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

**AB-8276**
File: 20-215245 Reg: 03055845

7-ELEVEN, INC., DIANE M. SWANSON, and JAMES R. SWANSON,
dba 7-Eleven Store # 2121-19987
3603 College Avenue, San Diego, CA 92115,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

**ISSUED JULY 8, 2005**

7-Eleven, Inc., Diane M. Swanson, and James R. Swanson, doing business as 7-Eleven Store # 2121-19987 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with 5 of the days stayed provided appellants complete one year of discipline-free operation, for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Diane M. Swanson, and James R. Swanson, 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, dated April 15, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. On September 15, 2003, the Department filed an accusation against appellants charging that, on April 26, 2003, their clerk, George Kinder (the clerk), sold an alcoholic beverage to 17-year-old Davina Trejo. Although not noted in the accusation, Trejo was working as a minor decoy for the San Diego Police Department at the time.

At the administrative hearing held on January 21, 2004, documentary evidence was received, and Trejo (the decoy) and Luis Madriz, a Department investigator, testified concerning the sale. The Department's subsequent decision determined that the violation charged was proved and no defense was established.

Appellants appealed, contending there was not substantial evidence to support the finding of compliance with rule 141(b)(2).[2] Appellants also filed a Motion to Augment Record, requesting that a document entitled "Report of Hearing" be included in the administrative record, and asserted that the Department violated their due process rights when the attorney who represented the Department at the hearing before the administrative law judge (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) requires the decoy's appearance be that "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."

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[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.

Appellants contend the finding that the decoy complied with rule 141(b)(2) is not supported by substantial evidence, and the decision does not comply with the standard for administrative decisions set in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*). Their contention rests on the failure of the ALJ to mention in his proposed decision the decoy's testimony about her appearance on the night of the decoy operation. Specifically, they assert, the ALJ did not mention that the decoy had "manicured eyebrows," highlights in her hair, and "puffy" eyes with "bags" under them that night.

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (positions of both the Department and the license-applicant supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d

38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The ALJ discussed the decoy's appearance in Findings of Fact II-C:

> The overall appearance of the decoy including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that she was a little heavier on the day of the hearing. Additionally, her hair was a little shorter and worn in a ponytail on the day of the hearing.
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> 1. The decoy is approximately five feet five inches in height and weighs one hundred forty-five pounds. On the day of the sale, her hair was worn half up and half down. Her clothing consisted of blue jeans, a gray sweatshirt and white shoes. The decoy was not wearing any make-up or any jewelry on the day of the sale, but she was wearing eye glasses.
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> 2. The decoy testified that she had not participated in any prior decoy operations.
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> 3. The decoy was soft-spoken and appeared nervous while she was testifying.
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> 4. Exhibit 3 was taken at the premises on the night of the sale and it depicts what the decoy was wearing and how she appeared at the premises. After considering the photograph depicted in Exhibit 3, the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance that 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.

The lack of a discussion, or even mention, of particular details of the decoy's appearance does not mean that there was not substantial evidence to support the ALJ's finding. The ALJ is not required to discuss every item of evidence he considered. We assume that, had the ALJ felt that the items mentioned by appellants were significant, he would have mentioned them. Where the ALJ sees the decoy in person and uses the correct standard to make his or her determination as to the apparent age

of the decoy, we must conclude that substantial evidence supports the determination, at least in the absence of any compelling evidence to the contrary. (See *The Southland Corporation/ Amir* (2001) AB-7464a (fn. 2).)

The ALJ mentioned a number of factors regarding the decoy's appearance based on his observation of her during the hearing. Deference to the trier of fact in such instances is particularly appropriate. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652].) As this Board has said on many occasions, the ALJ has the opportunity of observing the decoy as he or she testifies, and the Board, having no more than a photograph and a cold record, is not in a position to substitute its judgment for that of the trier of fact. Appellants' broad generalizations of what is or is not characteristic of a person under the age of 21 do not compel us to question the ALJ's determination.

Appellants assert that the ALJ did not comply with the California Supreme Court's holding in *Topanga, supra,* that the agency's decision must set forth findings to "bridge the analytic gap between the raw evidence and ultimate decision or order." This Board has addressed a similar contention in a prior appeal:

> Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)
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> In *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: " 'The holding in Topanga was, thus, that *in the total absence of*

> *findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be sustained.' " In the present appeal, there was no "total absence of findings" that would invoke the holding in *Topanga*.

(*7-Eleven, Inc. & Cheema* (2004) AB-8181.)

II

Appellants assert the Department violated their 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. 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

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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 petitioned the California Supreme Court for review, but the Court has not acted on the petition as of the date of this decision.

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