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

AB-8317
File: 20-400705 Reg: 04056990

GARDEN GROVE OIL CORPORATION dba Garden Grove 76
13960 Harbor Boulevard, Garden Grove, CA,
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

Garden Grove Oil Corporation, doing business as Garden Grove 76 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Shirin Maghsoudie, having sold a six-pack of Coors Light beer to Tony Vo, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Garden Grove Oil Corporation, 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 September 26, 2003.

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[1]The decision of the Department, dated July 15, 2004, is set forth in the appendix.

On March 29, 2004, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to Tony Vo, a 19-year-old minor.

An administrative hearing was held on June 9, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellant had failed to establish any affirmative defense.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the face-to-face identification conducted pursuant to Rule 141(b)(5) was unduly suggestive, rendering the decoy operation unfair, and violative of Rule 141(a). 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 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

Appellant asserts violations of Rule 141(a) and 141(b)(5), arising from the manner in which the decoy's identification of the seller was conducted.[2] Rule 141(a) provides that a law enforcement agency may only use a decoy in a "fashion that promotes fairness." Rule 141(b)(5) requires the decoy who purchased the alcoholic beverage make a face-to-face identification of the alleged seller of the alcoholic

[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.

beverage prior to the issuance of any citation.

There were two female clerks in the store when the decoy purchased the beer. One of them, Maghsoudie, made the sale. The transaction was witnessed by Garden Grove police officer John Gatine, who had entered the store shortly before the decoy entered. Vo left the store after he purchased the beer. Gatine remained in the store, and was speaking to Maghsoudie when Vo reentered. Maghsoudie was seated in a chair. Vo testified that about one minute elapsed before he was asked to identify her.

Appellant argues that the finding of the ALJ that the identification was not unduly suggestive was premised on an assumption not supported by substantial evidence. According to appellant, the ALJ's statement - that "Decoy Vo had every opportunity to decline to identify clerk Maghsoudie and to identify the other clerk if he believed it was the other clerk who had sold him the beer" - is based on "pure speculation," unsupported by evidence.

The thrust of appellant's argument is that, if Vo had not observed Officer Gatine speaking to Maghsoudie, he would not have identified her as the seller.

Vo had, only minutes before, displayed his driver's license to Maghsoudie, and confirmed her observation that he was 19. How likely is it that, in the brief interval that followed, he would have needed help in identifying the clerk with whom he dealt? We read the language that appellant says lacks evidentiary support as answering that question. If that language is a finding of fact, as appellant asserts, it must be read with the sentence which follows immediately after: "Decoy Vo did not impress as one who would blindly accept Gatine's suggestion that the selling clerk was Maghsoudie if he knew otherwise." In other words, the ALJ did not believe Vo had been influenced by the fact that the police officer was speaking with Maghsoudie.

In *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd*. (2003)109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339] ("Keller"), one of the cases cited by appellant, the court upheld as not unduly suggestive an identification which was conducted after the selling clerk had been brought outside the store to be confronted by the decoy.

The court cited *In re Carlos M*. (1990) 220 Cal.App.3d 372 [269 Cal.Rptr. 447], another case relied upon by appellant. In that case, the court upheld, as not unduly suggestive, an identification of a handcuffed suspect who had been transported to a hospital to be viewed by the victim. The court rejected the contention that a single person show-up was impermissible absent a compelling reason, stating:

> To the contrary, single person show-ups *for purposes of in-field identifications* are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by the immediate determination as to whether the correct person has been apprehended. ... The law permits the use of in-field identifications arising from single-person show-ups so long as the procedures are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. [Emphasis in original.]

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) We think the ALJ's observations concerning Vo's testimony were "reasonably deducible from the evidence." Appellant's claim lacks merit.

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").[3]

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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[3]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.

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 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 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.[4]

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

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[4] 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.