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

AB-8363
File: 20-328531 Reg: 04057521

7-ELEVEN, INC., and MANJIT SINGH dba 7-Eleven Store No. 2175-14003
2887 East Valley Boulevard, West Covina, CA 91792,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 1, 2005
Los Angeles, CA

ISSUED: NOVEMBER 9, 2005

7-Eleven, Inc., and Manjit Singh, doing business as 7-Eleven Store #2175-14003 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Jose Chica, having sold a six-pack of Budweiser beer to Joe A. Acosta, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Manjit Singh, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Claire Weglarz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 7, 1997.

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

Thereafter, on June 24, 2004, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor in violation of Business and Professions Code section 25658, subdivision (a).

An administrative hearing was held on October 7, 2004, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Acosta, the minor decoy, and Brian Moen, a City of West Covina police officer. No one testified on behalf of appellants. Acosta testified that he purchased a six-pack of Budweiser beer without having been asked his age or for his identification. Acosta further testified that he identified the clerk who sold him the beer while facing the clerk from about three feet away. Acosta testified on cross-examination that he had been a police Explorer since the age of 15, rose from recruit to the rank of sergeant, and held a supervisory position in the Explorer post. Acosta also said he had taken a security guard training class to get a state security guard card. He said he was a little nervous while making the purchase because of the potential embarrassment if he was rejected. Officer Moen testified that he had been waiting outside the premises until being informed there had been a violation. He and another officer accompanied Acosta back into the premises where he had Acosta identify the clerk who sold him the beer.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and no defense had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues; (1) they were denied due process; (2) the decoy did not display the appearance required by Rule 141(b)(2); and (3) the face to face identification required by Rule

141(b)(5) was unduly suggestive.

DISCUSSION

I

Appellants assert the Department violated their 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 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 issue 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 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

[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 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.)

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 appellants 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 appellants, it appears to us that appellants received the process that was due them 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

Appellants argue that the decoy did not display the appearance required by Rule 141(b)(2) - 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.

The ALJ found as follows with respect to the decoy's appearance (Finding of Fact II-D 1-4):

> D. The overall appearance of the decoy including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation.
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> 1. The decoy is five feet seven inches in height and he weighs one hundred thirty pounds. On the day of the sale, the decoy's hair was short and he was clean-shaven. His clothing consisted of blue denim shorts, a black T-shirt, a white undershirt and black shoes.
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> 2. The decoy testified that he had participated in two prior decoy operations, that he has been an Explorer since the year 2000, that he achieved the rank of sergeant with the Explorers, that he had worked as a security guard at a Halloween Club in October of 2003 and that he had taken a six hour security class in order to obtain a security guard card from the State. The decoy further

testified that although he was comfortable being a decoy, he was a little nervous when he was at the premises.

3. The decoy gave straight forward answers at the hearing. His right leg was shaking while he was testifying and he appeared nervous.

4. Exhibits 2 and 3 were taken at the police station on the night of the sale and Exhibit 4 was taken at the premises. These three photographs depict what the decoy was wearing and how he appeared at the premises. After considering the photographs depicted in Exhibits 2, 3 and 4, the overall appearance of the decoy when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellants complain that the ALJ did little more than recite the raw evidence without explaining how he reached his conclusion that the decoy displayed the appearance required by the rule. For example, they ask "Does a black shirt make a minor look younger." We suppose others might ask if the opposite is true.

We think appellants ask for too much. It is obvious that the ALJ weighed in his mind a number of considerations relative to the decoy's appearance. It would be unreasonable to require an ALJ to itemize each element of a decoy's experience and state how important that particular facet was to his overall impression. Aspects of a decoy's appearance are not viewed in isolation.

This Board has read Rule 141(b)(2) to require more than a simple statement in the language of the rule. We expect ALJ's to indicate, by explaining in their proposed decision, that they have considered the overall appearance of the decoy, taking into account several indicia of age, not merely his or her physical appearance. We expect, from our own experience, that an ALJ will place considerable weight on a decoy's physical appearance, particularly his or her size and facial appearance, especially when there is no evidence that other indicia of age played a significant role in the transaction.

We have said that the ALJ should look at the whole person, and the ALJ appears to have done so in this case.

In this case, there was little if any interchange between the decoy and the clerk. The clerk did not ask the decoy for his age or for identification, and he did not testify at the hearing.

The ALJ noted that the decoy was clean shaven. That a pattern of facial hair can be discerned from the photographs adds nothing to the decoy's otherwise youthful appearing face.

We are not persuaded that the ALJ erred in his assessment of the decoy's appearance.

III

Department Rule 141(b)(5) (Title 4, Cal. Code Regs., §141, subd. (b)(5)), requires that, prior to the issuance of a citation, if any, the decoy must make a face to face identification of the alleged seller of alcoholic beverages. Such an identification was made in this case. However, appellants contend that, because it was unduly suggestive, the police violated the fairness element of Rule 141, entitling them to an affirmative defense to the charge of the accusation. Appellants argue that it is the Department's burden to establish that the identification was not unduly suggestive. We do not agree.

We note at the outset that this issue was not raised at the administrative hearing. Nonetheless, we have reviewed the record and find nothing to support the claim that the identification was the result of undue suggestion. Both the decoy and the police officer testified that, when the decoy reentered the store, the clerk had been asked to step near the soda machine, and that is where the identification took place.

Appellants cite *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Board (Keller)* (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339] for the proposition that an unduly suggestive one person show-up in the context of a decoy operation is impermissible. The court did say that an *unduly suggestive* one-person line-up is impermissible, but also noted that "single person show-ups are not inherently unfair." (*Keller*, *supra*, 109 Cal.App.4th at p. 1698.) As the facts of that case make clear, far more is necessary than a mere showing that the police officer had asked the clerk to stand in a certain place before the decoy was brought back into the store.

In *Keller*, the clerk had been taken outside the store and brought to where the decoy was waiting with other officers. The court found that unobjectionable.

The decoy had purchased the beer from the clerk just moments before he made the identification. It is highly improbable that he would have identified the wrong clerk. For this very reason, the courts have approved in-field one-person identifications. In *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447], the court found that a rape victim's identification of one of her attackers when he was brought, handcuffed, to her in the hospital immediately after she had positively identified another suspect, was not unduly suggestive. The court went on to say:

> Appellant contends, incorrectly, that single-person show-ups are impermissible absent a compelling reason. 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 an immediate determination as to whether the correct person has been apprehended. [Citation.] The law permits the use of in-field identifications arising from single-person show-ups so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. [Citation.]

(*Id.* at p. 387.)

The Board has rejected arguments similar to appellants' in a number of appeals. (E.g., C*hevron Stations, Inc*. (2004) AB-8166; *Chevron Stations, Inc*. (2004) AB-8153; *The Vons Companies, Inc*. (2004) AB-8058.)

Appellants have given us no reason to think that the decoy was influenced in making this identification by anything the officers did or that he was mistaken in his identification. There was no violation of rule 141(b)(5).

ORDER

The decision of the Department is affirmed.[3]

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

[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.