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

AB-8432
File: 20-232626 Reg: 04058097

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 20, 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 5 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 R. Bruce Evans, 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 7, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

On September 30, 2004, the Department filed an accusation against appellant charging that, on August 5, 2004, appellant's clerk sold an alcoholic beverage to 17-year-old David Sanchez. Although not noted in the accusation, Sanchez was working as a minor decoy for the Dixon Police Department at the time.

At the administrative hearing held on February 15, 2005, documentary evidence was received and testimony concerning the sale was presented by Sanchez (the decoy) and by Dixon police officer Loren Ellefson.

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 its right to due process by an ex parte communication and that rules 141(a) and 141(b)(2)[2] were 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 the decoy's appearance at the time of the violation was not that which could generally be expected of a person under the age of 21, in violation of rule 141(b)(2); that the Board should not defer to the ALJ's determination that the decoy's appearance did comply with rule 141(b)(2) because the decoy's appearance underwent a "dramatic transformation" between the time of the violation and the time of the hearing, so the ALJ could not accurately judge how the decoy appeared at the time of the violation; and the decoy operation was not conducted in "a fashion that promotes fairness" because the decoy had sideburns and facial hair and wore a baseball cap, thus violating rule 141(a).

The decision addresses the decoy's appearance in Findings of Fact III and VI:

> III. On that date, Sanchez was 5'10" tall and weighed 135 pounds. He had shaved that morning but not his chin. He was wearing a baseball cap, blue jeans, a gray short-sleeved shirt and low-cut sneakers. He also wore a dark brown wooden necklace with brown beads. He had no other jewelry. His hair was very short on top. A photograph was taken of him before starting on the operation. His chin showed a slight amount of facial hair. His sideburns could also be seen. Otherwise, he appeared clean-shaven.
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> [¶] . . . [¶]
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> VI. . . . 1. Respondent urges that this decoy operation was not conducted in a fair manner because the decoy did not display the appearance that could be expected generally of a person under 21 years of age. In particular, respondent postures that the decoy did not look the same on August 8, 2004, as at the hearing. Photographs of the decoy taken at the police station show stubble on his chin. He wore a hat. His hair at the hearing was much longer.
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> It is true that the decoy, at the hearing, physically appeared different than the photographs taken on August 8, 2004. However, one's physical attributes do not solely contribute to a determination of "appearance" under Title 4, California Code of Regulations, Rule 141. The Appeals Board has repeatedly stressed that "appearance" requires a consideration not just of physical attributes but also includes demeanor,

poise, presence and level of maturity under the actual circumstances presented to the seller of alcoholic beverages (*Circle K Stores, Inc., dba Circle K Store # 1940* v. *Department of Alcoholic Beverage Control* (2004) AB-8169; *Circle K Stores, Inc.* (2000) AB-7378; *Circle K Stores, Inc.* (1999) AB-7080).

The major differences between Sanchez' "appearance" on August 8, 2004, and his presence at the hearing were his hair, which was longer at the hearing, and the lack of a noticeable chin stubble. On August 8, his hair was much shorter and hardly seen whereas he did have more of a stubble on his chin.[1] His height was the same at the hearing as on August 8. He weighed five pounds less at the hearing than on August 8. Nonetheless, respondent failed to offer any evidence as to the impression Sanchez made upon the clerk other than her comment to the officer that she was surprised he was under 21. This is an astonishing statement when one considers that she asked for and looked at his identification that clearly showed he would not reach the age of 21 years until 2007.

Sanchez, at the hearing, while wearing a baseball cap similar to the one he wore on August 8, did display the "appearance" that could be expected generally of a person under the age of 21 years notwithstanding the length of his hair. This finding is made based upon his physical attributes in addition to the other factors required for consideration by the Appeals Board. This operation was Sanchez' first as a decoy. He visited approximately thirteen licensed premises as a decoy that night. The evidence did not establish at how many he successfully purchased an alcoholic beverage. He did state that he was nervous upon reentering this premises when asked to identify the seller.

There is no reason not to expect that Sanchez' demeanor, poise, presence and level of maturity at the hearing were the same when he bought the beer. Those factors, coupled with his physical appearance as depicted in the photos taken that date, establish that his "appearance" was the same as at the hearing, to wit: under 21 years of age. It is found that respondent did not establish a defense under Rule 141(a) and (b)(2).

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[1]In *Southland Corporation/Samra* (2000) AB-7320, the Appeals Board "looked with disfavor on those operations using decoys who had 'five o'clock shadow,' especially when the decoy was also large and/tall [*sic*]." In this case, the decoy, though he did have a five o'clock shadow around his chin, was neither exceptionally tall nor overweight. The shadow did not cause him to appear over 21 (see *Abdulnour and Haddad*, *dba Santa Fe Liquor* (2004) AB-8233).

The Administrative Law Judge made an express finding that the decoy displayed the appearance that could be expected generally of a person under 21 years of age. He made this finding after having observed the decoy as he testified and having heard and considered essentially the same arguments made by appellants on appeal. He considered the effect of stubble on the decoy's chin and the wearing of a baseball hat, but concluded that these did not make the decoy look substantially different on the day of the violation than he did at the hearing, nor did they make him appear to be over the age of 21.

The Board has only appellant's assessment of the decoy's appearance and a photograph of the decoy upon which to base a judgment as to his appearance. Under such circumstances, and where the ALJ's findings indicate compliance with the rule as written, the Board is not in a position to substitute its judgment for that of the trier of fact.

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.