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

AB-8385
File: 20-359339 Reg: 04057680

7-ELEVEN, INC., HARVINDER KAUR KHAIRA, and MANMOHAN SINGH KHAIRA,
dba 7-Eleven # 2237-15883C
1045 Old Oakdale Road, Modesto, CA 95355,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

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

ISSUED DECEMBER 13, 2005

7-Eleven, Inc., Harvinder Kaur Khaira, and Manmohan Singh Khaira, doing business as 7-Eleven # 2237-15883C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their 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 appellants 7-Eleven, Inc., Harvinder Kaur Khaira, and Manmohan Singh Khaira, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Claire C. Weglarz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

---

[1]The decision of the Department, dated January 6, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 2, 1999. Thereafter, the Department instituted an accusation against appellants charging that, on November 15, 2003, appellants' clerk, Juan Carlos Lizarraga (the clerk), sold an alcoholic beverage to 19-year-old Evan Jacobs. Jacobs was working as a minor decoy for the Modesto Police Department at the time.

At the administrative hearing held on December 10, 2004, documentary evidence was received and testimony concerning the sale was presented by Jacobs (the decoy), by Department investigator Alma Yamada, and by Lizarraga, the clerk.

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

Appellants filed an appeal making the following contentions: Rules 141(b)(2) and 141(b)(5)[2] were violated, and the Department violated appellants' right to due process and the prohibition against ex parte communications.

DISCUSSION

I

Appellants contend the decoy's appearance did not comply with rule 141(b)(2). Rule 141(b)(2) requires that a decoy must "display 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 at the time of the alleged offense." Appellants argue that Jacobs' large physical stature combined with his experience as a police Explorer, gave him "an appearance which will unfairly induce

[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.

clerks to sell alcoholic beverages by lulling the clerk into a false sense of security." (App. Br. at p. 6.)

They also contend that the administrative law judge (ALJ) did not properly apply the law in determining that the decoy complied with rule 141(b)(2) because he failed to analyze the non-physical appearance of the decoy under the circumstances presented to the seller.

The ALJ made the following findings regarding Jacobs' experience and appearance (Findings of Fact [FF] 8, 10, 11, & 12):

> 8. At the time of the hearing, Jacobs was between 5'6" and 5'7" tall and weighed approximately 285 pounds. At the time of the decoy operation, he was the same height, but weighed approximately 35 pounds less. The photograph on the driver's license he gave Lizarraga depicted him as much younger than he appeared at the time of the decoy operation and indicated he was 5'1" tall and weighed 220 pounds. Jacobs explained at the hearing that the license was one that had been renewed without updating the photograph and height and weight that were on the original license.
>
> [¶] . . . [¶]
>
> 10. Based on the photograph marked Exhibit 5, Jacobs looked no older physically at the time of the decoy operation than he did at the time of the hearing. At the time of the operation, he had a round smooth-skinned and clean-shaven face and very short dark hair. He wore glasses, blue jeans, a blue sweatshirt-jacket, a T-shirt, tennis shoes, a black watch, and no jewelry. He was member of the police department's "Explorer" program and had been participating in that program for about two years. He testified that he was not nervous during the decoy operation, but was nervous while testifying at the hearing. The administrative law judge observed that while testifying, Jacobs tapped his left foot rapidly, which is often a sign of nervousness. The administrative law judge also noted that Jacobs exhibited no more poise or self-confidence during the hearing than one would expect of a person his age. He had a young person's voice, and his non-physical characteristics – including but not limited to poise and self-confidence – were consistent with those of a person under 21 years of age.
>
> 11. It may be argued that [Jacobs'] weight-to-height ratio was a misleading factor. However, there was no evidence that it made him

> appear older than his true age. It is noteworthy that Jacobs appeared so young to Lizarraga that he felt it felt it [sic] necessary to determine if Jacobs was old enough to purchase cigarettes, much less alcoholic beverages.
>
> 12. Based on the foregoing, it is found that Jacobs displayed the physical and non-physical appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to Lizarraga when he sold beer to Jacobs.

With regard to whether the decoy's appearance complied with rule 141(b)(2), appellant is asking the Board to reweigh the evidence presented at the hearing. In the first place, the Appeals Board is not authorized to do so. The scope of the Appeals Board's review of the decision is strictly limited: The Board must determine whether the Department's findings of fact are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

In the second place, the Board has said repeatedly that it will not second-guess the ALJ's determination regarding the decoy's appearance, absent unusual circumstances. The ALJ has the benefit of seeing the decoy in person, while the Board has only the record and, at most, a photograph of the decoy. Even were the Board so inclined, it would have no sufficient basis for rejecting the ALJ's determination, much less supplanting it. We are satisfied that the ALJ considered the decoy's physical and non-physical appearance and his training and experience as a police Explorer. He took into account all the factors upon which appellants' contention is based, and concluded that the decoy met the requirement of rule 141(b)(2).

