

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

AB-8414

File: 20-398986 Reg: 04057345

7-ELEVEN, INC., and AMBER, INC., dba 7-Eleven # 2131-17265
1601 East 18th Street, National City, CA 91950,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 3, 2005
Los Angeles, CA

ISSUED DECEMBER 29, 2005

7-Eleven, Inc., and Amber, Inc., doing business as 7-Eleven # 2131-17265 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ 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., and Amber, Inc., appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The 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 May 28, 2003.

Thereafter, the Department instituted an accusation against appellants charging that, on February 6, 2004, their clerk, Jeffery Seastrong (the clerk), sold an alcoholic beverage to 17-year-old Megan Barahura. Although not noted in the accusation, Barahura was working as a minor decoy for the National City Police Department at the time.

At the administrative hearing held on January 11, 2005, documentary evidence was received and testimony concerning the sale was presented by Barahura (the decoy), by National City police officer John Dougherty, and by the clerk.

The decoy testified that she entered appellants' premises, went directly to the beer cooler, selected a six-pack of Bud Light beer, and took it to the counter. She was carrying her ID in her hand, along with her money. When she brought the beer to the counter, the clerk said that he didn't have to "card" her, since he saw that she had her ID out. The decoy made no response to his statement, but she "sort of laughed." She paid for the beer, the clerk bagged it, and she carried it out of the store. She re-entered with one of the officers and identified the clerk as the seller of the beer. She was wearing braces on her teeth both at the time of the decoy operation and at the hearing.

Officer Dougherty testified that he watched the decoy from outside through the large plate-glass windows at the front of the store. He had a clear view of the decoy inside, and he saw her select the beer, carry it to the counter with her ID in her hand, and pay for the beer. He met her outside the store, they re-entered the store after he had taken possession of the beer, and he asked the decoy who had sold the beer to her. She pointed at the clerk and said, "He did." Dougherty also testified that when he

informed the clerk that he had sold beer to a minor, the clerk exclaimed, "Oh, man. I thought she looked young."

The clerk testified that he thought the decoy looked young when he first saw her in the store, before she brought the beer to the counter. He said that when he saw she was carrying her ID in her hand, he said to her, "Normally minors wouldn't have their ID out," to which she made no response. He testified that he said the same thing to her a second time, and this time, he said, the decoy asked him in a deep voice if he wanted to see her ID, and she held it up. He responded that it was not necessary, and proceeded to sell the beer to her. Shortly after the decoy left the store with the beer, she returned with a plainclothes police officer and identified the clerk as the person who sold beer to her. The clerk testified that he told the officer only that he had not sold alcohol to a minor.

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

Appellants have appealed the decision, contending the determination that the decoy's appearance complied with rule 141(b)(2)² is erroneous and not supported by substantial evidence, and the Department violated their rights to due process and the prohibition against ex parte communications.

DISCUSSION

I

Rule 141(b)(2) requires that a decoy's appearance must be that "which could generally be expected of a person under 21 years of age, under the actual

²References 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.

circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." Appellants contend that the administrative law judge (ALJ) did not apply the correct standard when he determined that the decoy's appearance complied with the rule and that the determination is not supported by substantial evidence.

The standard was wrong, according to appellants, because the ALJ determined that the decoy's appearance complied with the rule "without deciding how all of the circumstances presented to the seller that were established by the evidence of record affected the appearance of the decoy." (App. Br. at p. 4.) Specifically, they assert that the ALJ erred because he did not address the effect on the clerk of the decoy holding her identification in her hand when she approached the counter with the beer. In addition, appellants contend that the decoy's acne scars and the fact that she carried her ID in her hand indicated to the clerk that the decoy was over the age of 21.

The decision addresses the decoy's appearance in Finding of Fact II.D.(fn. omitted):

D. The overall appearance of the decoy including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that she was not wearing glasses on the day of the sale.

