

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

AB-8365

File: 21-54749 Reg: 04056777

THE VONS COMPANIES, INC. dba Vons
7789 Foothill Boulevard, Sunland, CA 91040,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

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

ISSUED OCTOBER 12, 2005

The Vons Companies, Inc., doing business as Vons (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for its clerk, Kanitha Titasandvan (“the clerk”), having sold a six-pack of Coronita beer to Jaime Ortiz (“the decoy”), an 18-year-old 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 Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated December 9, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 1, 1973. Thereafter, the Department instituted an accusation against appellant charging an unlawful sale of an alcoholic beverage to a minor. An administrative hearing was held on July 29, 2004, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Joseph Kalyn, a Los Angeles police officer, and that of Ortiz, the decoy.

Subsequent to the hearing, the Department issued its decision which determined that the transaction had occurred as alleged, and ordered the stayed suspension from which this timely appeal has been taken. Appellant raises the following issues: (1) appellant was denied due process of law; (2) there was no compliance with Rule 141(b)(5); and (3) the Department violated Government Code section 11425.50, subdivision (c), by failing to base its finding of fact exclusively on evidence of record. The latter two issues are related and will be discussed together.

DISCUSSION

I

Appellant asserts the Department violated its right to procedural due process when the attorney representing the Department at the hearing before the administrative law judge (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. The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants alleged due process violations virtually identical to the 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").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 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

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.)

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.

II

In its opening brief, appellant directed a two-pronged attack on the ALJ's findings (Finding of Fact 8) and conclusions (Conclusion of Law 6) that there was compliance with Rule 141(b)(5). asserting that there is no evidence in the record in support of the finding that the decoy's identification of the clerk who sold him the beer was "face to face" as required by Rule 141(b)(5), and that such a finding violates the requirement of

Government Code section 11425.50, subdivision (c),³ that it be based exclusively on evidence in the record. Appellant cited testimony of the decoy that one of the police officers was standing between him and the clerk when he verbally identified the clerk as the seller, and the testimony of the police officer that the clerk was facing him when the identification took place. Thus, argued appellant, there could not have been the mutual acknowledgment the *Chun* case⁴ requires, and there is nothing in the record to support the ALJ's determination that the identification was "face to face."

Thereafter, in a late-filed reply brief, appellant withdrew the issue from its appeal. Consequently, we see no need to discuss it.

ORDER

The decision of the Department is affirmed.⁵

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

³ Government Code section 11425.50, subdivision (c), provides:

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

⁴ *Chun* (1999) AB-7287

⁵ 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.