

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

AB-8413

File: 20-225864 Reg: 04058027

7-ELEVEN, INC., MYUNG BYUN, and TAI Y. BYUN dba 7-Eleven #2171-29685
1845 Hamner Avenue PE, Norco, CA 92860,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED: FEBRUARY 3, 2005

7-Eleven, Inc., Myung Byun, and Tai Y. Byun, doing business as 7-Eleven #2171-29685 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Ki Youl Choi (hereinafter "the clerk"), having sold a 24-ounce can of Budweiser beer to Vanessa Roldan, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Myung Byun, and Tai Y. Byun, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Andres Garcia, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 24, 1989. On September 14, 2004, the Department instituted an accusation against appellants charging that, on March 19, 2004, appellants' clerk sold beer to a minor.

An administrative hearing was held on January 4, 2005, 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, and appellants had failed to establish a defense under Department Rule 141.

Appellants thereafter filed a timely appeal in which they contend they were denied due process as a result of an ex parte communication, that there was no compliance with Department Rule 141(b)(4)², and that the administrative law judge (ALJ) failed to make findings to show how he resolved issues of credibility.

DISCUSSION

I

Appellants assert the Department violated their right to procedural due process when the attorney 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.

² References to Department Rule 141 are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

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

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.)

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 them 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, 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.

II

Appellants contend that there was no compliance with Rule 141(b)(4), and that the ALJ failed to make findings that explained how he resolved issues of credibility in rejecting appellants' contentions. Rule 141(b)(4) requires a decoy to answer truthfully any question about his or her age.

Riverside County Sheriff's Detective Raymond Huskey testified that he witnessed the transaction from outside the store, then entered the store and informed the clerk of the violation. The clerk, according to Detective Huskey, "denied that the person was underage, he made statements that she had a false ID, he jumped up and down, curled into a fetal position on the floor and didn't want to believe it."

The decoy testified that she was asked for identification and produced her California driver's license. The clerk examined it, did not ask her any questions, and went forward with the sale.

The clerk testified that, after examining the identification the decoy produced in response to his request (her California driver's license), he asked her "You are 82,

right?” and she responded by nodding her head two or three times. He further testified that he understood her response to mean she was born in 1982:

I'm pretty sure that I saw "82" on that day. And I asked the client whether she was born in "82 [sic] and the decoy nodded her head. And, therefore, I was pretty sure that she was old enough. (RT 55.)

The ALJ rejected the clerk's testimony, explaining (Finding of Fact 4F):

There was a conflict in the evidence as to whether the clerk asked the decoy any questions. After evaluating the credibility of the witnesses pursuant to the factors set forth in Evidence Code Section 780 including the existence of bias or motive, greater weight was given to the testimony of the decoy than to that of Respondent's clerk. The testimony of the decoy and of Detective Huskey was consistent in all material matters. The decoy credibly testified on direct examination that the clerk did not ask her any questions after she presented her identification. The clerk simply returned the identification, stated the price and took the money she gave to him. The decoy also credibly testified during cross-examination that the clerk said nothing about her identification and that he did not ask questions. The clerk's testimony that he asked the decoy, "You are 82, right?" and that the decoy nodded in the affirmative three times makes no sense and this testimony is found not to be credible. Although the clerk explained that he asked this question because he wanted to verify that she was born in 1982, the decoy's identification indicates she was born in 1985. Furthermore, the clerk was either being evasive or he simply could not recall the answer to many of the questions that he was asked during cross examination.

Appellants cite *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836], and argue that it requires more explanation of the ALJ's resolution of the credibility issue than he provided in his proposed decision.

We might ask "What more do appellants expect the ALJ to do?" He carefully explained why he chose to believe the testimony of Detective Huskey and of the decoy, and why he did not believe that of the clerk. He gave reasons that make sense, and that are understandable. We are not left to guess why he accepted the testimony of

some witnesses and not that of others.

Appellants appear to be interested in exploring the ALJ's mind, and requiring him to isolate every fragment of evidence, assign specific weight to that fragment, ascertain a total weight, and explain each individual step he took in the process. The *Topanga* case upon which they rely does not go that far. We rejected a similar argument in *7-Eleven, Inc./Cheena* (2004) AB-8181, and we do so here.

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.