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

AB-8443
File: 21-371837 Reg: 05058734

RAKESH BALA and KULDIP CHAND, dba Circle R K Food Store
12105 Pioneer Boulevard, Norwalk, CA 90650,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

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

ISSUED MAY 11, 2006

Rakesh Bala and Kuldip Chand, doing business as Circle R K Food Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 20 days for their clerk selling an 18-pack of Miller Genuine Draft beer to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Rakesh Bala and Kuldip Chand, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated May 10, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on January 16, 2001. On January 24, 2005, the Department filed a two-count accusation against them charging that their clerk sold alcoholic beverages to 16-year-old Juan Ayon and 18-year-old Luis Ahumada, Jr., on November 5, 2004.

At the administrative hearing held on April 8, 2005, documentary evidence was received and testimony concerning the violation charged was presented by Ayon ("the minor") and Department investigator Mamie Velez. Ahumada did not appear at the hearing and the count as to him was dismissed.[2] The decision issued by the Department determined that the violation alleged as to Ayon was proved.

Appellants have filed an appeal making the following contentions: The Department violated appellants' right to due process by an ex parte communication and the penalty is excessive under the circumstances.

DISCUSSION

I

Appellants assert the Department violated their right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the 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.

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[2]In all cases charging sale-to-minor violations, the Department must produce the minor at the hearing, unless the minor is deceased, too ill to be present, or the minor's presence is waived by the respondent. (Bus. & Prof. Code, § 25666.)

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 motion 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 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 to them in this administrative proceeding. Under these circumstances, and with the potential for 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

The Department adopted the proposed decision of the ALJ which imposed a penalty of 20 days. The usual penalty for a first sale-to-minor violation, which this was, is 15 days. (4 Cal. Code Regs., § 144 [Penalty Guidelines].) Appellants contend the Department abused its discretion in ordering a 20-day suspension in this case.

The decision addresses the penalty in Determination of Issues II and III:

> II The Department recommended that Respondents' license be suspended for twenty days, five more than the Department's "standard" penalty as stated in the Department's Penalty Schedule. The higher penalty is consistent with the Department's Penalty Policy Guidelines, which state in part: "Higher or lower penalties from (the penalty) schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. Aggravating factors may include, but are not limited to: . . . 6. Appearance and actual age of minor." Title 4, California Code of Regulations, Section 144.
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> III In this case, Respondents' clerk sold a substantial amount (eighteen cans) of beer to a customer who was only sixteen years old. Although the minor was large for his age, he did not appear to be at least twenty-one years old when he testified at the hearing. If anything, he appeared to be a large sixteen-year old young man. (The Administrative Law Judge assumes that the minor on November 5, 2004 did not appear older than he did at the hearing.) In accordance with the Department's Penalty Policy Guidelines, aggravation of Respondent's penalty is warranted.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. “If reasonable minds might differ as to the propriety

of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

Appellants contend that the penalty is an abuse of discretion because the Department did not follow its own penalty guidelines, there is not substantial evidence in the record on which to base an aggravated penalty, and the decision does not comply with the directive of the California Supreme Court's holding in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga*) because it does not properly "bridge the gap" between "the raw evidence of the minor's appearance and the ultimate determination regarding the minor's age." None of these arguments has merit.

It is obvious from the explanation for the penalty imposed that the Department's guidelines were followed. The guidelines provide that the "Appearance and actual age of [the] minor" may be considered an "aggravating factor" in determining the appropriate penalty. The standard 15-day penalty was aggravated in this case because the decoy's actual age was only 16 and his appearance was not that of a 21 year old, but of "a large sixteen-year old young man."

This Board has previously addressed the question of substantial evidence of a decoy's apparent age:

> This Board has considered in prior decisions assertions that substantial evidence did not support the ALJ's finding regarding the decoy's apparent age. In *Circle K Stores, Inc.* (2001) AB-7498, the Board declined to find that substantial evidence of the decoy's apparent age was lacking, saying, "The decoy himself provides the evidence of his appearance." In *The Southland Corporation/Amir* (2001) AB-7464a, the Board responded to the argument by saying: "We simply do not agree that an administrative law judge who must determine the apparent age of a decoy, and actually sees the decoy in person, lacks substantial evidence to make such a determination."

(7-Eleven, Nagra, & Sunner (2004) AB-8064.)

Just as a decoy's presence at a hearing provides substantial evidence for an ALJ's determination of the decoy's apparent age, the minor's presence at the hearing in this case provided substantial evidence to support the ALJ's determination that the minor did not appear to be 21 years old, but "a large sixteen-year old young man." There is clearly substantial evidence to support the aggravated penalty.

The contention that the Department failed to comply with *Topanga* has been rejected by this Board numerous times before. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181, the Board explained:

> Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)

Sufficient analysis was provided by the ALJ's explanation that the minor did not appear to be 21, but only a large 16-year-old young man.

The Department's imposition of a 20-day suspension, under the circumstances in this case, was not an abuse of discretion.

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 order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.