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

AB-8314
File: 20-386312 Reg: 04056733

BP WEST COAST PRODUCTS, LLC dba Arco AM PM 5252
82338 Highway 111, Indio, CA 92201,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED JUNE 30, 2005

BP West Coast Products, LLC, doing business as Arco AM/PM 5252 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk having sold a 24-ounce can of Bud Light beer to Damian Ruiz ("Ruiz"), a 19-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.

PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 26, 2002. On February 24, 2004, the Department instituted an accusation against appellant charging that, on September 23, 2003, appellant's employee sold an alcoholic beverage to

[1]The decision of the Department, dated July 8, 2004, is set forth in the appendix.

Damian Ruiz, a minor.

An administrative hearing was held on May 21, 2004, at which time oral and documentary evidence was received. At that hearing, Ruiz testified that when he purchased the beer, he was asked for identification. He gave the clerk his California driver's license, and after she had examined it, she sold him the beer. No one testified on behalf of appellant.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven, and appellant had not established any affirmative defense to the charge.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the administrative law judge (ALJ) erred in finding that the decoy displayed the appearance required by Rule 141(b)(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.

DISCUSSION

I

Rule 141 (b)(2) requires that a police 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. Appellant asserts that the ALJ failed to give proper consideration to the fact that Ruiz had been a two-year employee of the police department of the city of Indio, and a six-year Explorer with the police.

The ALJ's findings (Findings of Fact 5 and 10 through 12) with respect to Ruiz's appearance are as follows:

> 5. Ruiz appeared at the hearing. He stood about 5 feet, 6 inches tall and weighed about 135 pounds. He described his black hair as being worn in a crew cut, although it was a bit longer than that. His hair was unremarkable. He wore blue jeans and a gray T-shirt that had some orange embroidered writing on the front chest area. There had been no change in Ruiz's height or weight since September 23, 2003. At Respondent's Licensed Premises Ruiz was dressed the same as he appeared at the hearing. (*See* Exhibit 3.) At the hearing Ruiz looked substantially the same as he did at Respondent's Licensed Premises on the date of the decoy operation
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> 10. On September 23, 2003, decoy Ruiz visited a number of Department-licensed locations. His visit to Respondent's Licensed Premises was toward the end of that day's operation. As the operation continued, Ruiz became more and more comfortable with what he was doing. Decoy Ruiz did not recall being nervous while buying beer at Respondent's Licensed Premises. He said he was nervous while testifying at the hearing.
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> 11. Decoy Ruiz is employed by the IPD as a parking enforcement officer. He has been an explorer scout with IPD for about 6 years, receiving basic law enforcement training short of that usually experienced at an academy.
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> 12. Decoy Ruiz is an adult male who appears his age, within a week of his 20th birthday. Based on his overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of clerk Garcia at the Licensed Premises on September 23, 2003, Ruiz displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Garcia.

Not only did the ALJ refer to Ruiz's status as a police department employee and Explorer Scout in his findings, he also referred to it in the process of rejecting appellant's claim that Ruiz's experience made him appear older than 21. Judge McCarthy wrote [Conclusion of Law 5]:

> Respondent argued that decoy Ruiz failed to have the requisite appearance because of his extensive experience as an explorer and as a parking enforcement officer with IPD. The apparent age of decoy Ruiz was addressed above in Findings of Fact, paragraphs 5 and 10 through 12. Ruiz's appearance in front of clerk Garcia and at the hearing fully complied with the rule. Respondent's sole rationale for contending Ruiz looked too old is not persuasive.

Appellant argued at the hearing that "despite his physical appearance, and beyond his demeanor, [Ruiz] portrays a mature appearance beyond what would generally be perceived in a person under 21 years of age." Now, appellant expands its argument to encompass Ruiz's training in law enforcement techniques, including those dealing with the arrest and detention of suspects, and his training in criminal justice as an Explorer. These experiences, appellant argues "took him out of the realm of being a normal teenager." (App. Br., at page 7.)

We said in *Azzam* (2001) AB-7631:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the observable effect of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even when there is an observable effect, it will not manifest itself the same way in each instance. There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years or older.

The ALJ is the primary trier of fact, and the question concerning the decoy's apparent age is certainly a factual question. It is neither within our power nor our desire to substitute our assessment of the facts for that of the ALJ where we cannot say he was clearly wrong. This is particularly true when all appellant says is that the ALJ should have given a more complete explanation of why he felt appellant's argument "not persuasive."

We have said on numerous occasions that a decoy's personal experience is not the sole, or even significant, determinant of his apparent age. Appellant seems to have recognized this at the hearing, when it felt compelled to discount Ruiz's physical appearance as an appearance factor: "He also, despite his physical appearance, and

beyond his demeanor, portrays a mature appearance beyond what would generally be perceived in a person under 21 years of age." [RT 44.]

Appellant has not demonstrated a violation of Rule 141(b)(2).

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 ALJprovided 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

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[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 *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. The court has yet to act on the petition.

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 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. 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 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 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.[3]

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

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[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.