

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

AB-8476

File: 21-365321 Reg: 04058352

JAROCO DISCOUNT MARKET, INC., dba Jaroco Discount Market
1148 25th Street, San Diego, CA 92102,
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

Jaroco Discount Market, Inc., doing business as Jaroco Discount Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 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 Jaroco Discount Market, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Justin Harelik, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated August 15, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 26, 2000. On November 18, 2004, the Department filed an accusation against appellant charging that, on August 6, 2004, appellant's clerk, Rafi Hanna (the clerk), sold an alcoholic beverage to 18-year-old Abdikarim Warsame. Although not noted in the accusation, Warsame was working as a minor decoy for the San Diego Police Department at the time.

At the administrative hearing held on June 28, 2005, documentary evidence was received and testimony concerning the sale was presented by Warsame (the decoy) and by San Diego police detective Greg Olson.

The Department's decision determined that the violation charged was proved and no defense was established. Appellant then filed an appeal contending: (1) The Department violated appellant's right to due process as the result of an ex parte communication and (2) rule 141(b)(2)² was violated.

DISCUSSION

I

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

²References 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.

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 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.

³The 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 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

Appellant contends that the decoy's appearance violated 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 under the actual circumstances presented to the seller of the alcoholic beverage. Appellant argues that the Board should not accord its usual deference to the ALJ's finding that the decoy complied with rule 141(b)(2) because the decoy was able to purchase alcoholic beverages in four of the six licensed premises he visited that night. This high purchase rate, appellant asserts, was due to the decoy's mature facial features and the self-assured demeanor that appellant insists he must have had as the result of his prior experience as a decoy.

The ALJ made the following findings regarding the decoy's appearance (Finding of Fact D):

The overall appearance of the decoy including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was approximately ten pounds lighter on the day of the sale.

1. The decoy is a youthful looking male. On the day of the sale, he was five feet eleven inches in height, he weighed one hundred forty pounds, he had no facial hair, he wore no jewelry and his clothing consisted of blue jeans, a short sleeve, gray T-shirt and tennis shoes. The photographs depicted in Exhibits 3, 4-A and 4-B were taken on the day of the sale and they show how the decoy looked and what he was wearing on the day of the sale.
2. The decoy testified that he had participated in two or three prior decoy operations, that he was not paid to be a decoy and that he had never been a police Explorer.
3. The decoy attempted to purchase an alcoholic beverage at a total of six locations on August 6, 2004 and he was able to purchase at four locations.

4. There was nothing remarkable about the decoy's nonphysical appearance.
5. The clerk who sold beer to the decoy did not testify at the hearing. However, the clerk made a statement to Detective Olson indicating that he had been tricked by the decoy's identification. Based upon this hearsay statement by the clerk, the Respondent's attorney implied that the decoy had used a fake identification. However, the preponderance of the evidence did not establish that the decoy used a fake identification. The decoy credibly testified that he provided his California driver license to the clerk and that Exhibit 2 is an accurate photocopy of the driver license he presented to the clerk. This driver license indicates that the decoy's date of birth is 06-05-86 and it also contains a red stripe indicating "AGE 21 in 2007." Furthermore, the Respondent's president testified that the clerk had told him that he was distracted because his wife and baby were present during the sale of the beer to the decoy.
6. After considering the photographs depicted in Exhibits 3, 4-A and 4-B, the overall appearance of the decoy when he testified and the way he conducted himself 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 relies on the decision of the Appeals Board in *7-Eleven, Inc./Dianne Corporation* (2002) AB-7835 (*Dianne*), in which the Board reversed the Department's decision, in part because the decoy was able to purchase in eight out of the ten licensed premises he visited. However, appellant ignores both the other factors influencing the Board's decision in *Dianne* and the Board's subsequent clarification of the *Dianne* decision in *7-Eleven, Inc./Jain* (2004) AB-8082 (*Jain*).

In *Jain*, the Board made it clear that *Dianne* did not create a per se rule of noncompliance with rule 141(b)(2) whenever a decoy was able to purchase alcoholic beverages in 80 percent of the licensed premises in which attempts were made. The Board continued:

Although an 80 percent purchase rate during a decoy operation raises questions in reasonable minds as to the fairness of the decoy operation, that by itself is not enough to show that rule 141(a) or rule 141(b)(2) were

violated. Such a per se rule would be inappropriate, since the sales could be attributable to a number of reasons other than a belief that the decoy appeared to be over the age of 21.

We are not convinced that the 67 percent purchase rate in the present case is so high that it should raise the question of whether the decoy complied with rule 141(b)(2). Even if it did, however, the ALJ answered that question in his findings regarding the decoy's appearance. Nothing in those findings leads us to question the ALJ's conclusion that the decoy complied with the rule. We extend our usual deference to the judgment of the ALJ in making the finding as to apparent age, since the ALJ had the opportunity, which this Board does not, of observing the decoy in person.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.