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

AB-8266
File: 20-364069 Reg: 03055457

CHEVRON STATIONS, INC. dba Chevron #9-4863
8687 Baseline Road, Rancho Cucamonga, CA 91730,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JUNE 30, 2005

Chevron Stations, Inc., doing business as Chevron #9-4863 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for its clerk, Candice Collins, having sold a can of Budweiser beer to Shannon Vanderkallen, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 11, 2000. On July 24, 2003, the Department instituted an accusation against appellant charging the

[1]The decision of the Department, dated March 11, 2004, is set forth in the appendix.

sale of an alcoholic beverage to a minor.

An administrative hearing was held on December 11, 2003, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction by Robert Harm, a San Bernardino deputy sheriff, and by Shannon Vanderkallen ("the decoy").

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellant had not established any affirmative defense.

Appellant has filed a timely notice of appeal. In its appeal, appellant contends that there was no compliance with Rule 141(b)(2). Appellant asserts that the administrative law judge (ALJ) based his finding that the decoy possessed the requisite appearance under the rule on a personal opinion unsupported by any evidence. Appellant has also filed a Motion to Augment Record, requesting that a document entitled "Report of Hearing" be included in the administrative record, and has asserted that the Department violated its due process rights when the attorney who represented the Department at the hearing before the ALJ provided a Report of Hearing to the Department's decision maker after the hearing, but before the Department issued its decision.

DISCUSSION

I

Rule 141(b)(2) (Cal. Code Regs., tit. 4, §141, subd. (b)(2)) provides that a decoy must 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 the alcoholic beverage. Appellant argues that the ALJ's finding that the decoy displayed the requisite

appearance is erroneous because the ALJ relied on his personal opinion, that "It is common knowledge that when a licensee asks a customer for identification, what they are really asking for is documentary proof that the customer is at least 21 years of age" as a reason for finding the decoy displayed that appearance. That opinion, appellant asserts, is unsupported by any evidence.

The finding in question (Finding of Fact 3) reads as follows:

> During the decoy operation described herein, Vanderkallen displayed the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to Collins at the time. He was 5'11" tall, weighed 180 pounds, displayed no facial hair, and was casually dressed in a manner consistent with his age. He had been an Explorer Scout for approximately one year and was acting as a decoy in conjunction with that program. He held the Explorer Scout rank of sergeant and supervised a squad of eight other scouts, but this was his first decoy operation. At the hearing on December 11, 2003, he exhibited poise and maturity that were at the high end of the scale for his chronological age, but even if that had also been the case during the decoy operation, it did not mislead Collins, as evidenced by the fact that she asked him for identification. (It is common knowledge that when a licensee asks a customer for identification, what they are really asking for is documentary proof that the customer is at least 21 years of age.) (Emphasis in original).

Appellant argues that the ALJ made his determination with regard to the decoy's apparent age not on the requirements of Rule 141(b)(2), but on the fact that the clerk asked for the decoy's identification. "It is obvious that for whatever reason, the ALJ felt that the fact that the clerk checked the decoy's identification established that the decoy therefore had the appearance of someone over [sic] the age of 21.[2] Appellant cites *BP West Coast Products, LLC* (2004) AB-8131, a case in which the Appeals Board rejected the Department's contention that once identification has been displayed

[2] Appellant's brief mistakenly makes several references to "over 21" (see pages 5 and 6) when the sense of its argument would indicate it intended to state "under 21," and we have understood the latter to be appellant's intended argument.

showing the decoy to be under 21, the issue of the decoy's appearance is no longer relevant. In that case the Board voiced its understanding that the decision in *Acapulco Restaurants, Inc. v. Alcoholic Bev. Control Appeals Bd.* (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126] requires compliance with Rule 141 even if there is other evidence suggesting that compliance with the rule would be unnecessary.

We do not think that the ALJ based his finding that the decoy displayed the appearance of a person under 21 years of age on what the clerk may have thought, as appellant suggests, nor do we think that his statement why identification is requested was critical to that finding. Instead, we think it apparent from what he wrote that he based his finding on the decoy's overall appearance, and was simply saying that, had the decoy displayed the same level of poise and maturity during the decoy operation as he did at the hearing, the clerk was not misled. The clerk did not testify, so it is only appellant's speculation that she might have been misled. She may have requested the decoy's identification pursuant to a policy appellant says many licensees follow, or, contrariwise, she may have thought the decoy appeared to be younger than 21. We simply do not know.

Nonetheless, we think it undeniable that, when a prospective purchaser of an alcoholic beverage is asked for identification, it is to establish that he or she is over 21 years of age. Otherwise, the sale should not go forward. That is no less true even in those cases where store policy requires that identification be requested of customers appearing to be under 35 years of age. Such a policy wisely reflects the recognition that not every person under 21 displays the appearance which could generally be expected of a person under 21, but its objective remains the same - to insure that the person is, in fact, 21.

II

Appellant asserts the Department violated its 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. Appellant 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.

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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 *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615 [25 Cal.Rptr.3d 821]. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. (127 Cal.App.4th 615; ___ Cal.Rptr.3d ___). The Department has petitioned the California Supreme Court for review. The court has yet to act on the petition.

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 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 appellant at the hearing. Appellant has 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 appellant has 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 appellant, it appears to us that appellant received the process that was due it 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, appellant is 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. Appellant's motion is denied.

ORDER

The decision of the Department is affirmed.[4]

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

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[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.