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

AB-8338
File: 21-195887 Reg: 04057104

THE VONS COMPANIES, INC. dba Vons
1160 Via Verdi Avenue, San Dimas, CA 91773,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: August 4, 2005
Los Angeles, CA

ISSUED OCTOBER 5, 2005

The Vons Companies, Inc., doing business as Vons (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for its clerk having sold a six-pack of Bud Light beer to Heather Radtke, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant The Vons Companies, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

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[1]The decision of the Department, dated September 2, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 3, 1997. On April 17, 2004, the Department instituted an accusation against appellant charging that, on November 21, 2003, appellant's clerk sold a six-pack of Bud Light beer to Heather Radtke, a 19-year-old minor. Radtke was acting as a minor decoy for the Los Angeles County Sheriff.

An administrative hearing was held on July 30, 2004, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Radtke ("the decoy") and by David Flores, a Los Angeles County Deputy Sheriff. The decoy testified that she displayed her California driver's license to the clerk, who looked at it, and then went forward with the sale of the beer. Flores testified that he entered the store after the transaction, and observed the decoy identify the clerk who made the sale.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and no defense had been proven.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant wase denied due process when the Department's attorney made an ex parte Report of Hearing available to the Department's decision maker; (2) the use of two decoys in the decoy operation violated the fairness requirement of Department Rule 141(a) (4 Cal. Code Regs. §141, subd. (a)); and (3) the failure of the Department to produce the second decoy at the hearing was a violation of Business and Professions Code section 25666.

DISCUSSION

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

Applying these standards, we are satisfied that the decision of the Department is correct.

I

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

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[2]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

before the Department issued its decision. The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants alleged due process violations virtually identical to the 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 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

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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 response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. *(Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

"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 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.

II

Appellant contends that the Los Angeles Sheriff's Department's use of two decoys violated the fairness requirement of Rule 141(a).[4] It asserts that the Department has not met its burden of proving a prima facie case that the requirements of Rule 141 have been met; that the use of two decoys requires the ALJ to make a finding of fairness based upon the overall circumstances and appearances of both decoys at the time of the purchase; and that the Department used decoys who appeared to be over 21 years of age.

Heather Radtke, the decoy who purchased the beer, testified that she and Ryan Collins, the second decoy, entered the store together, conversed while she removed beer from the cooler, but separated when she got in line to buy the beer. Collins stood ten feet away as Radtke made her purchase. Collins was not present at the hearing, nor was the clerk who sold the beer to Radtke.

Appellant reads the Board's decision in *Southland Corporation /R.A.N.* (1998) AB-6967, a case involving two decoys decided early in the development of the law under Rule 141, as requiring the Department to prove compliance with Rule 141 before any burden falls on a licensee to prove the absence of compliance. It is true that the decision in that case emphasized the obligatory requirements of Rule 141, and stressed the Department's need to conform to the rule. However, we think it went too far in relieving the licensee of its obligation to prove a violation of the rule before the burden

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[4] Rule 141(a) provides: "A law enforcement agency may only use a person under the age of 21 years to attempt to purchase alcoholic beverages to apprehend licensees, or employees or agents of licensees who sell alcoholic beverages to minors (persons under the age of 21) and to reduce sales of alcoholic beverages to minors in a fashion that promotes fairness."

shifted to the Department to prove compliance with the rule.

Rule 141 creates an affirmative defense, and any reading of that rule must begin with the recognition that, as a general rule, the burden of proof is on the party asserting the defense. We see nothing in the facts of this case that warrant an exception to that rule.

The Board has only recently considered a factual situation very similar to that in this case, and rejected the argument that the presence of a second decoy rendered the decoy operation unfair. (See *Circle K Stores, Inc*. (2004) AB-8171). In that case, the Board said:

> Appellant argues that the two decoys acted in tandem, accompanying each other as they entered the store, selected the beer, and stood at the counter while the transaction was conducted. It is not disputed that Duran purchased the beer, and that Perez, the second decoy, although standing next to, or slightly behind Duran, did not participate in the transaction.
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> In *7-Eleven, Inc./Janizeh* (2002) AB-7790, the Board said that the "real question" to be asked is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law. Noting that, as here, the clerk did not testify, the Board found no evidence or claim that the clerk was distracted.
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> In *Hurtado, supra*, a 27-year-old plain clothed police officer sat at a small table with a minor decoy, and each ordered a beer. The Appeals Board reversed the decision of the Department, quoting dicta from its earlier decision in *The Southland Corporation/R.A.N., Inc*. (1998) AB-6967, that "such an apparent loose practice [an 18-year-old female accompanied the 19-year old decoy who made the purchase of an alcoholic beverage] may cause confusion at the time of the sale, which may be contrary to the Rule's demands for 'fairness.'" The Board said in *Hurtado*:
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> > Here consideration of the effect of another person is essential for disposition. 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.

