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

AB-8377
File: 21-391931 Reg: 04057564

7-ELEVEN, INC. dba 7-Eleven
600 North Glenoaks Boulevard, Burbank, CA 91502,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED: DECEMBER 29, 2005

7-Eleven, Inc., doing business as 7-Eleven (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Heidi Hubbard, having sold a can of Coors beer to Silvie Siwadjian, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant 7-Eleven, Inc., appearing through its 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.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 7, 2003. Thereafter, the

[1]The decision of the Department, dated December 30, 2004, is set forth in the appendix.

Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage to a minor. An administrative hearing was held on October 26, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation charged in the accusation had been proved.

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 decision maker; and (2) there was no compliance with Rule 141(b)(2).

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 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").[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

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[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.

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

Appellant contends that the decoy in this case did not display the appearance required by Rule 141(b)(2), i.e., one that could generally be expected of a person under 21 years of age under the actual circumstances at the time of the sale. Appellant asks the Board to view a photograph of the decoy as she appeared at the time of the violation, and asks the Board to conclude from that photograph that the decoy did not present the appearance required by the rule. Appellant states "Clearly, the woman in these pictures does not look like a teenager," stressing her makeup, her shaped eyebrows, dyed hair streaks, dark gloves and a dark scarf covering her neck, and equating the wearing of the scarf and gloves with the wearing of jewelry.

Appellant also challenges the ALJ's assessment of the decoy's appearance at the hearing, stating that her hair was more blond at the hearing, and that, in combination with the fact that she was not wearing a scarf or gloves, all made her appear younger. Thus, asserts appellant, the ALJ was not entitled to infer from her appearance at the hearing how she might have appeared a year earlier.

The Board stated in *Albertson's* (2003) AB-7905:

> This Board has indicated on several occasions - we could add, many more than several - that the ALJ is the trier of fact and has the opportunity to observe the decoy as he or she testifies. It is this advantage that the ALJ has over this Board that compels us to defer to his judgment, except in the most unusual circumstances.

In his proposed decision the ALJ addressed essentially the same arguments that appellant now raises. He wrote, with respect to the decoy's appearance (Findings of Fact 7 through 10):

> 7. At the time of the violation, the minor had an overall appearance of a teenager; wore no makeup except for some eyeliner, had on no jewelry or a watch, and was attired in a black jacket, pants and gloves. She also wore a black and white scarf and had on white tennis shoes. Her hair was dark, straight and long and fell to her chest area. She was 5' 3" tall and weighed between 135

and 140 pounds. She had had no prior experience as a minor decoy. At the hearing her hair was shorter; streaked with blond highlights and she weighed a few pounds less.

8. At the hearing the minor was soft spoken, spoke in a small voice and seemed to be a bit unsure of herself. She had a rather youthful composure. There was little in the minor's appearance, that is her physical appearance, clothing, poise or demeanor to indicate an age beyond her actual 19 years at the time the violation was committed. She displayed the appearance which could generally be expected of a person under 21 years of age.

9. The licensee argues that the minor did not display the appearance which could generally be expected of a person under 21 years of age in that the minor wore eyeliner during the decoy operation and this made her appear older than her actual age. It is further contended that her appearance at the hearing is different than it was during the decoy operation.

10. The licensee's contentions are without merit. The licensee is grasping at straws to suggest the minor's appearance was materially affected by the wearing of eyeliner during the decoy operation and that she looked older because of it. Further, except for the black and white scarf she wore as a minor decoy, her appearance was substantially the same at the hearing taking into account the hair color change and slight loss in weight.

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 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, as we stated above, 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.

ORDER

The decision of the Department is affirmed.[3]

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

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[3] 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.