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

AB-8438
File: 20-388250 Reg: 04058534

7-ELEVEN, INC., and AAA MANAGEMENT CORPORATION,
dba 7-Eleven Store # 13606
768 Midway Avenue, Escondido, CA 92027,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: February 2, 2006
Los Angeles, CA

ISSUED: APRIL 26, 2006

7-Eleven, Inc., and AAA Management Corporation, doing business as 7-Eleven Store # 13606 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and AAA Management Corporation, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

---

[1]The decision of the Department, dated April 25, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 3, 2002. Thereafter, the Department instituted an accusation against appellants charging that, on October 8, 2004, appellants' clerk, Juan Venegas (the clerk), sold an alcoholic beverage to 18-year-old Glenn Williams. Although not noted in the accusation, Williams was working as a minor decoy for the Escondido Police Department at the time.

An administrative hearing was held on March 22, 2005, at which time documentary evidence was received, and testimony concerning the sale was presented by Williams (the decoy); Escondido police officer Ted Henson; the clerk; and by AAA Management Corporation's secretary, Gurinder Singh.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal making the following contentions: The Department violated appellants' right to due process by an ex parte communication and rules 141(a)[2] and 141(b)(2) were violated.[3]

DISCUSSION

I

Appellants assert the Department violated their right to procedural due process

---

[2]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations and to the various subdivisions of that section.

[3] Appellants have filed a supplemental brief raising for the first time the contention that their motion to compel discovery was improperly denied. The brief was filed after the Department had filed its reply to appellants' opening brief, thus not affording the Department sufficient time to respond prior to the hearing. For that reason, we consider the brief untimely, and decline to consider the issue.

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. Appellants 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").[4]

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

---

[4] 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.)

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 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 appellants at the hearing. Appellants have 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 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 them 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, appellants are 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. Appellants' motion is denied.

II

Appellants contend that the decoy's combined size, experience as a decoy, and law enforcement training prevented him from displaying the appearance required by Rule 141(b)(2), and rendered the decoy operation unfair within the meaning of the fairness requirement of Rule 141(a).

There are a number of reasons why this portion of the appeal should be considered frivolous.

First, the ALJ made a factual finding that the decoy did display the appearance required by the rule. He wrote (Finding of Fact E and paragraphs 1-5 of that finding):

> E. The overall appearance of the decoy including his demeanor, his poise, his size, his mannerisms and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was approximately twenty pounds heavier at the time of the hearing.
>
> 1. The decoy is a youthful looking male and on the day of the sale, he was six feet in height and he weighed approximately one hundred eighty pounds. On that date, he was clean-shaven and his clothing consisted of a gray T-shirt and the same black pants and black Vans shoes that he was wearing at the hearing.
>
> 2. The decoy testified that he had been a cadet with the Border Patrol, that he desires a career in law enforcement, that he had participated in approximately

fifteen prior decoy operations, that he had visited approximately 300 stores during these decoy operations, that he was pretty confident at the subject premises and that he was sold alcoholic beverages at three out of the eighteen premises he visited on the night of October 8, 2004.

3. The photograph depicted in Exhibit 3 was taken inside the premises on the night of the sale and it depicts how the decoy appeared when he was at the premises.

4. There was nothing remarkable about the decoy's nonphysical appearance.

5. After considering the photograph taken inside the premises (Exhibit 3), the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

As this Board has said many times, it is unwilling to substitute its judgment for that of the ALJ when considering a challenge to the decoy's appearance under Rule 141(b)(2). Unless we can say that the ALJ was wrong as a matter of law, we must respect his decision. There was substantial evidence in support of the finding. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2002) 103 Cal.App.4th 1084, 1094 [127 Cal.Rptr.2d 652].)

Additionally, the decoy was asked by the clerk for his identification, and provided his California driver's license which showed his date of birth, carried a blue stripe stating that the license was "PROVISIONAL UNTIL AGE 18 IN 2003," and a red stripe with the legend "AGE 21 IN 2006." Even more compelling, when the decoy gave the license to the clerk, he volunteered to the clerk that he was only 18 years of age.[5]

---

[5] Although the clerk denied that the decoy said this, the ALJ chose to accept the decoy's testimony over that of the clerk. The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]*; Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) Nonetheless, our own review of the record satisfies us that the ALJ was correct in his

Despite all this, the clerk went forward with the sale.

Appellants suggest that, because of the decoy's physical size, training and extensive experience as a decoy, the clerk may have been led into a false sense of security. We find it difficult to take this suggestion seriously in light of all that was available to the clerk.

We are unpersuaded by appellants' argument that the decoy operation was unfair or did not promote fairness. In this case, a clerk was presented with everything he might need to avoid selling to a minor, and sold anyway. Appellants' attempt to lay blame for the transaction on the police choice of a decoy is totally without merit.

ORDER

The decision of the Department is affirmed.[6]

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

---

assessment of the clerk's testimony.

[6] 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.