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

AB-8484
File: 20-294672 Reg: 05059151

7-ELEVEN, INC., and P R CUTSHAW, INC., dba 7-Eleven # 2111-27524
1177 North Escondido Boulevard, Escondido, CA 92026,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 1, 2006
Los Angeles, CA

ISSUED AUGUST 11, 2006

7-Eleven, Inc., and P R Cutshaw, Inc., doing business as 7-Eleven # 2111-27524 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, all of which were stayed on the condition that appellant operate discipline-free for one year, for their 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 appellants 7-Eleven, Inc., and P R Cutshaw, Inc., appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated October 20, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 12, 1994. On March 15, 2005, the Department filed an accusation against appellants charging that, on January 13, 2005, appellants' clerk sold an alcoholic beverage to 19-year-old Glenn 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 August 17, 2005, documentary evidence was received, and testimony concerning the sale was presented by Williams (the decoy).

The Department's decision determined that the violation charged was proved and no defense was established. Appellants filed an appeal contending: (1) Rules 141(a) and 141(b)(2)[2] were violated, (2) the Department violated appellants' right to discovery; and (3) the Department violated appellants' right to due process.

DISCUSSION

I

Appellants contend that it was unreasonable and an abuse of discretion for the ALJ to find that the decoy displayed the appearance that could generally be expected of a person under the age of 21 at the time of the illegal sale, in compliance with rule 141(b)(2). They base this contention on the decoy's size, his "extensive experience as a paid minor decoy," and his "extensive law enforcement training." In addition, they argue that the decoy operation was not conducted in a fashion that promoted fairness, as required by rule 141(a), because this decoy was used.

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[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.

The decision addresses the decoy's appearance in Finding of Fact II.C.:

C. 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. The decoy's appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was twenty-five pounds heavier at the time of the hearing. The decoy also had long sideburns and some facial hair on his chin resembling a "goatee" at the time of the hearing.

1. On the day of the sale, the decoy was six feet in height, he weighed one hundred seventy-five pounds, his hair was short and he was clean-shaven. His clothing consisted of black jeans, a black sweatshirt and black Nike shoes.

2. The decoy testified that he had participated in fifteen to twenty prior decoy operations, that he was paid to be a decoy and that he usually received thirty to fifty dollars per night when he worked as a decoy. The decoy further testified that he had taken classes at Palomar College consisting of an introduction to criminal justice and criminal scene forensics and that he had participated in a Border Patrol cadet program.

3. The evidence established that the decoy visited twenty-three licensed premises on January 13, 2005 and that only three of those premises sold an alcoholic beverage to the decoy.

4. Exhibit 2 was taken at the premises on the day of the sale. This photograph depicts what the decoy was wearing and how he appeared at the premises. Although the decoy is a fairly large young man, he has what is generally described as a "baby face." The "baby face" was evident at the hearing even though he had long sideburns and a ["]goatee" and the "baby face" is even more evident in the photograph depicted in Exhibit 2.

5. The decoy came across as a polite, intelligent and confident young man while testifying at the hearing. Although the Respondents' attorney argued that the fact that the decoy was very polite and confident made him appear more mature, the evidence established that the decoy had no conversation with the clerk at the time of the sale.

6. After considering the photograph depicted in Exhibit 2, the overall appearance of the decoy including his demeanor and his "baby face" and the fact that only three of the twenty-three licensed premises sold an alcoholic beverage to the decoy on the day of the subject decoy operation, 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.

Appellants make the familiar argument that the decoy's size and experience make his appearance violative of rule 141(b)(2). As we have said many times before, we will ordinarily defer to the ALJ's determination as to the decoy's appearance. The ALJ saw the decoy in person and he considered all the factors relied upon by appellants in making his determination. There is no reason for this Board to question the ALJ's conclusion.

II

Appellants assert in their brief that their 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 determination 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.

Appellants allege 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 appellants failed to show that the requested items were relevant or would lead to admissible evidence.[3]

Appellants spend much of their brief arguing that the provisions of the Civil Discovery Act (Code Civ. Proc., §§ 2016-2036) apply to administrative proceedings before the Department, a contention this Board rejected in numerous cases in 1999

[3]This Board has found no document in the record related to this contention. No documents were included as exhibits to appellants' brief. This failure of evidence would be a sufficient basis in itself to reject appellants' contention in this appeal.

and 2000. One of those cases, *The Southland Corporation/Rogers* (2000) AB-7030a, is representative of the Board's response to this argument:

> "[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.

Appellants' 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.

Appellants argue they are entitled to the materials sought because they will help them "prepare its [sic] defense by knowing . . . what factors have been considered by the Department in deciding how a decoy's appearance violated the rule" so that they 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." They assert 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, appellants do not explain how an ALJ is expected 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.[4]

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, in every case, it is 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 appellants' motion.

III

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.

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

[4] 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.)

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").[5]

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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[5]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 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.

ORDER

The decision of the Department is affirmed.[6]

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

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[6]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.