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

AB-8448
File: 20-387957 Reg: 04058536

CHEVRON STATIONS, INC., dba Chevron
215 East Via Rancho Parkway, 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 MAY 18, 2006

Chevron Stations, Inc., doing business as Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 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 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, Kerry K. Winters.

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[1]The decision of the Department, dated June 9, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 19, 2002. On December 22, 2004, the Department filed an accusation against appellant charging that, on October 22, 2004, appellant's clerk, Jacqueline McKeithen (the clerk), sold an alcoholic beverage to 19-year-old Jessica Patten. Although not noted in the accusation, Patten was working as a minor decoy for the Escondido Police Department at the time.

At the administrative hearing held on April 29, 2005, documentary evidence was received, and testimony concerning the sale was presented by Patten (the decoy).

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: Substantial evidence does not support the finding that the decoy's appearance complied with rule 141(b)(2)[2]; the Department violated appellant's right to discovery under Government Code section 11507.6; and the Department violated appellant's right to due process by an ex parte communication.

DISCUSSION

I

Appellant contends that the ALJ erroneously found that the decoy's appearance complied with the mandate of rule 141(b)(2), which requires that the decoy display the appearance that could generally be expected of a person under the age of 21. Appellant asserts the ALJ's finding was based on his "unsupported presumption that [the decoy's] nonphysical appearance at the hearing would be similar to her

[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.

nonphysical appearance at the location while transacting with the clerk," citing page 3 of the Department's decision.

Appellant states that an experienced decoy, such as the one here, would be relaxed during the transaction at appellant's premises. Because there was no evidence of the decoy's experience testifying at adjudicatory hearings, appellant asserts, it was "improper for a Decision to be based upon the assumption that [the decoy's] experience testifying is commensurate with her experience acting as a decoy." Appellant then enumerates the factors it believes "substantiate a determination that [the decoy] violated Rule 141(b)(2)": the decoy was "a mature-looking nineteen-and-a-half-year old woman with three to four years of decoy experience"; she wore mascara and earrings; she had dyed her hair black; and she believed she was tall for her age.

On page 3 are three of the five paragraphs in the decision devoted to the decoy's appearance (Finding of Fact II.D., ¶¶ 2-4):

> 2. The decoy testified that she had participated in fifteen to twenty prior decoy operations, that she usually visited fifteen to twenty premises per operation, that she visited fifteen to twenty premises on October 22, 2004, that she was able to purchase beer at two or three premises that night, that she was a little nervous at the premises but not too much and that she was relaxed for the most part. The decoy also testified that she had become an Explorer with the Escondido Police Department at about age 15, that she continued in that program for thirteen months, that she was paid ten dollars per hour as a decoy and that she was paid about fifty dollars on the night of October 22, 2004.
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> 3. The decoy's nonphysical appearance was unremarkable and she provided straight forward answers at the hearing.
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> 4. After considering the photograph depicted in Exhibit 4, the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance that 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.

Appellant's argument is meritless. Appellant did not raise this issue at the hearing, limiting its argument to the contention that the decoy's appearance was not that generally to be expected of a person under the age of 21. No evidence or argument was presented suggesting that appellant believed the decoy's appearance at the hearing might have been substantially different at the time of the illegal sale. The Board is entitled to consider this issue waived. (See *Islam* (2000) AB-7442; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §394, p. 444.)

In any case, the ALJ's finding of compliance with rule 141(b)(2) did not rely on "an unsupported assumption that [the decoy's] appearance at the hearing was similar on the date of the incident." Rather, five paragraphs are devoted to describing the physical and nonphysical appearance the decoy presented to the ALJ, and the determination is based on all the evidence presented regarding her appearance. Unlike appellant, the ALJ did not focus on one particular aspect of the decoy's appearance, but considered her overall appearance.

In determining whether a Department decision is supported by substantial evidence, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *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].)

Rather than "an unsupported assumption" that the decoy's appearance at the hearing was similar on the date of the illegal sale, the ALJ drew a proper and reasonable inference based on all the evidence presented to him. In the absence of any evidence or argument to the contrary, he was clearly entitled to do so.

The ALJ was aware of all the factors that appellant asserts show that the decoy's appearance violated the rule, but he concluded that the decoy did not violate the rule. Appellant has given us no reason to depart from our general rule of deference to the ALJ's determination regarding the decoy's appearance.

II

Appellant asserts in its brief that its pre-hearing motion seeking discovery of all decisions certified by the Department over a four-year period "where there is therein a finding or an effective determination that the decoy at issue therein did not display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense," was improperly denied. Appellant alleges that ALJ Gruen, who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellant failed to show that the requested items were relevant or would lead to admissible evidence.

Appellant spends much of its brief arguing that the provisions of the Civil Discovery Act (Code Civ. Proc., §§ 2016-2036) apply to administrative proceedings, a contention this Board rejected in numerous cases in 1999 and 2000 (see, e.g., *The Southland Corporation/Rogers* (2000) AB-7030a), all of which were argued by the same law firm representing the present appellant. Those decisions of the Appeals Board held:

> "[T]he exclusive right to and method of discovery as to any proceeding governed by [the APA]" is provided in §11507.6. (Gov. Code, §11507.5.) The plain meaning of this is that any right to discovery that appellants may have in an administrative proceeding before the Department must fall within the list of specific items found in Government Code §11507.6, not in the Civil Discovery Act. . . . . [¶] In addition, §11507.7 requires that a motion to compel discovery pursuant to §11507.6 "shall state . . . the reason or reasons why the matter is discoverable *under that section* . . . ." [Emphasis added.] [¶] Therefore, we believe that appellants are limited in their discovery request to those items that they can show fall clearly within the provisions of §11507.6.

Appellant's arguments in the present appeal, repeating, almost verbatim, the arguments made in 1999 and 2000, are no more persuasive today than they were six or seven years ago.

Appellant argues that it is entitled to the materials sought because they will help it "prepare its defense by knowing . . . what factors have been considered by the Department in deciding how a decoy's appearance violated the rule" so that it can compare the appearance of the decoy who purchased alcohol at its premises with the "characteristics, features and factors which have been shown in the past to be inconsistent with the expectations . . . of the rule." (App. Br. 12) It asserts that "it is more than reasonable" that decisions in which decoys were found not to comply with rule 141(b)(2) "could assist the ALJ in this case by comparison." However, appellant does not explain how an ALJ is expected to use those decisions to make such a comparison.

It is conceivable that each decoy who was found not to display the appearance required by the rule had some particular attribute, or combination of attributes, that warranted his or her disqualification. We have considerable doubt, however, that any such attributes, which an ALJ would only be able to examine from a photograph or

written description, would be of any assistance in assessing the appearance of a different decoy who is present at the administrative hearing.[3]

The most important attribute at the time of the sale is probably the decoy's facial countenance, since that is the feature that confronts the clerk more than any other. Yet, it is, in every case, an ALJ's overall assessment of a decoy's appearance that matters, not simply a focus on some narrow aspect of a decoy's appearance.

We know from our own experience that appellants' attorneys represent well over half of all appeals this Board hears. We must assume, therefore, that the vast bulk of the information they seek is already in the possession of their attorneys. This, coupled with the questionable assistance this information could provide to an ALJ in assessing the appearance of a decoy present at the hearing, persuades us that ALJ Gruen did not abuse his discretion in denying appellant's motion.

III

Appellant asserts the Department violated its right to procedural due process when the attorney 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 motions and issues raised in the

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

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 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.

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[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.)

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.

ORDER

The decision of the Department is affirmed.[5]

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

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[5]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.