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

AB-8298
File: 21-7888 Reg: 03056400

THE VONS COMPANIES, INC., dba Vons
4365 Glencoe Avenue, Venice, CA 90292,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo
Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JULY 12, 2005

The Vons Companies, Inc., doing business as Vons (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, all stayed provided appellant completes one year of discipline-free operation, for its 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 appellant The Vons Companies, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, 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 June 3, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 23, 1973. On December 21, 2003, the Department filed an accusation against appellant charging that, on July 12, 2003, appellant's clerk, Christine Morimoto (the clerk), sold an alcoholic beverage to 19-year-old Guadalupe Tapia. Although not noted in the accusation, Tapia was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on April 27, 2004, documentary evidence was received and testimony concerning the sale was presented by Tapia (the decoy) and by Marie Felhauer, a Los Angeles police officer. No witnesses appeared on behalf of appellant.

The Department's decision determined that the violation charged was proved, and no defense was established. Appellant then filed this appeal contending that the decoy's appearance violated rule 141(b)(2)[2] and the decoy's identification of the clerk as the seller of the alcoholic beverage violated rules 141(b)(5) and 141(a). Appellant 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 its 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.

[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.

DISCUSSION

I

Rule 141(b)(2) requires that a decoy "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." Appellant contends that the decoy's physical appearance, combined with her experience as a police Explorer and a decoy, gave her the appearance of a person over the age of 21. In addition, appellant argues, there is not substantial evidence to support the finding that the decoy complied with rule 141(b)(2).

At the time of the decoy operation, the decoy had been in the Explorer program with the Westminster Police Department for about one year and nine months and had participated in about 15 decoy operations. Appellant argued at the hearing that this experience made the decoy appear older. The ALJ stated, in Findings of Fact VII: "This argument is rejected, just as it has been rejected on many occasions by the Alcoholic Beverage Control Appeals Board." He cited several Appeals Board decisions that rejected this type of argument: *Prestige Stations, Inc*. (2002) AB-7802; *7-Eleven / Azzam* (2001) AB-7631; *7-Eleven / Virk* (2001) AB-7597; *The Vons Companies* (2001) AB-7568. In *7-Eleven / Azzam*, *supra*, the Board observed that:

> [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. . . . 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.

We reject this argument in the present case as we have done before.

We have also previously addressed, and rejected, the contention that there is not substantial evidence to support a finding of compliance with rule 141(b)(2):

> This Board has considered in prior decisions assertions that substantial evidence did not support the ALJ's finding regarding the decoy's apparent age. In *Circle K Stores, Inc.* (2001) AB-7498, the Board declined to find that substantial evidence of the decoy's apparent age was lacking, saying, "The decoy himself provides the evidence of his appearance." In *The Southland Corporation/Amir* (2001) AB-7464a, the Board responded to the argument by saying: "We simply do not agree that an administrative law judge who must determine the apparent age of a decoy, and actually sees the decoy in person, lacks substantial evidence to make such a determination."

(7-Eleven, Nagra, & Sunner (2004) AB-8064.)

We have no reason to decide this issue any differently than we have before.

II

Rule 141(b)(5) requires "the peace officer directing the decoy" to have the decoy "make a face to face identification of" the person who sold alcoholic beverages to him or her. This takes place after the sale, but if a citation is issued to the clerk, the identification must occur before the citation is issued. Rule 141(a) provides that decoy operations must be conducted "in a fashion that promotes fairness."

Appellant contends that neither of two attempts to have the decoy identify the seller complied with rule 141(b)(5). The first identification failed, it asserts, because there was not "mutual acknowledgment" between the decoy and the seller. The second identification cannot be held to have complied with rule 141(b)(5), according to appellant, because no substantial evidence was produced to establish that it occurred before the citation was issued, and both rule 141(b)(5) and rule 141(a) were violated because the second identification was unduly suggestive.

The ALJ discussed the face-to-face identification and issuance of the citation in Findings V and VI:

> V. While standing near the counter where the sale of the beer took place, either Sergeant Nassief or [Officer Felhauer] asked the decoy to identify

> the person who sold the beer to her. The decoy pointed to Morimoto and identified her as the seller. During the identification, the clerk and Morimoto were face-to-face. Shortly thereafter, the decoy and the clerk moved to the rear of the store, where two photographs (Exhibits 2A and 2C) were taken of the decoy again conducting a face-to-face identification of Morimoto. Each of these identifications was in compliance with the Department's Rule 141(b)(5).
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> VI. A citation was issued to Morimoto after the second identification took place.

Appellant relies on the Appeals Board decision in *Chun* (1999) AB-7287 for its statement that there must be a "mutual acknowledgment" between the decoy and the seller for the face-to-face identification to be valid under rule 141(b)(5). In *Chun* the Board said "face-to-face" means that:

> the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

Contrary to appellant's assertion, *Chun* does not require "mutual acknowledgment." It is not necessary that the seller make some visible sign of acknowledging the decoy; in fact, as the Board said in *Greer* (2000) AB-7403, it is not necessary that the clerk *actually* be aware that the identification is taking place. The only acknowledgment required is achieved by "the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller."

Appellant argues that regardless of whether you believe the officer's version of the first identification or the decoy's version, the testimony shows a violation of rule 141(b)(5). It asserts the testimony was either that the clerk's attention was diverted to the officer at the time the decoy was making the identification or that the clerk continued

to ring up customers when the decoy identified her. Appellant reaches this conclusion by selectively focusing on parts of the testimony taken out of context and by ignoring other parts of the testimony. In doing so, appellant also ignores the findings made by the ALJ, which this Board must uphold if there is substantial evidence to support them.

Substantial evidence clearly exists to support the finding of the ALJ that rule 141(b)(5) was satisfied. The officer testified [RT 24]:

> We had a face-to-face identification where the clerk looked at her, looked at the minor decoy, Tapia[,] and Tapia pointed to Morimoto stating who sold her the beer. And then explained to her what was going on. So, yes, [the clerk] saw who [the decoy] was.

The clerk did not testify, so we do not know if she was aware. However, we find it difficult to believe the clerk might not be aware of what the decoy, standing only a few feet away, was doing or saying. At the very least, the clerk reasonably ought to have been aware that the decoy was identifying her, and that is all that is required. We are satisfied that there was compliance with rule 141(b)(5).

Appellant also contends that the second identification, which took place in the back room of appellant's premises, with the store manager present, violated rule 141(b)(5). It asserts that the identification was "unduly suggestive" because the decoy had already identified the clerk for the officers, and she "would be under tremendous pressure" to make the second identification consistent with the first. Appellant's contention is rejected because it is based on pure speculation, for which there is not a scintilla of evidentiary support.

Appellant's last contention is that no substantial evidence exists establishing that the citation was issued to the clerk after the second attempted identification. This contention is based on appellant's characterization of officer Felhauer's testimony as

wholly unreliable and not credible. The ALJ, however, obviously found the officer to be credible and made his finding based on Felhauer's very specific recollection that the citation was issued after the second identification. It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion. Appellant, who has the burden of proof for the affirmative defense it is asserting, has made no such showing.

III

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]

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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 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 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

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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.

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 to it 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, 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

[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.