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

AB-8375
File: 20-352011 Reg: 04057595

CHEVRON STATIONS, INC. dba Chevron
13003 Rosedale Highway 4, Bakersfield, CA 93312,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

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

ISSUED: JANUARY 30, 2006

Chevron Stations, Inc., doing business as Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for its clerk, Benicia Criswell, having sold a six-pack of Budweiser beer to Vanessa Sanchez, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Andres Garcia, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 24, 1999. On July 6, 2004, the Department instituted an accusation against appellant charging an unlawful

---

[1]The decision of the Department, dated December 30, 2004, is set forth in the appendix.

sale of an alcoholic beverage to a minor on February 18, 2004. An administrative hearing was held on December 1, 2004, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Vanessa Sanchez ("the decoy") and Scott Carvel, the Bakersfield police detective conducting the decoy operation.

The decoy testified that she entered appellant's station, went to the "cold box" and grabbed a six-pack of Budweiser beer. She took the beer to the counter. One person was in line ahead of her. When it came time for the clerk to ring up her sale, she placed the beer on the counter. The clerk scanned the beer, told the decoy the price, and completed the transaction. The clerk did not ask the decoy her age or for identification. The decoy left the store with the beer, met Carvel, returned to the store, and identified the clerk as the person who sold her the beer. She then left the store. On cross-examination, the decoy testified that she had entered the police Explorer program in 2000, and had advanced to the rank of Sergeant. She testified that the clerk was facing her when she pointed to and identified the clerk as the person who sold her the beer. After reviewing a surveillance videotape of the transaction, she acknowledged that she could not see herself pointing to the clerk. She testified that she had participated in five to ten previous decoy operations, and had visited from 10 to 15 premises each time. On the evening in question, she visited only three premises.

Detective Carvel testified over objection that the clerk told him she had forgotten to ask for identification. He further testified that the reason the videotape did not depict the decoy pointing at the clerk was because the decoy was standing out of the range of the surveillance camera when she pointed to the clerk.

Subsequent to the hearing, the Department issued its decision which determined that the sale violation had occurred as alleged, and that appellant had failed to establish

a defense under Rule 141.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant was denied due process as a result of an ex parte communication to the Department decision maker; (2) the decoy did not display the appearance required by Rule 141(b)(2); and (3) there was no compliance with the face to face identification requirement of Rule 141(b)(5).

DISCUSSION

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 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]

---

[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.)

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.)

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.

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.

II

Appellant argues that the decoy in this case did not display the appearance required by Rule 141(b)(2), that which could generally be expected of a person under the age of 21 under the actual circumstances presented to the seller of alcoholic beverages.

Counsel for appellant argued to the ALJ that the decoy's appearance, her demeanor, her experience and her stature add up to the fact that she does not display the appearance that could generally be expected of a person under 21 years of age.

The ALJ made the following finding (Finding of Fact 7) with respect to the

decoy's appearance, and, on the basis of that finding, found (Finding of Fact 8) that the decoy presented the requisite appearance under the rule:

> The Bakersfield Police Department has a so-called "explorer" program for people who are interested in law enforcement, and Sanchez has been in that program since she was 16 years of age. As part of that program, she had acted as a decoy prior to February 18, 2004, but despite that experience, she was nervous and uncomfortable during the decoy operation at the licensed premises. During that operation, she was wearing a peach-colored T-shirt, dark blue jeans, a black jacket, and no makeup or jewelry. She was 5'6" tall and weighed 200 pounds, and was wearing her hair pulled back in a pony tail. She was wearing her hair in a different style at this hearing, but her height and weight had not changed and did not cause her to appear older than her actual age. Her poise and confidence while testifying at the hearing were no greater than one would expect of a person her age, and there is no reason to believe she was any more poised or self confident during the decoy operation.

Appellant suggests that a decoy whose height and weight is that of the decoy would be considered obese, yet we fail to see how obesity necessarily equates to an appearance of a person over the age of 21. The ALJ had the opportunity to observe her physical appearance and mannerisms as she testified, and, taking all those indicia of age into account concluded that she displayed the appearance of a person under 21 years of age. This Board has repeatedly declined to substitute its judgment for that of the ALJ on this question of fact, and is not inclined to do so in this case.[3] Minors come in all shapes and sizes, and we are reluctant to suggest that minor decoys of large stature, by that alone, violate the rule.

III

Appellant contends that there is no substantial evidence to support the finding that there was a face to face identification as required by Rule 141(b)(5). Appellant

---

[3] The picture of the decoy reproduced in appellant's brief is not a matter of record, and, in any event, it does not persuade us that we should alter our belief that we should ordinarily defer to the trier of fact on this issue.

points to that portion of Finding of Fact 4 which states that the decoy "responded by extending her right arm and index finger toward [the clerk] while saying 'she did,'" and argues that there is no evidence to support that part of the finding.

Despite an indication on the record (RT 59) that all concerned - the ALJ, counsel for the Department, and counsel for appellant - agreed, after viewing the videotape at least twice, that it did not show a physical pointing, the ALJ stated in his proposed decision his opinion that the videotape did not support that conclusion.

Our own review of the videotape satisfies us that what does appear on the videotape is sufficiently corroborative of the testimony of the decoy that she identified the clerk as the seller even if it is assumed that no physical pointing can be seen on the tape.

It is apparent from viewing the videotape that the surveillance system which generated it is one which relies on two or more cameras, each in turn showing a moment in time of the overall event. The movement of the images on the tape is not fluid, as it would be if captured on a single camera. Instead, the movements are jerky, the scenes constantly changing, reflecting the short periods of time when what is seen by one of the cameras is not recorded because another camera has for that moment taken charge. The ALJ was aware of this problem, noting (RT 56) that "I doubt very much that it captures the decoy's entire presence in the premises."

The videotape clearly shows the decoy as she purchased the beer. It also shows her returning to the counter after other customers have completed their transactions with the clerk, and standing directly across the counter from the clerk, facing her. A man identified as Bakersfield Police Detective Carvel (see RT 57-58) is standing to her right. Detective Carvel's gaze is directed at the clerk. He then turns to

the decoy, and then turns back to the clerk. It is at this moment that the decoy pointed to the clerk, if at all, according to Detective Carvel.

But, even if the decoy did not point, the identification was still effective. She verbally identified the clerk, and appellant has not disputed that she did so. The clerk did not testify. Thus, there is no affirmative evidence that the clerk was unaware she had been identified as the person who sold beer to Sanchez. Given the proximity of the decoy to the clerk at the time of the identification, we are unwilling to assume that the clerk was unaware of the fact that the decoy identified her as the seller of the beer.

Appellant has been unable to persuade us of the merit of its contention.

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 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.