(2),[2] and that they were denied due process as a result of a report of hearing having been made available to the Department's decision maker.

DISCUSSION

I

Appellants contend that the 15-year-old decoy, because of his size (5' 10" tall and weighing 235 pounds), his role (in high school) as an attorney in mock trials, the experience he gained in five or six ride-alongs with his Long Beach Police sergeant father, and his confidence during the decoy operation, did not display the appearance required by rule 141(b)(2).

Once again, the Appeals Board is asked to substitute its judgment of the apparent age of a young male decoy it has never seen for that of an experienced administrative law judge (ALJ) who observed and heard the decoy when he testified at the administrative hearing. In this case, appellants contend that the ALJ did nothing to

[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.

reconcile his finding that the decoy presented the appearance required by the rule with "the totality of the circumstances presented to the sales clerk." Appellant places considerable emphasis on the fact the decoy placed the payment for the beer on the counter even before he was asked for identification.[3]

We think the ALJ's factual findings refute the contention that he did not consider the totality of circumstances presented to the clerk (Findings of Fact 4, 5, and 10 through 12):

> *4*. Alexander Lancaster [Lancaster] was born September 16, 1987. He served as a minor decoy during an operation conducted by the Long Beach Police Department [LBPD] on May 16, 2003. At the time, Lancaster was 15 years of age.
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> *5*. Lancaster appeared at the hearing. He stood about 5 feet, 10 inches tall and weighed about 235 pounds. His wavy, brown hair was neatly trimmed. There had been no change in Lancaster's height since May 16, 2003, but he had gained about 10 pounds. He wore a high school sweatshirt and khaki trousers to the hearing. At Respondents' Licensed Premises he was dressed as is shown in Exhibits 2 and 3. At the hearing, Lancaster looked substantially the same as he did at Respondents' Licensed Premises on the date of the decoy operation, despite the weight gain and his having attained the age of 16 years.
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> *10*. May 16, 2003, was the second date decoy Lancaster worked undercover with LBPD as a decoy trying to buy alcoholic beverages. On the prior occasion Lancaster had visited 5 or 6 licensed premises. His father is a Sergeant for LBPD and Lancaster has gone along with him 5 or 6 times on "ride-a-longs." Decoy Lancaster is an 11th grader in high school and has participated twice in school-sponsored "mock trial" events. In the most recent one he played the role of a litigation attorney. Lancaster has not skipped any grades. He estimated that he is young for his level in school due to nothing more than where his birthdate falls.
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> *11*. Lancaster testified that he was comfortable with the decoy program and with testifying at the hearing. He presented himself at the hearing as a well-spoken young man who may present the appearance of one a year or two, or even three, beyond his actual 16 years. Clerk Heoun most likely had no occasion to hear Lancaster speak prior to selling him the beer since he did not engage

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[3] When asked for identification, the decoy produced a California ID which showed his true age and bore the legend "AGE 21 in 2008."

Lancaster in any conversation.

12. Based on his overall experience, *i.e.*, physical appearance, dress, poise, demeanor, maturity and mannerisms shown at the hearing, and his appearance/conduct in front of clerk Heoun at the Licensed Premises on May 16, 2003, Lancaster displayed the appearance that could generally be expected of a person under 21 years of age under the actual circumstances presented to Heoun This finding is made even though Lancaster very likely gave the appearance to Heoun of one older than his then 15 years of age.

We also think it significant that the ALJ addressed in his conclusions of law (Conclusions of Law 5 and 6) virtually all of the elements that appellants include in their "totality of circumstances" argument:

5. Respondents argued that the defense provided by sections 141(a) and 141 (b)(2) of title 4, California Code of Regulations [Rule 141] both apply to the facts of this case. Therefore, the matter should be dismissed. Respondents described decoy Lancaster as having "a strong, confident presence," having participated in mock trials and previous decoy operations, and as being raised in the family of a law enforcement officer. Therefore, Respondents argue, Lancaster did not present the appearance required by Rule 141(b)(2). The apparent age of decoy Lancaster was addressed above in Findings of Fact, paragraphs 5, 11 and 12. Facts relied upon by Respondents are for the most part true. Nevertheless, Lancaster's appearance in front of clerk Heoun and at the hearing fully complies with the rule, even though Lancaster may give the appearance of one a year or three older than he actually is. (Findings of Fact, ¶¶ 11 and 12.)

6. The contention that the decoy operation was not operated in a fair manner is based solely on the fact that decoy Lancaster put his $5 bill on the counter after setting the can of beer down, but before clerk Heoun requested his identification or before he stated the price for the beer. (Findings of Fact, ¶ 7.) This fact is said to have helped the clerk and sped the process of the transaction along. The facts show otherwise. Instead of "helping" the clerk or "speeding" the transaction along, the evidence shows clerk Heoun stopped and requested ID from Lancaster. [Citation.] He looked at the ID and returned it to Lancaster before completing the sale. There is no evidence that the decoy's innocent placing of currency on the counter prior to any interaction with the clerk had any effect on the transaction whatsoever. No lack of fairness was shown.

We have quoted extensively from the decision of the Department for two reasons. One reason is to illustrate that the ALJ gave careful consideration to the issues involved in his determination whether there was compliance with rule 141(b)(2).

The other is to show why this Appeals Board is so reluctant to interject itself into a fact-finding process on a subject with which the ALJ has intimate familiarity, while all this Board has is a cold record concerning a person the Board never sees. The disadvantage under which we labor is obvious, and explains why we defer to the factual determination of the ALJ in the absence of extraordinary or compelling circumstances, none of which are present here.

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.

The Appeals Board discussed this issue 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 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").[4]

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

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[4]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.)

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 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 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.

ORDER

The decision of the Department is affirmed.[5]

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

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[5] 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.