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

AB-8349
File: 20-215061 Reg: 04056953

7-ELEVEN, INC., EARL P. LANGFORD, III, and NANCY L. LANGFORD,
dba 7-Eleven # 2121-18824
4205 Voltaire Street, San Diego, CA 92107,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 1, 2005
Los Angeles, CA

ISSUED: NOVEMBER 9, 2005

7-Eleven, Inc., Earl P. Langford, III, and Nancy L. Langford, doing business as 7-Eleven # 2121-18824 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with five days stayed on the condition that appellants have 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., Earl P. Langford, III, and Nancy L. Langford, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

---

[1]The decision of the Department, dated October 14, 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 March 24, 2004, the Department filed an accusation against appellants charging that, on November 12, 2003, their clerk, Teresa Ding Quan (the clerk), sold an alcoholic beverage to 19-year-old Brandon Baldwin. Although not noted in the accusation, Baldwin was working as a minor decoy for the San Diego State University Police Department at the time.

At the administrative hearing held on July 21, 2004, documentary evidence was received and testimony concerning the sale was presented by Brandon Baldwin (the decoy) and by Ruben Villegas, a San Diego State University police officer.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants filed an appeal contending: (1) The Department violated their rights to due process and (2) the Department violated Government Code section 11425.50, subdivision (c), by failing to base its decision exclusively on the evidence in the record or matters officially noticed.

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").[2]

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 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

---

[2]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.)

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

Government Code section 11425.50, subdivision (c), provides:

> The statement of the factual basis for the [administrative adjudicatory] decision shall be based exclusively on the evidence of record in the proceeding and on matters officially noticed in the proceeding. The presiding officer's experience, technical competence, and specialized knowledge may be used in evaluating evidence.

Appellants contend that there is no evidence in the record to support the ALJ's finding that the decoy's "appearance at the time of the hearing was similar to his appearance on the day of the decoy operation." Specifically, they assert that the record does not include any information regarding the appearance of the decoy at the hearing. It is not simply that substantial evidence is lacking, appellants insist, but that there is *no* evidence. Appellants argue that this prevents the Appeals Board from effectively reviewing the Department's decision.

Appellants are simply wrong. The substantial evidence of the decoy's appearance at the hearing was the decoy himself.

The Court of Appeal, in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1446 [13

Cal.Rptr.3d 826], addressed the issue of whether the ALJ's observations, not recorded in the transcript, sufficed to support a finding and stated: "[W]e must assume the ALJ's observations of physical evidence support his findings."

The court relied on *People v. Buttles* (1990) 223 Cal.App.3d 1631, 1639-1640 [273 Cal.Rptr. 397], which said:

> What the trier of fact observes is itself evidence which may be used alone or with other evidence to support the judgment. (See *South Santa Clara etc. Dist. v. Johnson* (1964) 231 Cal.App.2d 388, 399 [41 Cal.Rptr. 846] and cases cited therein.) When what the trier of fact observed has not been made a part of the transcript on appeal, a reviewing court must assume that the evidence acquired by such a viewing is sufficient to sustain the finding or judgment in question. (See *ibid*. and cases cited therein.) Furthermore, when there is a conflict between such evidence and other evidence, it is presumed that the trier of fact resolved the conflict by accepting the demonstrative evidence as being more credible, and this determination is binding on a reviewing court. (See *id.* at pp. 399-400. See also *Woolliscroft v. Starr* (1964) 225 Cal.App.2d 667, 670 [37 Cal.Rptr. 570]; *Lauder v. Wright Investment Co*. (1954) 126 Cal.App.2d 147, 151 [271 P.2d 970].)

ORDER

The decision of the Department is affirmed.[3]

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

---

[3]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.