

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

AB-8489

File: 20-391817 Reg: 05059312

MIRIAM ZLOTOLOW dba Venice Ranch Market
425 Rose Avenue, Venice, CA 90291,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

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

ISSUED OCTOBER 4, 2006

Miriam Zlotolow, doing business as Venice Ranch Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended her off-sale beer and wine license for 25 days for her clerk, Nora Torres, having sold a six-pack of Bud Light beer to Marisol Salas, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Miriam Zlotolow, appearing through her counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 28, 2002. The

¹The decision of the Department, dated October 27, 2005, is set forth in the appendix.

Department instituted an accusation against appellant on April 4, 2005 charging the sale of an alcoholic beverage to a minor on December 9, 2004. The accusation also alleged that appellant had been disciplined on July 31, 2003, for a prior sale to a minor.

An administrative hearing was held on August 16 and September 15, 2005, at which time oral and documentary evidence was received. At that hearing, Marisol Salas (the decoy) testified that the clerk did not ask her age or for any identification before making the sale. The decoy left the store with the beer, and then returned to the store and identified Torres as the clerk who sold the beer to her.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation, rejected appellant's contention that she had established an affirmative defense under Rule 141(b)(2), and ordered the suspension from which this timely appeal has been taken.

In her appeal, appellant raises the following issues: (1) there was no compliance with Rule 141(b)(2); and (2) appellant was denied due process.

DISCUSSION

I

Appellant contends that the decoy did not display the appearance which could generally be expected of a person under 21 years of age. She points to the decoy's height (five feet 10 inches tall), her mature demeanor, the fact that she was able to purchase an alcoholic beverage in half (three of six) of the establishments she visited, and her experience as a police Explorer. Further, appellant alleges that the administrative law judge (ALJ) erred in giving no weight to the purchase ratio, and in noting that the decoy wore braces. Finally appellant asserts that the clerk could not have seen the braces because the decoy did not discuss anything with the clerk, and

because she did not smile.

Appellant may be correct that the decoy did not discuss anything with the clerk, but is clearly wrong in asserting the clerk had no opportunity to see the decoy wore braces. Her own witness, the clerk, testified that she thought the decoy to be older than 21 because of the way the decoy's eyes looked at her - "Like smiling and just straight to my eyes. [RT 12.]

Appellant also exaggerates the decoy's experience as an Explorer. She was in the program only two months at the time of the decoy operation, had been given no training, and engaged only in conditioning exercises, such as running.

The ALJ disagreed with appellant on both these points, as did the record, and this was apparent in several of his findings (Findings of Fact 11 through 14), and in one of his legal conclusions (Conclusion of Law 5) regarding the decoy's appearance and what transpired at the time of the sale:

FF 11. Salas became a Police Explorer with LAPD about 2 months prior to the within decoy investigation. Her training as of December 9, 2004, had consisted of little more than running and other physical conditioning. Salas' experience as an Explorer was not shown to bear any relevance to the above-described decoy operation or to her apparent age.

FF 12. Decoy Salas is a female adult who appears her age, 20 years of age at the hearing. Based on her overall appearance, *i.e.*, her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance/conduct in front of clerk Torres at the Licensed Premises on December 9, 2004, Salas displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Torres. Salas appeared her true age.

FF 13. Nora Torres testified at the hearing. She was 23 years of age at the hearing and stood 5 feet, 2 inches in height (See Exhibit 5.) She said she thought that decoy Salas was about 27 years of age at the time of the sale. The main reason for that assessment was that Salas was tall, because she smiled and looked Torres straight in the eye. She did not notice the braces. Torres also testified that she recalled 6 to 8 people in line behind Salas at the time of the sale. That was unusual for that day and time. Torres testified that she did

not check Salas' ID because of the line.

FF14. Respondent's store was not as busy as clerk Torres testified. It is impossible to believe that had there been as many as 6 people in line behind her, decoy Salas could have failed to notice. Respondent's store was likely not as empty as decoy Salas testified. While she surely would have noticed had there been 6 to 8 people in line behind her, Salas was not focused on that element, her principal attention being her decoy duties themselves.

CL 5. Respondent argued there was a failure to comply with sections 141(a) and 141(b)(2) of Chapter 1, title 4, California Code of Regulations [Rule 141]. Therefore, Rule 141(c) applies and the Accusation should be dismissed. Respondent argued that decoy Salas was a tall, confident woman being trained as a Police Explorer who was able to buy alcoholic beverages at 3 out of 6 locations that night. She argued that the decoy did not present the appearance required by Rule 141(b)(2) and the Accusation should be dismissed. The apparent age of decoy Salas was treated in Findings of Fact, paragraphs 5 and 12.

We do not need to belabor the point. The ALJ, who had the opportunity, as this Board does not, to see the decoy as she testified, made a factual determination that her appearance complied with Rule 141(b)(2). We are not inclined to substitute our judgment for his.

II

Appellant asserts the Department violated her 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

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.)

Although the legal issue in the present appeal is the same as that in the

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.)

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 her 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.³

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

³ 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.