

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

AB-8465

File: 20-373750 Reg: 05058960

7-ELEVEN, INC., GARY WISEMAN, and HOLLY WISEMAN
dba 7-Eleven #2121-20611
9805 Prospect Street, Santee, CA 92071,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: March 2, 2006
Los Angeles, CA

ISSUED: MAY 3, 2006

7-Eleven, Inc., Gary Wiseman, and Holly Wiseman, doing business as 7-Eleven #2121-20611 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Dale Kelley (“the clerk”), having sold a six-pack of Budweiser beer to Jason Angel, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Gary Wiseman, and Holly Wiseman, 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 August 4, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 27, 2001.

Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on December 30, 2004.

An administrative hearing was held on June 8, 2005, at which time oral and documentary evidence was received. The evidence established that the clerk asked the decoy for his identification, and, after the decoy showed him his California driver's license, went ahead with the sale. The decoy left the store, then returned and identified the clerk as the seller. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged and no affirmative defense had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) there was no compliance with Rule 141(b)(3); (2) appellants' motion to compel discovery was improperly denied; and (3) appellants were denied due process as a result of an ex parte communication.

DISCUSSION

I

Appellants contend that there was no compliance with Department Rule 141(b)(3) (4 Cal. Code Regs., §141, subd. (b)(3)). The rule provides:

A decoy shall either carry his or her own identification showing the decoy's correct date of birth or shall carry no identification; a decoy who carries identification shall present it upon request to any seller of alcoholic beverages.

The administrative law judge (ALJ) made a factual finding (Finding of Fact II-A) that the decoy handed the clerk the decoy's California driver's license which contained

the decoy's correct date of birth and also a red stripe indicating "AGE 21 IN 2007."

Appellants assert that there is no factual support in the record for this finding because the license does not contain the decoy's correct date of birth. That part of Exhibit 3 (a color photocopy of the license) which ordinarily contains such information has been redacted.

There are several reasons why appellants' claim must be rejected.

First, it was not raised at the hearing, so must be considered waived. (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §394, pp. 444-445.)

Second, at the administrative hearing, no one questioned the adequacy of the license *which was displayed to the clerk*, and the decoy's testimony that the license contained his true date of birth went unchallenged by appellants' counsel. This testimony alone was enough to establish compliance with Rule 141(b)(3), as well as provide factual support for the disputed finding.

The record does not indicate when or under what circumstances the color photocopy marked as Exhibit 3 was made. The decoy testified [RT 12] that he no longer had the original license:

Q. Do you still have that same identification that you gave to the clerk, sir?

A. I do not have it.

Q. And why not?

A. I had to get my license renewed to go out of the country. Otherwise it would have expired while I was gone.

An examination of the color photocopy reveals what appear to be red lines drawn through several areas of the license, possibly obscuring whatever information was

contained in those areas. There is no explanation in the record for the red lines. For all we know, the lines may have been for the purpose of highlighting, rather than redacting, the information they obscured. More importantly, there is no evidence that those red lines were on the license displayed to the clerk.

For all these reasons, we find appellants' contention to lack merit.

II

Appellants assert in their brief that their pre-hearing motion seeking discovery of all decisions certified by the Department over a four-year period “where there is therein a finding or an effective determination that the decoy at issue therein did not display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense,” was improperly denied. Appellants allege that ALJ Gruen, who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellants failed to show that the requested items were relevant or would lead to admissible evidence.

Appellants spend much of their brief arguing that the provisions of the Civil Discovery Act (Code Civ. Proc., §§ 2016-2036) apply to administrative proceedings, a contention this Board rejected in numerous cases in 1999 and 2000 (see, e.g., *The Southland Corporation/Rogers* (2000) AB-7030a), all of which were argued by the same law firm representing the present appellants. Those decisions of the Appeals Board held:

“[T]he exclusive right to and method of discovery as to any proceeding governed by [the APA]” is provided in §11507.6. (Gov. Code, §11507.5.) The plain meaning of this is that any right to discovery that appellants may

have in an administrative proceeding before the Department must fall within the list of specific items found in Government Code §11507.6, not in the Civil Discovery Act. . . . [¶] In addition, §11507.7 requires that a motion to compel discovery pursuant to §11507.6 “shall state . . . the reason or reasons why the matter is discoverable *under that section*” [Emphasis added.] [¶] Therefore, we believe that appellants are limited in their discovery request to those items that they can show fall clearly within the provisions of §11507.6.

Appellants’ arguments in the present appeal, repeating, almost verbatim, the arguments made in 1999 and 2000, are no more persuasive today than they were six or seven years ago.

Appellants argue they are entitled to the materials sought because they will help them “prepare its [sic] defense by knowing . . . what factors have been considered by the Department in deciding how a decoy’s appearance violated the rule” (App. Br. at p.14) so that they can compare the appearance of the decoy who purchased alcohol at their premises with the “characteristics, features and factors which have been shown in the past to be inconsistent with the general expectations . . . of the rule.” (App. Br. at p. 13.) They assert “it is more than reasonable” that decisions in which decoys were found not to comply with rule 141(b)(2) “could assist the ALJ in this case by comparison.” (*Ibid.*) However, appellants do not explain how an ALJ is expected to make such a comparison.

It is conceivable that each decoy found not to display the appearance required by the rule had some particular indicium, or combination of indicia, of age that warranted his or her disqualification. We have considerable doubt, however, that any such indicia, which an ALJ would only be able to examine from a photograph or written description, would be of any assistance in assessing the appearance of a different

decoy who is present at an administrative hearing.

The most important indicium at the time of the sale is probably the decoy's facial countenance, since that is the feature that confronts the clerk more than any other. Yet, it is, in every case, an ALJ's overall assessment of a decoy's appearance that matters, not simply a focus on some narrow aspect of a decoy's appearance.

We know from our own experience that appellants' attorneys represent well over half of all appellants before this Board. We would think, therefore, that the vast bulk of the information appellants seek is already in the possession of their attorneys, a fact of which the Board can take official notice. This, coupled with the questionable assistance the information sought could provide to an ALJ in assessing the appearance of a decoy present at the hearing,² persuades us that ALJ Gruen did not abuse his discretion in denying appellants' motion.

III

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

² Unless a minor is deceased or too ill to be present, or unless the minor's presence is waived, he or she must be produced at the hearing by the Department in all cases charging violations of Business and Professions Code sections 25658, 25663, and 25665. (See Bus. & Prof. Code §25666.)

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

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.)

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. 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.⁴

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

⁴ 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.