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

AB-8342
File: 20-345038 Reg: 04056554

7-ELEVEN, INC., and DEBBIE L. TRIPLETT, dba 7-Eleven # 2133-27433
1945 South Broadway, Santa Maria, CA 93454,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 4, 2005
Los Angeles, CA

ISSUED OCTOBER 5, 2005

7-Eleven, Inc., and Debbie L. Triplett, doing business as 7-Eleven # 2133-27433 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days 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., and Debbie L. Triplett, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Claire C. Weglarz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated September 16, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 10, 1998. On January 16, 2004, the Department filed an accusation against appellants charging that, on November 12, 2003, appellants' clerk, Thomas Mulkins (the clerk), sold an alcoholic beverage to 18-year-old Ashley Paz. Paz was working as a minor decoy for the Santa Maria Police Department (SMPD) at the time.

At the administrative hearing held on August 12, 2004, documentary evidence was received, and testimony concerning the sale was presented by Paz (the decoy) and by Rafael Torres, a Santa Maria police officer. The testimony established the following:

The decoy entered appellant's premises, selected a 6-pack of Coors Light beer from a cooler, and picked up a Butterfinger candy bar. At the counter, the clerk asked her how she was doing and for identification. The decoy gave him her valid California driver's license bearing her true date of birth and a red stripe with white lettering that said "AGE 21 IN 2005." The clerk looked at the license for a few seconds, handed it back to the decoy, saying "Okay, thanks," or words to that effect, and completed the sale. The decoy left the store with the beer. Shortly thereafter, the decoy re-entered the store with two officers. They approached the clerk, the officers identified themselves as police, and then they asked the decoy if she could identify who sold her the beer. The decoy pointed to the clerk, who was about three feet away from her.

The Department's decision determined that the violation charged was proved, and no defense was established. Appellants appealed, contending that the Department violated their rights to due process and rules 141(a) and 141(b)(5)[2] were violated.

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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.

DISCUSSION

I

Appellants contend that the Department's decision was made after the Department's decision maker received an ex parte communication from the Department's trial counsel, which violates due process.

The Appeals Board considered virtually identical allegations of due process violations, and reversed the Department's decisions, in three appeals: *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 a document entitled "Report of Hearing" before the Department's decision is made.

Although the legal issue here is the same as that in the *Quintanar* cases, there is a factual difference that 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

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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.)

determinations, imposing suspensions in all three cases. In this 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.

II

Appellants contend that a violation occurred of rule 141(a), which requires that decoy operations be conducted "in a fashion that promotes fairness." They argue that the officer instructed the decoy "to operate in a way so as to throw off the clerk," and this created unfairness, regardless of whether the decoy's actions actually distracted the clerk.

The officer's instruction to the decoy was to buy a food item along with the beer. The decoy said she believed that the purpose was to make it less obvious that she was

a decoy. Appellants' transformation of this possible purpose into something sinister is based on nothing more than inventive, but baseless, conjecture. There is no evidence of any sinister purpose behind the instruction.

Regardless of what the officer may have intended to achieve by having the decoy purchase a candy bar in addition to beer, if there was no demonstrable effect on the transaction, we do not see how the decoy operation can be considered unfair. Without some kind of observable manifestation, it would be virtually impossible to conclude that an intent, even the most sinister intent in the world, could make a decoy operation unfair.

The ALJ found that the purchase of the candy bar had no effect on the sale of beer to the decoy, and appellants have not alleged any other manifestation of the officer's purported intent. We see nothing in this decoy operation that was unfair.

III

Appellants contend there was not compliance with rule 141(b)(5), which requires, after a sale to a minor decoy, that the "officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages."

The ALJ made the following finding with regard to the face-to-face identification (Finding of Fact 9):

> After Paz left the store, she met with SMPD Corporal Ast. Torres, Ast and Paz entered Respondents' Licensed Premises and approached clerk Mulkins. Mulkins was still behind the counter. The Officers identified themselves to Mulkins as police officers. They asked Mulkins to shut down his register and they asked Paz if she could identify who had sold her the beer. Paz pointed to clerk Mulkins. (Exhibit 3.) At the time they were within about 3 feet of each other. (*Id*.) Mulkins was later issued a citation.

Appellants contend there is no evidence in the record that the clerk knew he was being accused by the decoy at the time of the identification, and without such knowledge on the part of the clerk there is not compliance with rule 141(b)(5). They argue that both Torres and the decoy testified that the photograph taken of the decoy and the clerk (Exhibit 3) was taken at the moment the identification was made, and in the photograph, neither the decoy nor the clerk is looking at the other. This shows, according to appellants, that there was no "mutual acknowledgment" at the time the clerk was being identified as the seller. No evidence in the record, appellants assert, shows that the decoy looked at the clerk when she pointed him out as the seller, or that the clerk saw the decoy point at him or heard the officers ask the decoy to identify who sold her the beer.

Appellants raised this contention at the administrative hearing and the ALJ responded to it in Conclusion of Law 5c:

> Because the eyes of Paz appear to be diverted in Exhibit 3, Respondents contended that the face-to-face identification failed to comply with Rule 141(b)(5). The photograph is merely a snapshot. A second before or a second after, it is unclear exactly where the eyes of Paz were looking. In addition, the photograph does not show the question asked of Paz by one of the Officers, "Can you identify who sold you the beer?" In response to that question and in the immediate presence of clerk Mulkins, the evidence showed the identification complied with the rule. Mulkins should have known he was being identified.

Appellants rely on the Appeals Board decision in *Chun* (1999) AB-7287 for their assertion 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 appellants' 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."

The clerk did not testify, so we do not know if he was aware. However, in this case, it is unrealistic to assert that the clerk was not aware that the decoy was identifying him as the seller. The photograph shows the two standing with only the width of the counter separating them; the six-pack of Coors Light beer that the decoy purchased minutes before is on the counter, still partly in the bag, in front of the clerk; and the decoy, her index finger outstretched, is pointing at the clerk. It is true that the decoy was looking slightly downward, with her face turned slightly toward the camera when the picture was taken, but 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. Nor does it follow that, because the clerk was looking at the camera at the moment when this photograph was being taken, he was unaware of the identification process.

In rejecting appellants' argument, the ALJ made a reasonable inference based on the evidence presented and his own common sense. At the very least, the clerk reasonably ought to have been aware that the decoy was identifying him, and that is all that is required. We are satisfied that there was compliance with Rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.