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

AB-8442
File: 20-351250 Reg: 04058445

CHEVRON STATIONS, INC. dba Chevron Food Mart
2895 North Main Street, Walnut Creek, CA 94596,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: April 6, 2006
San Francisco, CA

ISSUED JULY 20, 2006

Chevron Stations, Inc., doing business as Chevron Food Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, John Lorenzo, having sold a six-pack of Coors Light beer to Lauren Dewing, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, 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, Dean Lueders.

PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 1, 1999. On

[1]The decision of the Department, dated May 5, 2005, is set forth in the appendix.

December 17, 2004, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage on October 29, 2004.

An administrative hearing was held on April 12, 2005, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged, and no affirmative defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that it was denied due process as a result of an ex parte communication, and was not permitted to question the decoy about her experience in other decoy operations.

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 complains that the ALJ improperly sustained Department objections to its attempt to question the decoy about her experience in other decoy operations.

The only question to which any objection was sustained was that which asked the decoy how many stores she visited in the course of eight to ten prior decoy operations. Appellant's counsel made no attempt to explain what use he proposed to make of her answer, assuming she would be able to provide an estimate. It is noteworthy that there was no objection to the preceding question, which the decoy appeared to understand asked the number of stores visited during that particular decoy operation.

Appellant was permitted to explore in detail what the decoy did when she made the purchase in question. At most, it was precluded from obtaining what at best would have been only an approximation of the total number of stores this decoy had visited in earlier decoy operations.

Appellant's explanation of what use it might have made of this information had the decoy been permitted to answer leaves us singularly unpersuaded. The fanciful suggestion that further examination might have developed the fact that the decoy was successful in purchasing an alcoholic beverage in 14 of 15 stores she visited stands in sharp contrast with appellant's decision not to pursue how many stores she visited on the night in question (see RT14-15), or how many of those sold to her.

Moreover, appellant had already established that the decoy had extensive prior experience as a decoy. An estimate of the total number of stores visited in all of the decoy operations in which this decoy participated adds little.

ORDER

The decision of the Department is affirmed.[3]

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

[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.