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

AB-8388
File: 20-386236 Reg: 04057112

BP WEST COAST PRODUCTS, LLC dba ARCO AM/PM #543
1949 Arden Way, Sacramento, CA 95815,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 5, 2005
San Francisco, CA

ISSUED MAY 4, 2006

BP West Coast Products, LLC, doing business as Arco AM/PM #543 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Jessica Albin, having sold a six-pack of Bud Light beer to Huey Nguyen, 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 Andres D. Garcia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas M. Allen.

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 January 27, 2005, is set forth in the appendix.

Department instituted an accusation against appellant April 17, 2004, charging the sale of an alcoholic beverage to a minor on January 2, 2004.

An administrative hearing was held on December 1, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and appellant had failed to establish any affirmative defense under Department Rule 141 (Title 4, Cal. Code Regs., §141.)

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant was denied due process as the result of an ex parte communication; (2) there was no compliance with Department Rule 141(b)(2); and (3) the Department failed to make proper findings regarding its resolution of conflicts in the testimony of its witnesses regarding the face to face identification.

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

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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.)

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 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 did not display the appearance required by Rule 141(b)(2), that is, that he display an appearance which could generally be expected of a person under 21 years of age. Appellant argues that the decoy's facial features are not those which could generally be described as those of a person under 21 years of age: "The shape of his face is wide and he appears to have a 'double chin.' Most importantly, from the picture provided, the minor appears to have a receding hairline."[3] Appellant also argues that the ALJ improperly dismissed appellant's argument that the decoy's demeanor during the operation played a role in how he appeared to the clerk the night of the incident. It argues that the decoy's experience as a decoy, coupled with his experience as a Community Service Officer, would have given him a confident, poised demeanor when engaged in law enforcement operations.

The ALJ addressed the appearance of the decoy in Findings of Fact 5, 11 and 12, and Conclusion of Law 5;

> FF5 Nguyen appeared at the hearing. He stood about 5 feet, 4 inches tall and weighed about 130 pounds. His black or dark brown hair was cut short on the sides and was a bit longer on the top and worn in soft spikes. When Nguyen

[3] At the administrative hearing, appellant's attorney made no reference to this "most important" feature of the decoy's appearance

visited Respondent's store on January 2, 2004, his height was the same as it was at the hearing and he weighed only about 125 pounds. He was clean shaven and wore blue jeans and a black jacket over a long-sleeved gray shirt. (*See* Exhibit 2.) At Respondent's Licensed Premises, Nguyen's hair was a bit shorter than it was at the hearing. He wore no jewelry. At the hearing, Nguyen looked substantially the same as he did at Respondent's Licensed Premises on the date of the decoy operation, despite the passage of almost a year and his having attained the age of 20 years.

FF11 Decoy Nguyen, in January 2004, was an experienced police decoy, having worked on 2 or 3 earlier decoy operations. He had visited as many as 40 Department-licensed business establishments. At that time, Nguyen was working with law enforcement at California State University, Sacramento, as a Community Services Officer. In that capacity it was his job to make observations around campus and report in using a radio. He had received training in operating a golf cart and in using a radio.

FF12 Decoy Nguyen is an adult male who appears his age, 20 years of age at the hearing. Nguyen was a capable witness who displayed a little nervousness while testifying and appeared at times to be confused as to detail. Based on his overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of clerk Albin at the Licensed Premises on January 2, 2004, Nguyen displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to clerk Albin. Nguyen appeared his true age.

CL5 ... Respondent argued that the appearance of decoy Nguyen inside the store gave the impression he was over the age of 21 years. This, Respondent contends, is due to his significant experience as a police decoy and his work at school as a community services officer. The argument is rejected. The apparent age of decoy Nguyen was addressed above in Findings of Fact, paragraphs 5 [11] and 12.

Appellant cites the Board's decision in *The Southland Corporation/Te and Young* (2002) AB-7430, where it stated: "A receding hairline is usually associated with an age considerably greater than 21, and using a decoy with such a physical characteristic is a highly questionable practice." In that decision, the Board was of the belief that the ALJ's findings regarding the decoy's appearance strained credulity.

