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

AB-8431
File: 20-341268 Reg: 04057796

CHEVRON STATIONS, INC., dba Chevron Stations
1250 West Wood Street, Willows, CA 95988,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

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

ISSUED MAY 9, 2006

Chevron Stations, Inc., doing business as Chevron Stations (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days 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 Claire C. Weglarz, 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

Appellant's off-sale beer and wine license was issued on May 26, 1998. The Department filed an accusation against appellant charging that, on May 8, 2004, appellant's clerk, Rebecca Swartz (the clerk), sold an alcoholic beverage to 19-year-old Jared Tomlinson. Although not noted in the accusation, Tomlinson was working as a minor decoy for the Willows Police Department at the time.

At the administrative hearing held on February 24, 2005, documentary evidence was received and testimony concerning the sale was presented by Tomlinson (the decoy) and by Willows police officer Troy McIntyre.

The Department's decision determined that the violation charged was proved and no defense was established. Appellant filed an appeal contending: (1) its right to due process was violated by the Department's ex parte communication; (2) rule 141(b)(2)[2] was violated; and (3) the Department failed to consider mitigation evidence presented at the hearing.

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.

[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.

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 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.)

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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.)

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

Appellant contends that the ALJ did not use the correct standard to analyze whether the decoy's appearance complied with rule 141(b)(2). This rule requires that the decoy display the appearance, at the time of the sale, that could generally be expected of a person under the age of 21.

The ALJ addressed the decoy's appearance in Findings of Fact (FF) 5 and 9:

> 5. On May 8, 2004 Tomlinson was 5'10" tall and weighed 190 pounds. He had shaved that morning. He was wearing a Ducks Unlimited T-shirt and blue or black jeans, and boots. His hair was short. He wore no jewelry.
>
> [¶] . . . [¶]
>
> 9. Respondent contends that on May 8, 2004 decoy Tomlinson did not display the appearance which could generally be expected of a person under 21 years of age. In particular, respondent points to the fact that the decoy was able to purchase alcoholic beverages at almost half of the premises visited as part of the May 8, 2004 decoy operation.
>
> The differences established by evidence regarding Tomlinson's appearance on May 8, 2004 and the date of the hearing relate to two physical facts. At the hearing he was about 12 pounds heavier and his shoes had about one inch smaller heels. It was not established that these differences affected the sale of alcoholic beverages to Tomlinson by respondent's clerk.
>
> Tomlinson purchased alcoholic beverages as part of the May 8, 2004 decoy operation at four of the nine licensed premises visited by the decoy. The only conclusion drawn from this is that five of the licensed premises did not sell an alcoholic beverage to Tomlinson.
>
> There is no evidence that Tomlinson's demeanor, poise, presence and level of maturity at the hearing were different from his overall appearance when he purchased beer from respondent's clerk on May 8, 2004. The minor displayed the appearance which could generally be expected of a person under 21 years of age and as best as can be ascertained his appearance at the hearing was substantially similar to the appearance he presented to the selling clerk at the time of the violation.

Appellant's contention that an incorrect standard was used focuses on the last sentence of the second paragraph of FF 9: "It was not established that these differences affected the sale of alcoholic beverages to Tomlinson by respondent's clerk."

Appellant argues that the effect the two differences in appearance had on the selling clerk is not determinative of whether there was compliance with rule 141(b)(2). In this, appellant is correct. However, the ALJ did not determine there was compliance with the rule based on any effect, or lack of effect, on the selling clerk.

We are not quite sure what the ALJ meant by the sentence relied on by appellant. We are quite sure, however, the ALJ used the correct standard, as evidenced by the last sentence in FF 9: "The minor displayed the appearance which could generally be expected of a person under 21 years of age and as best as can be ascertained his appearance at the hearing was substantially similar to the appearance he presented to the selling clerk at the time of the violation." Obviously, the ALJ found that the differences in weight and heel height did not make the decoy's appearance on the date of the hearing significantly different from his appearance on the date of the decoy operation.

Appellant focuses on one sentence that is not the ultimate finding. The ultimate finding used the proper standard, and that is what matters.

III

Appellant contends that the Department abused its discretion by failing to consider the mitigation evidence appellant presented at the hearing and, therefore, the 15-day suspension is excessive.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971)

19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

The Department's penalty guidelines, promulgated as Department rule 144 (4 Cal. Code Regs., § 144) show the usual penalty for a first sale-to-minor violation is a 15-day suspension. Clearly, reasonable minds might differ as to whether this is an appropriate penalty in this case, but the Board must uphold the Department's penalty order "even if another penalty would be equally, or even more, reasonable." The penalty guidelines also provide that:

> Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. [¶] . . . [¶] Mitigating factors may include, but are not limited to:
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> 1. Length of licensure at subject premises without prior discipline or problems
> 2. Positive action by licensee to correct problem
> 3. Documented training of licensee and employees
> 4. Cooperation by licensee in investigation

Finding of Fact 8 in the Department's decision addresses the mitigation evidence presented at the hearing:

> 8. Della Ramsey is the manager of respondent's licensed premises at the above location and was the manager at the time of the sale of beer to Tomlinson. Her responsibilities include training new employees. This involves an ongoing monthly training about the sale of alcoholic beverages, tobacco, and lottery tickets. The monthly training is preceded by a three day New Employee Development program.

> Evidence established that the clerk who sold beer to Tomlinson had received the monthly training in March and May of 2004. No evidence was received regarding the specifics of the training.
>
> Respondent posts "We Card" signs at the premises and after the above sale, purchased a scanner which a clerk may elect to use to check a customer's identification birth date.
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> Della Ramsey testified credibly that the clerk subsequently explained to her that she mistakenly sold to Tomlinson because she had confused the birth years for permissible sales by referencing the store's calendar for birth dates regarding tobacco sales. That tobacco-legal age calendar is no longer used at the premises.

In Determination of Issues 4, the decision states: "The evidence did not establish aggravation or mitigation."

It seems clear the mitigation evidence was considered, since a substantial finding is devoted to it. While this Board has seen some cases in which such factors have served to reduce a penalty, each case is individual and what appears sufficiently mitigating in one case, may not warrant a reduction in penalty in another case.

The Department is not required to mitigate a penalty that is otherwise reasonable. The Appeals Board is not privileged to look behind the reasonableness of the penalty or to tell the Department how it must exercise its discretion, unless a clear abuse of discretion is shown. No abuse of discretion was shown 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

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[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.