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

AB-8400
File: 20-235384 Reg: 04057976

CHEVRON STATIONS, INC., dba Chevron
2270 West Frontage Road, Corona, CA 92882,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED: FEBRUARY 1, 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 15 days, all of which were stayed on the condition that appellant operate discipline-free for one year, 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 Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, Claire C. Weglarz, and Andres Garcia, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

---

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 18, 1989. On September 7, 2004, the Department filed an accusation against appellant charging that, on March 5, 2004, appellant's clerk, Tamray Gemeda (the clerk), sold an alcoholic beverage to 19-year-old Michele Reynolds. Although not noted in the accusation, Reynolds was working as a minor decoy for the Corona Police Department at the time.

At the administrative hearing held on January 7, 2005, documentary evidence was received and testimony concerning the sale was presented by Reynolds (the decoy) and by Richard Ribeiro, a Corona police officer. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant then filed an appeal contending: (1) Appellant was denied due process as the result of the Department's ex parte communication and (2) rule 141(b)(2)[2] was violated.

DISCUSSION

I

Appellant asserts the Department violated its right to procedural due process when the attorney (the advocate) 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

[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.

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.)

---

[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.

II

Rule 141(b)(2) requires that a decoy's appearance be that "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." Appellant contends that this decoy did not present the required appearance because she looked mature in the photographs entered into evidence, she wore make-up, she had streaked hair, and she had a sophisticated demeanor.

The decoy's appearance is addressed in Findings of Fact (FF) 5, 10, and 11:

> 5. Reynolds appeared at the hearing. She stood about 5 feet, 3 inches tall and weighed about 120 pounds. Her streaked blond hair was worn down. (*See* Exhibits 4 & A.) At the hearing Reynolds wore a black hooded, long-sleeved sweatshirt with a zipper front and blue jeans. When Reynolds visited Respondent's store on March 5, 2004, she was dressed almost the same, with a different black top. There had been no change in either her height or weight. She wore a little foundation and mascara, but no lipstick or lip gloss and no jewelry. At Respondent's Licensed Premises on the date of the decoy operation, Reynolds looked substantially the same as she did at the hearing. (*Id*.) [*Sic*.] By the time of the hearing, decoy Reynolds was 20 years of age.
>
> [¶] . . . [¶]
>
> 10. March 5, 2004, was the first date that decoy Reynolds worked as a police decoy trying to buy alcoholic beverages. Since April 2003 she had worked with CPD as a paid Police Cadet. She desires to become a police officer. As a Police Cadet, Reynolds has worked primarily in records and at the front desk of the Police Department. She has done filing, telephone answering, and fingerprinting. On a few occasions, Reynolds has gone on ride-a-longs where she has been instructed that if something happened to use the radio. Nothing causing her to use the radio ever occurred while she was along. Reynolds testified that she was comfortable while inside Respondent's store on March 5, 2004. She was sold alcoholic beverages during that operation at only 2 of 14 establishments. (Exhibit A.)

> 11. Decoy Reynolds is an adult female who appears her age, 20 years of age at the hearing. Reynolds was a capable witness who displayed a little nervousness while testifying. Based on her overall appearance, *i.e.*, her physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and her appearance/conduct in front of clerk Gemeda at the Licensed Premises on March 5, 2004, Reynolds displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Gemeda.[2] Reynolds appeared her true age.

---

[2]The Exhibit 4 photograph does seem to make Reynolds look older than she looked in other photographs (Exhibit A) and in person at the hearing.