Appellants also insist that the ALJ did not correctly analyze the decoy's non-physical appearance because he only referred to those aspects of the decoy's appearance as they appeared at the trial. According to appellants, the ALJ must analyze these characteristics "as the evidence proves that they were at the time of sale." (App. Br. at 4.)

The short answer to this is that no evidence was presented regarding the decoy's non-physical appearance at the time of the sale except for his testimony that he was not nervous then. Therefore, it was proper for the ALJ to assume that these characteristics were otherwise similar at the hearing and at the time of the sale. It was appellants' burden to show that the decoy's appearance, physical or non-physical, violated the rule. They did not do so, and they cannot now come to the Board and complain that the ALJ did not adequately "analyze" evidence that was not presented.

We also point out that appellants err in thinking the ALJ must "analyze" the decoy's physical and non-physical appearance in order for this Board to sustain the Department's decision. In *Circle K Stores, Inc.* (1999) AB-7122, this Board said:

> It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.

The Board was, and is, interested in some indication that the ALJ has not focused solely on the decoy's physical appearance, but has "reflect[ed] the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony." (*Ibid*.) This was especially important when rule 141 was first effective, since it took some time for the requirements of the rule to be explored and explained by the Department, this Board, and the courts and for these requirements to be applied by law enforcement agencies and ALJ's. After almost 10 years, the basic requirements of the rule are fairly well settled, and this Board is much less concerned that an ALJ might be applying an erroneous standard when assessing the apparent age of a minor decoy. Deviations by this Board from the rule of deference to an ALJ's findings regarding a decoy's apparent age have become limited to extraordinary circumstances. We see nothing in this case of an extraordinary nature.

In *The Southland Corporation/Kim* (2000) AB-7267 (ftnt. 2), the Board recognized the ALJ's had a sometimes difficult task in assessing what a decoy's appearance was like at the time of sale when the hearing was months after the incident. The Board went on to approve the ALJ's assessment of the decoy's apparent age based on the decoy's appearance at the hearing, "in the absence of *evidence* of any *discernible change* in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing." (Italics added.) The italicized words in

this quotation deserve notice: *evidence* is required to support an argument such as appellants' argument here, and the evidence must be of a *change* in appearance that is *discernible* or obvious. Even if a discernible change in appearance is proved, it is up to the ALJ to weigh the significance of that change with respect to the decoy's apparent age. Again, it would require an extraordinary circumstance for the Appeals Board to deviate from the rule of deference to the ALJ's findings. Again, we see nothing in this case of an extraordinary nature.

II

Appellants contend that the Department failed to prove that the face-to-face identification of the clerk by the decoy was done before a citation was issued to the clerk, as required by rule 141(b)(5).[3] They argue that once evidence was presented that a citation was issued to the clerk, "it was then incumbent on the Department to present contradictory evidence that ***no*** citation had been issued, or that such citation occurred after the 'face to face identification.[']" (App. Br. at p. 8.)

Appellants are simply wrong. The Board has addressed similar arguments before in which appellants mistakenly believed that they did not bear the burden of proof to establish that they were entitled to the defense afforded by rule 141. We have nothing to add to the following quotations from two particularly relevant examples:

> Appellants are mistaken. Rule 141 is an affirmative defense, and the burden of proof is on the licensee. Since the record is silent as to when the citation was issued, appellants have not satisfied their burden. It should be noted that appellants could have resolved the issue by simply asking their witness about the sequence of events.

(7-Eleven, Inc. & Mandania (2002) AB-7828.)

---

[3]Rule 141(b)(5) provides that after a sale to a minor decoy, "but not later than the time a citation, if any, is issued," a law enforcement officer should have the decoy "make a face to face identification of the alleged seller of the alcoholic beverages."

> We disagree. Once there is affirmative testimony that the face-to-face identification occurred, the burden shifts to appellants to demonstrate non-compliance, i.e., that the normal procedure of issuing a citation after identification of the clerk, was not followed. We are unwilling to read our decision in The Southland Corporation/R.A.N. as expanding the affirmative defense created by Rule 141 to the point where appellants need produce no evidence whatsoever to support a contention that there was a violation of that rule.

(7-Eleven, Inc. & Azzam (2001) AB-7631.)

III

Appellants assert the Department violated their 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. Appellants 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").[4]

---

[4]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 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 to them 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, appellants are 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. Appellants' motion is denied.

ORDER

The decision of the Department is affirmed.[5]

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

---

[5]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.