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

AB-8371
File: 20-386378 Reg: 04057747

BP WEST COAST PRODUCTS, LLC dba Arco AM/PM #5726
1025 Kloke Road, Calexico, CA 92231,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 3, 2005
Los Angeles, CA

ISSUED: DECEMBER 29, 2005

BP West Coast Products, LLC, doing business as Arco AM/PM #5726 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Bertha Campos, having sold a six-pack of Budweiser beer to Araceli Garcia, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant BP West Coast Products, LLC, 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, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 26, 2002. The

[1]The decision of the Department, dated December 23, 2004, is set forth in the appendix.

Department instituted an accusation against appellant on July 29, 2004, charging the unlawful sale of an alcoholic beverage to a minor on April 15, 2004.

An administrative hearing was held on October 27, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and no defense had been established under Rule 141.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant was denied due process as a result of an ex parte communication to the Department's decision maker; (2) there was no compliance with Rule 141(b)(2);[2] and (3) the administrative law judge failed to consider factors in mitigation.

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. 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

[2] Rule 141(b)(2) provides: "The decoy shall 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."

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 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.)

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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.)

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 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.

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.

II

The ALJ found as follows with respect to whether the decoy's appearance complied with Rule 141(b)(2), that is, whether she displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller at the time of the alleged offense (Findings of Fact II-D 1-3):

> D. 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 wearing braces on the day of the hearing and a very small nose ring.
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> 1. The decoy is a youthful looking young lady who is five feet three inches in height and who weighs one hundred twenty-five pounds. On the day of the sale, the decoy was wearing her hair combed down and her clothing consisted of dark blue jeans and a short sleeve, mustard colored shirt. She was wearing light makeup consisting of a little blush, eye liner and mascara and she was wearing similar makeup at the hearing. The only jewelry she was wearing consisted of small earrings. The photograph depicted in Exhibit 7 was taken at the police station on the day of the sale before going out on the decoy operation and the photograph depicted in Exhibit 4 was taken at the premises. These two photographs show how the decoy looked and what she was wearing on the day of the sale.
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> 2. The decoy testified that she volunteered as a minor decoy, that her brother-in-law is a police officer with the Calexico Police Department, that April 15, 2004 was the first or second time that she had participated in a decoy operation, that she visited twenty-four locations on April 15, 2004 and that she was able to purchase alcoholic beverages at a total of four locations.
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> 3. There was nothing remarkable about the decoy's nonphysical appearance and she provided straightforward answers during her testimony.

Appellant challenges these findings, asserting that the collective effect of makeup, cosmetically-shaped eyebrows, and long earrings was to cause the decoy to

appear older than 21, and the braces she was wearing at the hearing, but was not wearing at the time of the sale, would have given her a more youthful appearance at the hearing.[4]

This Board is not permitted to make factual determinations. Whether or not this decoy presented the appearance which could generally be expected of a person under the age of 21 was a finding on a question of fact, one we cannot overturn unless we are satisfied the evidence available to the ALJ (the decoy herself as she testified, the photographs of the decoy, and the testimony about the decoy's appearance during the decoy operation and at the hearing) simply cannot support his determination that she met the standard set by Rule 141(b)(2).

Although this Board has encouraged ALJ's to consider the whole person when assessing a decoy's appearance for compliance with Rule 141(b)(2), it must be acknowledged that in the usual case, the clerk knows nothing about the decoy except what he or she sees across the counter in a transaction that, at most, lasts only a minute or two. Thus, a decoy's physical and facial appearance are, in all likelihood, the most important factor a clerk considers in making the decision whether or not the decoy is old enough to purchase an alcoholic beverage, or whether identification should be requested. In the close case, a decoy may display an appearance which *could* be expected of a person under the age of 21, to some yet not to others. A clerk takes a chance when he or she does not ask for identification or consider carefully any identification which is produced. By the same token, an ALJ must carefully assess the

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[4] Appellant asked that the two color photographs of the decoy (Exhibits 4 and 7) be available at the hearing for examination by the Board Members. Our examination of the photographs leaves us unpersuaded by appellant's arguments.

appearance of the decoy when the decoy testifies at the hearing, and usually has a considerable period of time in which to do so.

On the other hand, this Board never sees the decoy. That is why only where the Board finds it next to impossible to accept the ALJ's determination is fair and correct will it express its disagreement. This is not such a case. There is nothing in any of the indicia of age to which appellant points that persuades us the ALJ erred.

III

Appellant contends that the Department abused its discretion by imposing an excessive penalty. It asserts that the decision failed to acknowledge evidence supporting each of the four factors set forth in the Department's penalty guidelines as supporting mitigation of a standard penalty.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The Department's penalty guidelines set forth four factors said to support mitigation: length of licensure at subject premises without prior discipline problems; positive action by licensee to correct problems; documented training of licensee and employees; and cooperation by licensee in investigation.

The ALJ did not mention any of these factors when imposing the Department's standard 15-day penalty for a first violation, despite the existence of evidence that the clerk had received training only two days before the incident in question, and had been

terminated immediately after the incident.

Appellant places much emphasis on its claim that the license change in 2002 was merely from one subsidiary company brand name to another subsidiary company brand name, so that the licenses are distinct only in form, not in substance. It asserts, in footnote 2 of its brief:

> Please note that according to the California Department of Alcoholic Beverage Control License Query system, the prior licensee was Prestige Stations, Inc., the President of which was Donald G. Strenk, and the licensee did business at this location under the name of AM PM Store No. 5276. This licensee was licensed since July 1990 with no prior record of discipline. In June 2002, a new license for this location was issued to BP West Coast Products, LLC, the President of which remained Donald G. Strenk, and the licensee did business at this location under the name Arco AM PM Store No. 5276. Prestige Stations is merely a wholly owned and operated subsidiary of Arco, a subsidiary of British Petroleum. Therefore, the licensee was changed from one subsidiary company brand name to another subsidiary company brand name. Therefore, the licensees are distinct only in form, not in substance.

Most of the information set forth in footnote 2, although not part of the record, would be reflected in the records of the Department. What can be gleaned from the record (see RT 59-60) is that there was a change in ownership in 2002, and that the present manager had been the manager four years when the change of ownership took place. The Department has not disputed appellant's claim of a long history of discipline-free operation.

The Department does not address the issue of mitigation in its brief, and the decision itself is also silent on the subject of mitigation. Yet, the Department holds out in its Penalty Guidelines the possibility of mitigation where certain factors are present.

Even without reference to appellant's and/or its predecessor's record of discipline, the record shows the presence of at least two mitigating factors, i.e., the training of employees and the termination of the offending clerk. While we think the

record provides only weak support for the third factor relied upon by appellant, i.e., the length of licensure, we do think the Department abused its discretion by failing to at least consider the issue of mitigation in accordance with its announced policy with respect to the factors that are supported by the record. If there were reasons why that would have been inappropriate, the decision should have explained what they were.

ORDER

The decision of the Department is affirmed except as to penalty. The penalty is reversed, and the case is remanded to the Department for reconsideration of the penalty in light of the above comments.[5]

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

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[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.