In Conclusion of Law 5, the ALJ addressed appellant's argument that the decoy's appearance did not comply with rule 141(b)(2):

> 5. Respondent argued there was a failure to comply with section 141(b)(2) of Chapter 1, title 4, California Code of Regulations [Rule 141]. Therefore, Rule 141(c) applies and the Accusation should be dismissed. Respondent argued that the appearance of decoy Reynolds inside the store gave the impression she was over the age of 21 years. Respondent reached this conclusion based almost solely on the three photographs of decoy Reynolds that were received in evidence, Exhibits 4 and A. It was argued that she appeared sophisticated; one who could not be under the age of 21 years. The argument is rejected. The apparent age of decoy Reynolds was addressed above in Findings of Fact, paragraphs 5 and 11. Reynolds's [sic] appearance in front of clerk Gemeda and at the hearing fully complied with the rule. While the Exhibit 4 photograph may add some age to Reynolds' appearance, based on all the information available, her appearance complied with the rule. There was no violation of 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 to reject the ALJ's determination, much less to supplant it.

Appellant, as the ALJ indicated in Conclusion of Law 5, relies heavily on the photograph of the decoy on the night of the decoy operation, calling it "the most relevant piece of evidence available as to how the decoy appeared to Appellant's clerk." (App. Br. at p. 12.) Appellant asserts that the ALJ must have given no weight to the photograph in Exhibit 4, "or else he would have been required to find a violation of Rule 141(b)(2)." (*Ibid.*) This tautological argument proves nothing; appellant is simply saying that the ALJ was wrong because appellant thinks he was wrong.

Contrary to appellant's assertions, the ALJ did take the photographs (Exhibits 4 & A) into consideration. He relied on them in determining what the decoy looked like on the night of the decoy operation. (FF 5.) He specifically found that, in appellant's premises on that night, the decoy "looked substantially the same as she did at the hearing." (*Ibid*.) The ALJ admitted that the Exhibit 4 photograph "may add some age to Reynolds' appearance," but concluded that, "*based on all the information available*, her appearance complied with the rule. [Italics added.]" We have no qualms rejecting appellant's conclusion based on its partisan view of a single photograph, and sustaining the ALJ's conclusion based on the record as a whole in conjunction with his own observations of the decoy in person.

As we have stated before, the presence of the decoy in person before the ALJ constitutes substantial evidence in support of the ALJ's conclusion as to the decoy's apparent age:

> This Board has considered in prior decisions assertions that substantial evidence did not support the ALJ's finding regarding the decoy's apparent age. In *Circle K Stores, Inc*. (2001) AB-7498, the Board declined to find that substantial evidence of the decoy's apparent age was lacking, saying, "The decoy himself provides the evidence of his appearance." In *The Southland Corporation/Amir* (2001) AB-7464a, the Board responded to the argument by saying: "We simply do not agree that an administrative law judge who must determine the apparent age of a decoy, and actually sees the decoy in person, lacks substantial evidence to make such a determination."

(7-Eleven, Nagra, & Sunner (2004) AB-8064; accord, *The Vons Companies, Inc*. (2005) AB-8298; *7-Eleven, Inc. & Swanson* (2005) AB-8276.)

Appellant argues that the make-up worn by the decoy caused her to appear to be over the age of 21, and asserts that a recent Court of Appeal case "reiterated [that] 'a female decoy should not use make-up or wear jewelry'." The Board has addressed

this assertion before. In *7-Eleven, Inc. & Pattaphongse* (2004) AB-8110 (ft. 2) the Board said:

> The court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2003) 109 Cal.App.4th 1687 [1 Cal.Rptr.3d 339] did not, contrary to the suggestion in appellants' brief, say that a female decoy should not use make-up or wear jewelry. The court was simply referring to the admonitions in the Department guidelines which antedated Rule 141, and was not passing judgment one way or the other on the propriety of the practice.

(Accord, *Chevron Stations, Inc*. (2004) AB-8165.)

Certainly, a decoy does not violate the rule simply by wearing make-up, and we find it hard to believe that appellant is serious in asserting that "a little foundation and mascara, but no lipstick or lip gloss" would cause a decoy to appear to be over 21.

We agree with the conclusion of the ALJ that this decoy's appearance did not violate rule 141(b)(2).

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.