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

AB-8245
File: 20-320070 Reg: 03055583

7-ELEVEN, INC., and HI CHEON JEON, INC., dba 7-Eleven Store # 2136-19102
16056 Sherman Way, Van Nuys, CA 91406,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JULY 13, 2005

7-Eleven, Inc., and Hi Cheon Jeon, Inc., doing business as 7-Eleven Store # 2136-19102 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Hi Cheon Jeon, Inc., appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department, dated February 5, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 2, 1996.[2] On July 31, 2003, the Department filed an accusation against appellants charging that, on April 12, 2003, appellants' clerk, Abdul Mannan Budd (the clerk), sold or furnished an alcoholic beverage to 20-year-old Luis Eduardo Sandoval in violation of Business and Professions Code section 25658, subdivision (a).[3]

At the administrative hearing held on November 5, 2003, documentary evidence was received and testimony concerning the sale was presented by Sandoval (the minor) and by Brandon Shotwell, a Department investigator.

Shotwell testified that he observed Sandoval and a young woman, named Amanda Ortiz, in front of the beer cooler in the premises and heard Ortiz assure Sandoval that she would get him whatever he wanted. Sandoval then took a six-pack of Corona beer out of the cooler and Ortiz took out three 24-ounce bottles of Corona. Sandoval walked to the cashier's counter with the six-pack, placed it on the counter a few feet away from the clerk, and when the clerk looked at him, made eye contact with the clerk and lifted the six-pack up to show him.

Ortiz came to the counter and placed her bottles of beer there. The clerk asked for and was shown her identification. Sandoval moved the six-pack next to the three bottles in front of Ortiz, and, in front of the clerk, handed her $3. Sandoval stepped to

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[2]The parties stipulated at the hearing that Hi Cheon Jeon, president of the corporate licensee, Hi Cheon Jeon, Inc., has been personally licensed at this premises since 1976 with no record of discipline.

[3]Business and Professions Code 25658, subdivision (a), provides that "every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor."

the side, and Ortiz paid for the three bottles and the six-pack. The clerk put the three bottles in one bag and the six-pack in another. Ortiz handed the bag with the six-pack to Sandoval, who was then standing next to her, and he carried it out of the store, where he was stopped by the investigators.

The clerk testified at the hearing that he did not see Sandoval lift up the six-pack, did not make eye contact with him, did not see Sandoval give the money to Ortiz, and did not see Sandoval take possession of the bag with the six-pack. After viewing the videotape of the sale, the clerk acknowledged that he saw Sandoval bring the six-pack to the counter, that he saw Sandoval place the six-pack on the counter in front of him, and that Ortiz handed the six-pack to Sandoval right in front of the sales counter where he was standing.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellants filed an appeal contending that the findings are not supported by substantial evidence. Appellants also filed a Motion to Augment Record, requesting that a document entitled "Report of Hearing" be included in the administrative record, and asserted that the Department violated their due process rights when the attorney who represented the Department at the hearing before the administrative law judge (ALJ) provided a Report of Hearing to the Department's decision maker after the hearing, but before the Department issued its decision.

DISCUSSION

I

Appellants state that the decision contains erroneous findings not supported by substantial evidence. However, their argument appears to come down to a challenge to

the ALJ's credibility determination. Appellants contend that the critical factor necessary to sustain the accusation was whether the clerk saw Sandoval give money to Ortiz just before she purchased the beer; that the clerk testified he did not see the money change hands; the ALJ chose not to believe the clerk, but the ALJ's credibility determination was wrong; and the ALJ did not discuss in the decision any facts or evidence regarding whether the clerk saw the money change hands.

Appellants' first contention, that the accusation cannot be sustained without a finding that the clerk saw Sandoval give money to Ortiz, is stated without citation of authority. This is understandable, since there is no authority for such a statement. The exchange of money between a minor and an adult during the purchase of alcoholic beverages, when it takes place in such a way that the selling clerk may be assumed to have seen it, is one factor that is considered when determining whether the clerk furnished alcohol to the minor. It is not, however, the only indicator of furnishing or even a necessary indicator. Furnishing may be found where the clerk does not, and cannot, know of any exchange of money, or even where there is no exchange of money involved.

In *Circle K Stores, Inc.* (2004) AB-8209, where a 21-year-old person purchased beer while accompanied and helped by several others who were not yet 21, the Board said:

> The clerk is the person in control of the sale. He or she must be alert to the substance of the transaction, and cannot ignore circumstances that ought to raise questions in the mind of a reasonably prudent person. When the transaction is in the nature of a group purchase, as the one in this case appeared to be, a clerk must establish that each of those who are involved in the transaction are 21 or over. It is not enough that the person who assembles the various selections and pays for them is 21. A clerk may not close his or her eyes to the reality of what is taking place. The critical fact in this case is not the mere presence of minors, it is their participation in the transaction, all of which took place in front of the clerk.

> Business and Professions Code section 23001 declares that "the subject matter of this division involves in the highest degree the economic, social, and moral well-being and safety of the state and of all its people," and mandates that "all provisions of this division shall be liberally construed for the accomplishment of these purposes." It would be an unduly restrictive reading of the word "furnish" to accept appellant*s contention that there was no furnishing in this case.

Here, Sandoval was with Ortiz at the beer cooler, selected a six-pack of beer and took it to the counter, placed the six-pack in front of Ortiz when she was at the counter, handed money to Ortiz while she was at the counter, stood nearby while Ortiz paid for the beer, and took possession of the beer after it was paid for and bagged. All this took place within the view of the clerk.

While the facts in AB-8029 were somewhat different from those in the present appeal, they are sufficiently similar to provide appropriate guidance. The appellant in AB-8029 attempted to draw the same analogy that appellants attempt to draw here, to a parent purchasing beer while accompanied by a child. The Board rejected this attempt in language that, with minor modification, applies equally to the present case:

> There is a considerable difference between the above scenario and those posited by appellant, in which children accompany their parents into a supermarket, or accompany their parents or other adults at dinner where the adults are served wine. In this case, the clerk knew, or should have known, that [Ortiz] was buying beer not only for [her]self, but also as a conduit for [Sandoval], who selected and/or paid for [his] share of the overall purchase.

We have no difficulty concluding that the participation of Sandoval in this transaction was sufficient to put a reasonable clerk on notice that it was necessary to verify Sandoval's age, as well as Ortiz's, before completing the sale.

II

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 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").[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

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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 *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615 [25 Cal.Rptr.3d 821]. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. (127 Cal.App.4th 615; ___ Cal.Rptr.3d ___). The Department petitioned the California Supreme Court for review, but the Court has not acted on the petition as of the date of this decision.

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 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.[5]

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

[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.