We cannot say that the same is true in this case. We have examined Exhibit 2, the photograph to which appellant refers, and are satisfied that to the extent the decoy's

hairline can be said to be receding, it does not detract in any way from the obvious youthful appearance the photograph conveys.

The ALJ has a distinct advantage, in that he sees the decoy while he testifies. All that the Board gets is a photograph, the ALJ's description of his appearance, and a partisan argument that the ALJ's assessment of his appearance is incorrect. It is the Board's practice to defer to the judgment of the ALJ regarding a decoy's appearance in the absence of any extraordinary circumstances and assuming the ALJ has applied the correct standards in making that appraisal, and we do so here.

III

Appellant contends that the Department does not adequately explain why it chose to accept the testimony of Investigator Szakacs regarding the face to face identification, even though, claims appellant, his testimony about the night of the incident was not corroborated by any other witness. Appellant claims that, in so doing, the Department violated precedent established by the decision in *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195.

Holohan v. Massanari, supra, involved the rejection of a Social Security disability claim. The decision built on a line of federal court cases relating to the proof required to support such a claim, and has no bearing on this case. This case does not involve the rejection of a disability claim. It involves nothing more than an ALJ's resolution of conflicts in the testimony of witnesses recalling events which occurred almost a year earlier. Although cited by appellant's attorneys in numerous appeals, the Appeals Board has never accepted the *Holohan* decision as a precedent binding on it or the Department.

Appellants are correct that the testimony of the witnesses concerning the face to face identification was conflicting. Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

The ALJ noted in a footnote (fn. 1) that "There were conflicts in the testimony given by witnesses Nguyen [the decoy], Buno, and Szakacs. That given by Szakacs was given more credibility due to his lack of personal involvement and the fact he expressed no difficulty about his recollections." The footnote is appended to a finding (Finding of Fact 8) that "SPD Officer Buno [Buno] had followed decoy Nguyen to the front of the store and observed through the front window ... ." The decoy had testified that Officer Buno was inside the store while the transaction took place, while Officer Buno and Investigator Szakacs had testified that Officer Buno was outside when the sale occurred. The conflict in the testimony did not relate to the issue of face to face identification. In that respect, all three of the Department's witnesses were in agreement regarding the circumstances of the face to face identification.

The decoy testified that, after the transaction, he returned to the store, accompanied by Investigator Szakacs, and identified the clerk as the seller. According

to the decoy, Sergeant Keith Buno, a Sacramento police officer, was also present during the identification, and had been inside the store during the transaction. The decoy further testified that he was photographed with the clerk, after which Sergeant Buno "wrote a ticket."

Sergeant Buno testified that he observed the transaction while standing outside the store. When the decoy exited the store, Sergeant Buno entered, and advised the clerk she had just sold alcohol to a minor. Investigator Szakacs and the decoy then entered the store, according to Buno, and the decoy identified the clerk as the seller. Investigator Szakacs testified that he was sitting in his vehicle when the decoy exited the store with the beer he had purchased, and Sergeant Buno had entered the store. Szakacs and the decoy then entered the store, and the decoy identified Jessica Albin as the seller.

Appellant does not identify any material conflict relating to whether or not any face to face identification took place. It does not challenge the decoy's testimony that he identified Albin as the seller while standing only four or five feet away, nor does it question the testimony of both Buno and Szakacs that the decoy identified Albin as the seller.

The testimony of appellant's second clerk does little to detract from the testimony of the Department witnesses. The fact that she does not remember the decoy saying anything is not enough to overcome the testimony of three witnesses to the contrary. Further, she admits that the decoy came back into the store, stood opposite Albin for "a couple of minutes," and was then photographed with Albin. Her statement on cross-examination that she was not sure whether the identification had occurred is of no persuasive value.

Our own review of the record satisfies us that none of the conflicts in testimony that appellant has argued rises to the level where it affects the decision. It is not unusual for memories to differ, especially after as long a period between the incident and the hearing as in this matter.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] 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.