1. The decoy is five feet four inches in height and weighs approximately one hundred twenty-five pounds. On the day of the sale, the decoy was wearing a green, long sleeve shirt and she was wearing braces on her teeth. The photograph depicted in Exhibit 2 was taken at the premises and it shows how the decoy looked and what she was wearing on the day of the sale. At the hearing, one could readily see that the decoy had acne on her face and the clerk testified that the decoy had a scar on the left side of her face on the day of the sale. Apparently, he was referring to the acne.

2. The decoy testified that she that she [sic] had not participated in any prior decoy operations.

3. There was nothing remarkable about the decoy's nonphysical appearance.

4. After considering the photograph depicted in Exhibit 2, the overall appearance of the decoy when she testified and way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

Appellants assert that rule 141(b)(2) requires the ALJ, when determining whether the decoy's appearance complies with the rule, to place himself or herself in the position of the seller under the "actual circumstances presented to the seller" when the sale occurred. Appellants argue that the actual circumstances presented to this seller were: a "mature looking woman" with pockmarks left by acne, which are indicative of someone past their teenage years, who was carrying her ID in her hand. These circumstances together, appellants conclude, led the clerk to believe the decoy was old enough to buy the beer. It was error, according to appellants, for the ALJ to ignore this evidence and conclude that the decoy presented the appearance generally to be expected of a person under the age of 21.

Appellants are asking this Board to reweigh the evidence and reach a conclusion different from that of the ALJ and the Department. This the Board is not entitled to do.

The Court of Appeal recently addressed the standard of review that it, and this Board, must use when considering a decision of the Department:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends* [(2002)] 100 Cal.App.4th [1250] at p. 1254 [[122 Cal.Rptr.2d 914]]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result.

(See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

As this Board has said on many occasions, the ALJ is the trier of fact and has the opportunity, which this Board does not, of observing the decoy as he or she testifies. All this Board has available is a "cold record," which may or may not include a photograph of the decoy, and a partisan appeal asserting that the decoy lacked the appearance required by the rule. Even if we were permitted to do so, we are not in a position to second-guess the ALJ's determination.

We note that appellants' argument relies on the clerk's testimony that he believed the decoy to be 27 or 28 years old. As we have noted before, "the [clerk's] erroneous belief that the decoy was over 21 does not preclude a finding by the ALJ that the decoy's appearance was that of a person under the age of 21." (*Tahvildari* (2001) AB-7706.) The Board has also addressed the ineffectiveness of relying on a seller's erroneous belief about a decoy's age when defending a sale-to-minor violation in *Prestige Stations, Inc.* (2000) AB-7248 [fn.2]:

The decoy must only present an appearance which could generally be expected of a person under the age of 21 years. If the clerk, observing a decoy who presents such appearance generally, perceives the decoy to be older than 21, he does so at his peril. A licensee cannot escape liability by employing clerks unable to make a reasonable judgment as to a buyer's age.

Similarly, in *Spirit Enterprises, Inc.* (2001) AB-7604, the Board said:

The rule, through its use of the phrase "could generally be expected" implicitly recognizes that not every person will think that a particular decoy

is under the age of 21. Thus, the fact that a particular clerk mistakenly believes the decoy to be older than he or she actually is, is not a defense if in fact, the decoy's appearance is one which could generally be expected of that of a person under 21 years of age.

Appellants' reliance on the clerk's belief in this case is equally ineffective.

With regard to the standard used by the ALJ to evaluate the decoy's apparent age, we find no error. Although he did not specifically address the effect of the ID in the decoy's hand, he concluded that the decoy presented the appearance generally to be expected of a person under the age of 21 under the actual circumstances presented to the seller. He was fully aware of appellants' contention that the ID in the decoy's hand affected how the clerk perceived the decoy's age, and he obviously concluded that even with the ID in her hand, the decoy would not reasonably have presented the appearance of a person over the age of 21.

After our review of the record, we cannot quarrel with the ALJ's conclusion. Since the ALJ found that this decoy clearly looked her age, 17, nothing she carried in her hand should have overridden the clerk's initial impression that she was too young to buy beer. The clerk gambled by not looking at the ID the decoy carried, and he lost.

II

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 motion 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.)

³The 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 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.⁴

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

⁴This 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.