

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

AB-8284

File: 21-84689 Reg: 03056186

JAMES KUNISAKI, dba La Brea Liquors
1617 South La Brea Avenue, Los Angeles, CA 90019,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

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

ISSUED JULY 12, 2005

James Kunisaki, doing business as La Brea Liquors (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his license for 25 days for his 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 James Kunisaki, appearing through his counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹The decision of the Department, dated April 29, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 3, 1980. On October 31, 2003, the Department filed an accusation against appellant charging that, on March 27, 2003, appellant's clerk, Moses Luckett (the clerk), sold an alcoholic beverage to 19-year-old Philidor Claudy.² Although not noted in the accusation, Claudy was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on February 20, 2004, documentary evidence was received, and testimony concerning the sale was presented by Claudy (the decoy), by Los Angeles Police officers Anthony Pack and Araceli Negrete, and by Luckett, the clerk.

The Department's decision determined that the violation charged was proved and no defense was established. Appellant then filed an appeal contending that rules 141(a)³ and 141(b)(2) were violated. Appellants also assert that the Department violated their right to procedural due process 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

Rule 141(b)(2) requires that a decoy must "display the appearance which could generally be expected of a person under 21 years of age, under the actual

²The decision erroneously refers to the decoy as Claudy Philidor.

³References 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.

circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." Rule 141(a) requires that a decoy operation be conducted "in a fashion that promotes fairness." Appellant contends that these requirements were violated because the decoy and officer Pack appeared to the clerk to be a father and son who were together in the store, and this gave the clerk "a skewed view of the decoy's appearance" and "an impression that the decoy was over age 21 because he was accompanied by his 'father'."

Appellant's argument appears to be that, because the clerk thought that the officer and the decoy were father and son, he couldn't judge the decoy's age accurately. Why the supposed familial relationship should make the clerk think the decoy was over 21 is unexplained.

Appellant refers to the decision of the Appeals Board in *Hurtado* (2000) AB-7246, in support of his position. He also cited this case at the administrative hearing, and the ALJ addressed his contention in the decision (Finding of Fact VII):

Citing the Hurtado case . . . , Respondent argued that Officer Pack's presence in the store and his proximity to the decoy made the decoy appear older than his age. The argument is rejected.

In Hurtado, a decoy and a police officer entered a bar and sat at a table. Either the police officer ordered two beers, one for himself and one for the decoy, or they each ordered a beer. The Department suspended the licensee's license for 25 days for violating Business and Professions Code Sections 25658(a) and 25665. The Appeals Board reversed, stating: "Certainly, if the officer ordered the beers, that would completely taint the decoy operation. Even if he did not order the beer for the minor, we find the officer's active participation in the decoy operation to be highly likely to affect how the decoy appeared and to mislead the seller. We conclude that the officer accompanying the decoy as a companion was unfair and violated Rule 141." At page 5.

The Hurtado facts are distinguishable from the facts in the present case. In the present case, Officer Pack did not have any "active participation" in the decoy operation. He merely entered the store behind

the decoy and four other persons not connected with the decoy operation, and he stood approximately five feet behind the decoy when the decoy purchased the beer. They did not do anything to suggest that they were "companions".

Despite appellant's characterization of the officer and the decoy being "together" in appellant's premises and the officer "accompanying" the decoy, the record reveals that they were never closer than two to three feet apart and usually they were five to ten feet apart. There is no evidence that, while in the store, they engaged in any conversation, made physical or eye contact, or interacted in any other way. There was no "active participation" by the officer in the decoy operation.

The fact that the clerk may have thought the decoy looked over 21 does not mean that rule 141 was violated by the decoy's appearance. The Appeals Board has addressed this type of contention a number of times before:

The decoy must only present an appearance which could generally be expected of a person under the age of 21 years. If the clerk, observing a decoy who presents such appearance generally, perceives the decoy to be older than 21, he does so at his peril. A licensee cannot escape liability by employing clerks unable to make a reasonable judgment as to a buyer's age.

(Prestige Stations, Inc. (2000) AB-7248 [fn.2])

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age. We have no doubt that it is the recognition of this possibility that impels many if not most sellers of alcoholic beverages to pursue a policy of demanding identification from any prospective buyer who appears to be under 30 years of age, or even older.

(Yaghnam (2001) AB-7758; accord, Chevron Stations, Inc. (2001) AB-7725; 7-Eleven, Inc. & Virk (2001) AB-7597.)

Regardless of whether the clerk thought the officer and the decoy were father and son, or thought the decoy was over 21, or simply didn't think about it, no violation of rule 141 occurred and appellant did not establish a defense to the charge.

II

Appellant asserts the Department violated its 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. 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").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

⁴The 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.

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. 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.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This 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.