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

AB-8429
File: 20-232626 Reg: 04057145

CHEVRON STATIONS, INC., dba Chevron
1300 Stratford Avenue, Dixon, CA 95620,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: January 5, 2006
San Francisco, CA

ISSUED: MARCH 24, 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, with all 15 days 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, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated April 14, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On April 27, 2004, the Department filed an accusation against appellant charging that, on January 15, 2004, appellant's clerk sold an alcoholic beverage to 19-year-old Donald Gallagher. Although not noted in the accusation, Gallagher was working as a minor decoy for the Dixon Police Department at the time.

At the administrative hearing on February 16, 2005, documentary evidence was received and testimony concerning the sale was presented by Gallagher (the decoy), by Dixon police officer Loren Ellefson, and by Department investigator Jaime Villones.

The Department's decision determined that the violation charged was proved, and no defense was established. Appellant then filed an appeal contending that the Department violated appellant's right to due process by an ex parte communication, and that rule 141(b)(5)[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 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

[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.

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.)

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.

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[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.)

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

Appellant contends that this decoy operation did not comply with rule 141(b)(5), which requires that an officer make "a reasonable attempt to enter the premises" and "have the minor decoy . . . make a face to face identification." The rule was violated, according to appellant, when the clerk was identified as the seller by the police officers and the Department investigator, instead of by the decoy as required by the rule. Appellant relies on the conflicting versions of the identification process testified to by the decoy, the officer, and the Department investigator, and the lack of testimony that the decoy verbally identified the clerk while the photograph was being taken.

The decision addresses the identification of the seller in Finding of Fact VII and part 2 of Finding of Fact IX:

> Once outside, the officers confirmed that Gallagher had purchased beer. They entered the store. Shortly thereafter, the decoy reentered with an ABC Investigator who asked him who the seller was. Gallagher pointed to him and identified him as the seller. At that time, he appeared to be looking at Gallagher. A photograph was taken of Gallagher and the clerk standing side-by side [*sic*] with Gallagher holding the can of beer. The clerk received a citation.
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> [¶] . . . [¶]
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> Respondent's main defense centers on whether there was an appropriate face to face identification of the seller by the decoy. Respondent urges that there are three different versions as to this point; specifically, the decoy's, who stated he was six to eight feet from the seller when the identification was made; the ABC Investigator's version, which was that all of the law enforcement personnel entered together with the decoy, who, at the investigator's request, then identified the seller when they were three feet apart; and Officer [Ellefson]'s, whose testimony respondent characterizes as wholly unreliable.
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> It is true that each of the witnesses who offered testimony on this point had different versions of who entered with whom. However, both the decoy and the ABC Investigator testified that the decoy identified the seller and that the clerk appeared to be looking at Gallagher when he pointed to him. A photograph was taken of the clerk and Gallagher, who was holding the beer can, after the identification was made. Certainly, at

> that time the clerk was aware he had been identified as the seller. The clerk did not appear at the hearing. There was no testimony from him clearly showing that he was unaware he had been identified by Gallagher as the seller. [¶] Respondent failed to establish a defense under Rule 141(b)(5).

Rule 141(b)(5) is an affirmative defense and therefore appellant bears the burden of proving the rule was violated. Appellant wishes to obtain the benefit of the defense without having presented any evidence. In place of evidence, appellant presents an argument that requires the Board to ignore findings of the Department, reweigh the evidence, and draw the inferences most favorable to appellant's position.

Appellant is urging the Board to do exactly the opposite of what the Board is authorized to do by the California Constitution and the Alcoholic Beverage Control Act. 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].)

It is the province of the trier of fact to resolve conflicts in the evidence, and the Board is bound to accept the Department's findings unless they are patently unreasonable. The ALJ resolved the conflicts in the testimony on which appellant relies and drew reasonable inferences therefrom that were not in appellant's favor. That effectively disposes of appellant's argument.

In any case, appellant does not support, and actually contradicts, its argument when it refers to the decision. In its brief, appellant states that the Department was unable to prove that the decoy, and not the officers, identified the seller. It cites Finding of Fact IX on page 4 of the decision, presumably directing the reader to something that supports its statement. On page 4 of the decision is the paragraph from Finding of Fact IX, quoted *ante*, that begins, "It is true that . . . ." The second sentence of that paragraph states that "both the decoy and the ABC Investigator testified that the decoy identified the seller and that the clerk appeared to be looking at Gallagher when he pointed to him." We have been unable to determine how that statement can possibly be read to support appellant's position.

Part of the problem with appellant's position, of course, is its insistence that the Department must prove that the decoy, and not the officers, identified the seller. In the first place, it makes no difference whether the officers identified the seller, as long as the decoy made a face-to-face identification of the seller at some time before the citation was issued. In the second place, it is not the Department's burden to prove the decoy identified the seller, at least not until appellant has presented evidence that could support a finding that the decoy did not identify the seller.

In short, we wholly agree with the ALJ's conclusion that "[Appellant] failed to establish a defense under Rule 141(b)(5)."

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.