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

AB-8295
File: 20-386436 Reg: 03056292

BP WEST COAST PRODUCTS, LLC dba Arco AM/PM #714
305 East Redlands Boulevard, San Bernardino, CA 92408,
Appellant/Licensee

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 JUNE 30, 2005

BP West Coast Products, LLC, doing business as Arco AM/PM #714 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, five days of which were conditionally stayed for one year, for its clerk, Bernardo Flores, having sold a six-pack of Bud Light beer to Germaan Ayala, a 17-year-old police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant BP West Coast Products, LLC, appearing through its 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 May 20, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 26, 2002. On November 20, 2003, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage to Ayala on August 13, 2003.

An administrative hearing was held on March 5, 2004, at which time oral and documentary evidence was received. The Department presented the testimony of Germaan Ayala, the decoy, and of Ramon Rocha, a San Bernardino police detective. Bernardo Flores, the clerk, and Tina Vasquez, a West Coast Products account executive, testified on behalf of appellant. The testimony established that the clerk did not ask Ayala his age or for his identification when he sold the Bud Light beer to Ayala.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no affirmative defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the decoy did not present the appearance required by Rule 141(b)(2).[2] Appellant has also filed a Motion to Augment Record, requesting that a document entitled "Report of Hearing" be included in the administrative record, and has asserted that the Department violated its due process rights when the attorney who represented the Department at the hearing before the ALJ provided a Report of Hearing to the Department's decision maker after the hearing, but before the Department issued its decision.

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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.

DISCUSSION

I

Appellant argues that the administrative law judge (ALJ) ignored the testimony of the clerk when making his determination that the decoy displayed the appearance required by Rule 141(b)(2),[3] and, as a result thereof, the finding that the decoy displayed the requisite appearance is not supported by substantial evidence. Appellant contends that the clerk's testimony must form a part of the ALJ's decision-making process in making his Rule 141(b)(2) determination because such testimony is relevant to the appearance displayed by the decoy under the actual circumstances presented to the seller.

What appellant seems to be saying is that, unless the ALJ makes specific reference to the clerk's testimony about how the decoy appeared to him, his finding that there was compliance with Rule 141(b)(2) cannot stand.

Appellant is incorrect when it asserts in its brief (App. Br., page 1) that the ALJ "completely ignored" the testimony of the clerk. The ALJ specifically noted, in Finding of Fact D-2, that the clerk testified that the decoy "looked the same on the day of the sale and on the day of the hearing."

But, even if the ALJ had not specifically referred to some portion of the clerk's testimony, that does not mean he ignored it. Indeed, he may have chosen not to believe the clerk, or, more benignly, simply concluded the clerk was a poor judge of a person's age.

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[3] Rule 141(b)(2) requires that a decoy "display the appearance which could 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."

We cannot expect an ALJ to articulate every thought that goes through his mind as he prepares his proposed decision. In *Circle K Stores, Inc.* (1999) AB-7080, this Board made that clear:

> It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.

A year later, the Board further clarified its thinking:

> We are well aware that the rule requires the ALJ to undertake the difficult task of assessing that appearance many months after the fact. However, in the absence of evidence of discernible change in the appearance or conduct of the decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date. A specific finding by the ALJ to the effect that the minor's appearance was substantially the same at both times shows that the ALJ was well aware of, and took into consideration, the rule's requirement that the minor's apparent age must be judged as of the time, and under the actual circumstances, of the alleged sale.

(Circle K Stores, Inc. (2000) AB-7265, fn.2.)

In this case, the ALJ and the clerk agreed that the decoy presented substantially the same appearance at both the time of the sale and the time of the hearing, and the proposed decision reflects that. The ALJ simply did not agree that the decoy appeared to be over 21 at either time. We find nothing in his description of the decoy's appearance on either occasion to warrant overturning the decision.

II

Appellant asserts the Department violated its right to procedural due process when the attorney representing the Department at the hearing before the ALJ (the

advocate) 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 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

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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 has petitioned the California Supreme Court for review, and the Court has yet to act on the petition.

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 administrative law judge (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. 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 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 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.[5]

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

[5] 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.