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

AB-8446
File: 20-386395 Reg: 04057856

BP WEST COAST PRODUCTS LLC, dba ARCO AM/PM # 5365
100 La Terraza Boulevard, Escondido, CA 92025,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED JUNE 2, 2006

BP West Coast Products LLC, doing business as ARCO AM/PM # 5365 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] that suspended its license for 16 days for appellant's clerk selling an alcoholic beverage to a 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, R. Bruce Evans, and Ryan Kroll, 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 26, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 26, 2002. On August 23, 2004, the Department filed an accusation against appellant charging that on June 18, 2004, appellant's clerk, Brian Hyde (the clerk), sold an alcoholic beverage to 18-year-old Josh Williams. Although not noted in the accusation, Williams was working as a minor decoy for the Escondido Police Department at the time.

At the administrative hearing held on January 21, 2005, documentary evidence was received, and testimony concerning the sale was presented by Williams (the decoy); by Jessica Patten, another minor decoy; by Department investigator Peter Tyndall; by Mohammad Jami, a clerk at appellant's premises; and by Rosemary Andaya, the manager of the premises.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant has filed an appeal making the following contentions: The Department violated its right to due process by an ex parte communication, and the penalty is excessive under the circumstances.

DISCUSSION

I

Appellant asserts the Department violated its 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. 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 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").[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.)

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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.)

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. 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 to it 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, 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

The facts pertinent to appellant's argument with regard to the penalty are set out in Finding of Fact II.A. of the decision:

> On June 18, 2004, an eighteen year old male decoy, Josh Williams (hereinafter "Williams") and a nineteen year old female decoy, Jessica Patten (hereinafter "Patten"), went to the Respondent's premises with officers from the Escondido Police Department as part of a shoulder tap operation.[1] While Williams and Patten were standing outside the premises near the front doors, an employee of the Respondent went outside the premises to smoke a cigarette. This employee who was later identified as Brian Hyde was wearing a shirt that identified him as a premises employee. Hyde subsequently asked the two decoys why they were standing there and whether they were planning to rob the premises. Williams responded by advising Hyde that he was only eighteen, that both he and Patten were under the age of twenty-one and that they were looking for someone to buy beer for them. Patten also advised Hyde that she was nineteen. Hyde then invited the two decoys to go inside the premises to his register and told them that he would let them buy some beer. When Hyde finished his cigarette, he went back into the premises and the two decoys followed him in. After the two decoys went to the beer coolers, Williams "grabbed" a six-pack of Coors Light Beer, took it to Hyde's cash register and placed the beer on the counter. When Hyde asked Williams for identification, Williams took out his wallet which contained his identification that was visible through a plastic cover. While Williams was holding his wallet, Hyde looked at the identification through the clear plastic cover and he stopped Williams from pulling the identification out of his wallet by saying, "You're good, you don't have to take it out." When a second clerk told Hyde that he should check the identification better because the cops had been outside the premises earlier, Hyde stated that he did not care if he got caught by the cops or if he got fired. After Hyde rang up the purchase, he took the money tendered by Williams, gave him some change and bagged the beer. The two decoys then exited the premises with the beer and proceeded to Detective Harrison's vehicle. They subsequently entered the vehicle and they advised the officers as to what had occurred.

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[1]During a shoulder tap operation, an underage decoy approaches a person outside a licensed premises, advises the person that he is under the age of twenty-one and asks the person to purchase an alcoholic beverage for him.

Appellant contends that because Hyde knew what he was doing was against the law, knew that it was against company policy, and did not care if he were fired over his actions, the Department's imposition of a 16-day suspension violates the Department's policy of non-punitive penalties and is an abuse of discretion. Appellant argues that, like the case of *Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570 [90 Cal.Rptr. 2d 523] (*Santa Ana*), the present case calls for an exception to the general rule that an employee's acts are imputed to the licensee. An exception in this case is justified, appellant urges, because it took strong steps to prevent and deter criminal activity by its clerks and was unaware of this "renegade" clerk's conduct. Additionally, appellant argues, Hyde's conduct was so far outside the scope of his employment that it could not have been reasonably foreseeable.

In *Santa Ana, supra,* the Department had ordered the license suspended for a single, surreptitious, illegal purchase of food stamps by an employee. The Court of Appeal reversed, holding that in this case the rule of imputed knowledge should not apply. The court carefully limited application of this holding, however, saying:

> By concluding the ABC's action in this case was an abuse of discretion, we do not intend to change the basic rules for suspension of licenses or unduly restrict the ABC from exercising its discretion. But where, as here, a licensee's employee commits a single criminal act unrelated to the sale of alcohol, the licensee has taken strong steps to prevent and deter such crime and is unaware of it before the fact, suspension of the license simply has no rational effect on public welfare or public morals.

(*Santa Ana, supra,* 76 Cal.App.4th 570, 576.)

Santa Ana, *supra*, is not helpful to appellant because the facts in the present case are not similar. In the present case, the illegal act was not surreptitious, but

flagrant, with at least one other employee being aware of Hyde's conduct, and it directly involved the sale of alcohol, instead of being unrelated to the sale of alcohol.

Appellant also argues it should not be sanctioned because it took strong steps to prevent and deter criminal activity by its clerks and was unaware of this "renegade" clerk's conduct.

The current manager testified that employees had to sign several forms acknowledging that they had been trained and that they knew what to do regarding tobacco and alcohol sales. She also said that employees had some training, received training again after this violation, and would be fired if they sold to minors. The training provided to the employees was not described. This hardly constitutes the kind of "strong steps" that might, along with other factors, justify an exception to the rule of imputed knowledge.

Appellant's statement that it was unaware of the violation does not exempt it from imputed liability. First, the other employee, Jami, was clearly aware that Hyde was engaging in conduct that violated company policy and might well be illegal. Secondly,

> a licensee can draw no protection from his lack of knowledge of violations committed by his employees or from the fact that he has taken reasonable precautions to prevent such violations. 'There is no requirement . . . that the licensee have knowledge or notice of the facts constituting its violation.' [Citations.]" (*Reimel v. Alcoholic Bev. etc. Appeals Bd.* [(1967)] 252 Cal.App.2d [520] at p. 522 [[60 Cal.Rptr. 641]].)

(*Santa Ana, supra,* 76 Cal.App.4th 570, 574 (fn. 3).)

As for appellant's argument that Hyde was acting outside the scope of his employment, this also fails. "Wrongful acts by employees giving rise to a suspension need not be within the scope of employment. ([*Reimel v. Alcoholic Bev. etc. Appeals Bd*., *supra*, 252 Cal.App.2d at p. 523].)" (*Santa Ana Food Market, supra,* 76 Cal.App.4th 570, 574.)

Appellant has not shown that the Department clearly abused its discretion in ordering a 16-day suspension in this case.

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 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.