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

AB-8366
File: 20-386125 Reg: 04057512

BP WEST COAST PRODUCTS, LLC, dba Arco AM/PM # 554
2225 16th Street, Sacramento, CA 95818,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 6, 2005
San Francisco, CA

ISSUED: DECEMBER 12, 2005

BP West Coast Products, LLC, doing business as Arco AM/PM # 554 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a police minor decoy, a 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, Stephen W. Solomon, and Claire C. Weglarz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated December 9, 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 June 24, 2004, the Department filed an accusation against appellant charging that, on April 8, 2004, its clerk, Alton Robinson (the clerk), sold an alcoholic beverage to 18-year-old Rachel Iniguez. Iniguez was working as a minor decoy for the Sacramento Police Department at the time.

At the administrative hearing held on October 21, 2004, documentary evidence was received, and testimony concerning the sale was presented by Iniguez (the decoy) and by Donald Buno, a Sacramento police officer. The testimony disclosed the circumstances of the decoy operation, which we summarize.

The decoy entered appellant's store, followed very shortly by Sergeant Buno. The decoy picked up a six-pack of Budweiser beer from the cooler and took it to the counter. The clerk asked for identification, and the decoy showed him her California driver's license with the words "Age 21 in 2006" on a red stripe. The clerk sold the beer to her, and she left the store with it. Outside, she met one of the police officers and re-entered the premises. Buno, who had remained in the premises, had identified himself as a police officer and was talking to the clerk when the decoy re-entered. Buno asked her if she saw the person who sold the beer to her and she identified the clerk while standing a few feet away from him. The clerk was facing her when she identified him.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense was established.

Appellant filed an appeal making the following contentions: 1) One of the findings is not supported by evidence in the record; 2) the administrative law judge (ALJ) did not explain why he relied on some parts of the decoy's testimony but not

others; and 3) the Department violated appellant's right to due process and the prohibition against ex parte communications. Appellant has also filed a motion to augment the record to include the report of hearing and related documents prepared by the prosecutor for the Department and available to the Department's decision maker or the decision maker's advisor.

DISCUSSION

I

Appellant contends there is no support in the record for the statement in Finding of Fact IV that "The clerk was paying attention to the decoy during the identification." This is important, appellant argues, because the Department must show that there was mutual acknowledgment between the decoy and the seller during the identification. If not, according to appellant, the Department has not shown compliance with rule 141(b)(5),[2] and appellant has a complete defense to the sale-to-minor charge.

Appellant relies on the Appeals Board decision in *Chun* (1999) AB-7287, for its assertion that there must be a "mutual acknowledgment" between the decoy and the seller for the face-to-face identification to be valid under rule 141(b)(5). In *Chun* the Board said "face-to-face" means that:

> the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.

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[2]Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Contrary to appellant's assertion, *Chun* does not require some overt manifestation of "mutual acknowledgment." As the Board said in *Greer* (2000) AB-7403, it is not necessary that the clerk *actually* be aware that the identification is taking place. The only acknowledgment required is achieved by "the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller."

The clerk did not testify, so we do not know if he was aware. However, in this case, it is unrealistic to assert that the clerk was not aware that the decoy was identifying him as the seller. While there was little testimony about the face-to-face identification, it established that the clerk was facing the decoy when she identified him, and the decoy was no more than a few feet from the clerk at the time.

We find it difficult to believe the clerk might not be aware of what the decoy, standing only a few feet away, was doing or saying. At the very least, the clerk reasonably ought to have been aware that the decoy was identifying him, and that is all that is required.

Even if we were to agree with appellant that the evidence did not support the finding that the clerk was "paying attention to the decoy," we could strike that statement from the finding and still not have a violation of rule 141(b)(5). This sentence is not crucial to the outcome.

II

Appellant contends that the decision is fatally deficient because the ALJ did not explain why he relied on some of the decoy's testimony but discredited other parts and accepted the testimony of the officer instead.

Appellant's contention depends on the testimony being in conflict, which is not necessarily so. There were some differences in descriptions about where the decoy was standing when making the identification, but it would not be unusual for witnesses to differ in their recollections of such details months after the fact. Testimony on the important fact, that the decoy was not more than a few feet away from the clerk when she made the identification, was entirely consistent. Even if there were conflicts, it is the province of the trier of fact to resolve them, and this Board will not interfere with those determinations in the absence of a clear showing of abuse of discretion. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

It is inherent in the process of resolving conflicts that the trier of fact will reject some testimony but accept some other. "[A] trier of fact 'is entitled to accept or reject all or any part of the testimony of any witness or to believe and accept a portion of the testimony of a particular witness and disbelieve the remainder of his testimony.'" *(Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1659 [21 Cal.Rptr.2d 85], quoting *Mosesian v. Bagdasarian* (1968) 260 Cal.App.2d 361, 368 [67 Cal.Rptr. 369] [citations omitted].)

> The trier of fact may believe and accept a part of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its effect. On appeal that part which supports the judgment must be accepted, not that part which would defeat, or tend to defeat, the judgment. Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal. (*Chan v. Title Ins. & Trust Co*., 39 Cal.2d 253, 258 [246 P.2d 632]; *Industrial Indem. Co. v. Industrial Acc. Com.*, 115 Cal.App.2d 684, 692 [252 P.2d 649]; *Postier v. Landau*, 121 Cal.App.2d 98, 101 [262 P.2d 565].)

(*Murphy v. Ablow* (1954) 123 Cal.App.2d 853, 858-859 [268 P.2d 80].)

Appellant asserts that, by not explaining the basis for his credibility determinations, the ALJ did not comply with the California Supreme Court's holding in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836] (*Topanga*), that the agency's decision must set forth findings to "bridge the analytic gap between the raw evidence and ultimate decision or order." This Board has addressed a similar contention in a prior appeal:

> Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.)
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> In *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: " 'The holding in Topanga was, thus, that *in the total absence of findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be sustained.' " In the present appeal, there was no "total absence of findings" that would invoke the holding in *Topanga*.

(*7-Eleven, Inc. & Cheema* (2004) AB-8181.)

There is no requirement that an ALJ explain his or her credibility determinations.

III

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 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.)

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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.)

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 to it in this administrative proceeding. Under these circumstances, and with the potential for 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]

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

[4]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.