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

AB-8454
File: 20-286536 Reg: 04058318

CHEVRON STATIONS, INC. dba Chevron
1960 West 11th Street, Tracy, CA 95377,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

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

ISSUED JULY 24, 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 10 days, all of which were stayed conditioned upon one year of discipline-free operation, for its clerk, Patricia Ann Morgan, having sold a six-pack of Budweiser beer to Brandon Richardson, 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 and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on November 30, 1993.

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[1]The decision of the Department, dated June 16, 2005, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellant on November 9, 2004, charging an unlawful sale of an alcoholic beverage to a minor, Richardson, on September 3, 2004.

An administrative hearing was held on May 11, 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 defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant's motion to compel discovery was improperly denied; (2) appellant was denied due process as a result of an ex parte communication; and (3) there was no compliance with Rule 141(b)(2).

DISCUSSION

I

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 Administrative Law Judge (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 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" (App. Br. at p.14) so that it can compare the appearance of the decoy who purchased alcohol at their premises with the "characteristics, features and factors which have been shown in the past to be inconsistent with the general expectations . . . of the rule." (App. Br. at p. 13.) It asserts "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." (*Ibid*.) However, appellant does not explain how an ALJ is expected to make such a comparison.

It is conceivable that each decoy found not to display the appearance required by the rule had some particular indicium, or combination of indicia, of age that warranted his or her disqualification. We have considerable doubt, however, that any such indicia, 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 an administrative hearing.

The most important indicium 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 appellant's attorneys represent well over half of all appellants before this Board. We would think, therefore, that the vast bulk of the information appellant seeks is already in the possession of its attorneys, a fact of which the Board can take official notice. This, coupled with the questionable assistance the information sought could provide to an ALJ in assessing the appearance of a decoy present at the hearing,[2] persuades us that ALJ Gruen did not abuse his discretion in denying appellant's motion.

II

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

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[2] Unless a minor is deceased or too ill to be present, or unless the minor's presence is waived, he or she must be produced at the hearing by the Department in all cases charging violations of Business and Professions Code sections 25658, 25663, and 25665. (See Bus. & Prof. Code section 25666.)

(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").[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

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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.)

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 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.

III

Appellant contends the decision must be reversed because the decoy had a receding hairline. They cite *The Southland Corporation/Te and Young* (2000) AB-7430, a case in which the Board was critical of the use of a decoy with a receding hairline. In broad language, the Board said the use of such a decoy was unacceptable.

We believe it would be ill-advised to treat the *Southland/Te and Young* decision as creating a per se rule that a decoy whose hair line could be said to be receding could not display the appearance required by Rule 141(b))(2). Such a rule would place undue weight on a single characteristic, ignoring other indicia of age that are to be considered in a reasonable assessment of a decoy's overall appearance.

The ALJ has the opportunity to see the decoy, weigh each aspect of his appearance against the standard prescribed by the rule, and make his or her judgment taking into account the whole person. In this case, for example, the ALJ made it very clear that he was considering the overall appearance of the decoy (Finding of Fact 13):

> The overall appearance of the decoy including his demeanor and physical appearance is consistent with that of a person under the age of 21. Exhibit 3 is a photocopy of a photograph taken the date of the illegal sale. It is an accurate depiction of the minor decoy and after considering it and other evidence about

> his overall appearance on September 4, 2004 as well as the decoy's overall appearance during the hearing, a finding is made that the decoy displayed an overall appearance that could be generally expected of a person under 21 years of age when the sale occurred at Respondent's premises.

By the same token, his reference in Finding No. 10 to the decoy's receding hair line is proof that he did not overlook that feature in making his assessment.

We have looked at Exhibit 3. It is not our function to reweigh the evidence, and we do not purport to do so. We must say, however, that the person depicted in Exhibit 3 appears to be a typical teenager, a young man well under the age of 21 who happens to have a wide forehead.

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 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.