> Unlike *Hurtado*, Perez cannot be said to have actively participated in the decoy operation. True, he accompanied the decoy in the store, and stood nearby when the transaction took place. But there is no evidence that he said or did anything that might have influenced the clerk's perception of Duran. It would be pure speculation to assume that the clerk was distracted or confused merely because another person was standing near Duran or had been near her while in the store. Since the clerk did not testify, there is nothing to indicate that he was confused, distracted, or misled.[5]

This case is more like *Janizeh*, *supra*, and we reach the same result here.

Since the clerk did not testify, any notion that Collins' presence in the store may have distracted him while examining Radtke's driver's license is nothing but speculation.

Appellant appears to accept the ALJ's determination that Radtke possessed the appearance which could reasonably be expected of a person under the age of 21, but argues that the ALJ was also obligated to make such a finding with respect to Collins, and that his failure to do so vitiates the decision.

We have already discussed the fact that Collins had no involvement in the actual sale transaction, and that the failure of the clerk to testify nullifies any notion that he may have been distracted by Collins' presence in the store. Thus, we do not think there was any need for a finding with respect to Collins.

In this respect, the case is very much like *CEC Entertainment, Inc*. (2004) AB-8189, another case involving a two-decoy operation. The Board there rejected the argument that Rule 141(b)(2) was violated by the failure of the ALJ to make a finding regarding the appearance of a second decoy not involved in the actual sale transaction,

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[5] When the clerk swiped Duran's license a second time, after having been accused of selling beer to a minor, he said, according to Duran, "See, 19." This suggests, as Department counsel argued, that the clerk mistakenly assumed the buyer needed only to be 19, an obvious mistake. It would be the rankest speculation to assume the mistake was caused by 17-year-old Perez's presence.

stating:

> Appellant argues that the ALJ refused to take into consideration "the impact of the apparent age of the first [sic] decoy had on the apparent age of the purchasing decoy." ... The problem with appellant's argument is that there is nothing to indicate that the presence of a second decoy had any impact. As noted above, there is no evidence that Lopez did anything that might reasonably distracted the clerk. The clerk did not testify, and we cannot speculate as to what, if anything, she may have thought about the presence of the second decoy. In such circumstances, the apparent age of the second decoy is irrelevant.

III

Business and Professions Code section 25666 provides that the Department "shall produce the alleged minor for examination at the hearing" in any case involving a charge that Business and Professions Code sections 25658, 25663 or 25665 was violated. Appellant claims the Department failed to comply with section 25666 by its failure to produce Collins at the hearing.

The Board has addressed, and rejected, this contention in several cases.

The Board said, in *7-Eleven, Inc./Villagrana* (2002) AB-7860:

> This is another issue which does not appear to have been raised at the hearing, and we would be justified in declining to consider it. However, we know that there have been other instances where two decoys entered a premises together, but only one is present at the hearing and there will likely be similar instances in the future. Thus, we think our brief consideration of the issue could provide useful guidance to the Department and affected licensees in future cases. Business and Professions Code section 25666 provides, in pertinent part: "In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination at the hearing ... ."
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> There is a paucity of reported case law involving the three statutes. Each of the three Code provisions enumerated in section 25666 addresses unlawful activity by or involving a minor. Section 25658 applies to sales to a minor (subdivision (a)), purchases by a minor (subdivision (b)), purchases by an adult for a minor (subdivision (c)), and permitting consumption by a minor in on-sale premises (subdivision (d)). Section 25663 applies to the employment of a minor in any portion of the premises primarily designed for the service and consumption of alcoholic beverages on the premises, and the unsupervised employment by an

> off-sale licensee of a minor under 18 years of age for the sale of alcoholic beverages. Section 25665 applies to the permitting of a minor to enter and remain in an on-sale public premises without lawful business therein. Only section 25658, subdivisions (a) and (b), have any direct relevance to decoy operations. In all three of the named statutes, the involvement of a minor is critical to the charge. *It is our belief that the term "alleged minor" as used in section 25666 refers only to the person whose age underlies the charge that one of those statutes was violated, and does not acquire a broader meaning simply because a decoy operation is involved.* (Emphasis supplied*).*

The Board has applied that teaching in other cases. (See, e.g., *Circle K Stores, Inc./Field* (2003) AB-8076; *BP West Coast Producrts, LLC* (2004) AB-8131.) As recently as this year, the Board stated:

> We have found no judicial decisions involving section 25666 and only a few Board decisions, none of which appear to be similar to the present appeal. The question in most of those cases was whether the Department was required by section 25666 to produce at the hearing anyone other than the minor or minors named in the accusation. The Board's response is exemplified in *BP West Coast Products, LLC* (2004) AB-8131, where the Board said: "We do not read section 25666 as requiring the Department to produce anyone other than the minor who is the subject of the claimed violation of section 25658, subdivision (a)." The dismissal of count 2 in the present case is consistent with that interpretation. We find nothing in section 25666, however, suggesting that reference may not be made to any minor who is not present at the hearing.

(Youssef (2005) AB-8252.)

ORDER

The decision of the Department is affirmed.[6]

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

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[6] 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.