

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

AB-8462

File: 20-326883 Reg: 05058968

7-ELEVEN, INC., ADNAN U. KHAN, and TEHMINA ADNAN KHAN
dba 7-Eleven #2175-22943
1546 West Mission Boulevard, Pomona, CA 91766,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: June 1, 2006
Los Angeles, CA

ISSUED SEPTEMBER 20, 2006

7-Eleven, Inc., Adnan U. Khan, and Tehmina Adnan Khan, doing business as 7-Eleven #2175-22943 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Jawed Sayed, having sold a six-pack of Smirnoff Malt Liquor, an alcoholic beverage, to Floyd Dougan, an 18-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Adnan U. Khan, and Tehmina Adnan Khan, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Kevin Snyder, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated August 4, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 10, 1997. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on August 13, 2004.

An administrative hearing was held on June 10, 2005. Dougan, the minor, testified that he was not asked his age or for identification when purchasing the malt liquor. He was apprehended by Department investigators as he left the store. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the administrative law judge (ALJ) erred on the issue of the credibility of the minor; and (2) appellants were denied due process.

DISCUSSION

I

Appellants contend that the ALJ erred in accepting the minor's testimony that he purchased the alcoholic beverage in question. They assert that Dougan may have stolen the alcoholic beverage, and argue that the Department failed to refute this contention at the hearing.

It is well established that the credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

Since there is no evidence in the record that suggests the minor stole the malt liquor, there was nothing for the Department to refute. Indeed, not only is there no

evidence to support the contention, appellants did not even raise the issue at the administrative hearing.

Appellants refer to the absence of any testimony about a receipt, and suggest that either no receipt existed or Department counsel forgot to ask the officer about it. The simple fact is that no one at the hearing mentioned any receipt. We have reviewed the record and have not found the word "receipt" anywhere in the transcript. Department counsel's failure to refer to a document that no one else had even mentioned, does not, contrary to appellants' suggestion, lend itself to speculation that there was no receipt. Whether there was or was not is irrelevant. The minor testified without contradiction that he purchased the malt liquor, and, it must be noted, co-licensee Adnan U. Kahn essentially conceded there had been a sale when he testified that he was told by the clerk that the transaction had been with another person. The clerk, whose testimony would have been critical to appellants' claim, did not testify. The claim that Dougan stole the beer is based on speculation and nothing more.

Appellants' contention is rejected.

II

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. 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").²

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.)

² 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 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.

ORDER

The decision of the Department is affirmed.³

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

³ 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.