

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

AB-8399

File: 20-332846 Reg: 04057977

7-ELEVEN, INC. dba 7-Eleven #2172-27337
1724 West Chapman Avenue, Orange, CA 92868,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: March 2, 2006
Los Angeles, CA

ISSUED JUNE 2, 2006

7-Eleven, Inc., doing business as 7-Eleven #2172-27337 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk, Ramil Sanguyu, having sold a 24-ounce can of Budweiser beer to Dyanna Ahlefeld, an 18-year-old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 11, 1997. The Department instituted an accusation against appellant September 7, 2004, charging the

¹The decision of the Department, dated February 3, 2005, is set forth in the appendix.

sale of an alcoholic beverage to a minor.

An administrative hearing was held on December 16, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged in the accusation, and that appellant had failed to establish a defense under Department Rule 141.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant was denied due process by an ex parte communication; and (2) the face to face identification required by Rule 141(b)(5) was conducted in an unduly suggestive manner.

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

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

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.)

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

Rule 141(b)(5) requires that, after a completed sale, the decoy make a face to face identification of the person who sold the alcoholic beverage to the decoy. There was such an identification in this case, but appellant contends it was done in an unduly suggestive manner, thus violating the requirement in Rule 141(a) that the decoy operation be conducted in a manner which promotes fairness.

Appellant contends that the detective who conducted the face to face identification first identified the clerk by asking the decoy if a specific clerk was the person who sold her the beer: "Can you identify *this* gentleman as the man who sold you alcohol?" Although appellant italicizes for emphasis the word "this" in the question, we see nothing in the way the decoy answered to warrant any more emphasis on this word than any other word in her answer.

This same argument was made to the ALJ, who rejected it, stating (Conclusion of Law 6):

There is no reason to believe that decoy Ahlefeld was uncertain in her identification or that it was the result of undue suggestion on the part of the Police Officer. Ahlefeld remembered the clerk's comment to her advising that she should have bought a 6-pack.

We find it unpersuasive that the decoy could not recall what the clerk looked like at the time of the hearing, nearly seven months later. What is persuasive is that she remembered him only a few minutes after he made the sale to her. Her testimony on cross-examination (at pages 33-37 of the hearing transcript) makes it clear to us, as it

did to the ALJ, that the decoy had no doubt who it was who sold to her.

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.