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

AB-8470
File: 20-326479 Reg: 05059307

7-ELEVEN, INC., and TIM LYONS, INC. dba 7-Eleven 2172-13822
1515 Gisler Avenue, Costa Mesa, CA 92626,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

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

ISSUED OCTOBER 4, 2006

7-Eleven, Inc., and Tim Lyons, Inc., doing business as 7-Eleven 2172-13822 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk, Enrique Granado, having sold a 40-ounce bottle of Bud Light beer, an alcoholic beverage, to Jason Poulos, a 17-year-old decoy, a violation of Business and Professions Code section 25658, subdivision (a). The decoy operation was conducted by the Department of Alcoholic Beverage Control.

Appearances on appeal include appellants 7-Eleven, Inc., and Tim Lyons, Inc., appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and D. Justin Harelik, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

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[1]The decision of the Department, dated August 11, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 25, 1997. On April 1, 2005, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on December 29, 2004.

An administrative hearing was held on July 15, 2005, at which time oral and documentary evidence was received. At that hearing, Jason Poulos (the decoy) testified that he was not asked his age or for identification when he purchased the 40-ounce bottle of Bud Light beer at appellants' store. He further testified that after leaving the store with his purchase, he returned to the store and, at the request of a Department investigator, identified Granado (the clerk) as the person who sold him the beer.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellants' claim of an affirmative defense under Rule 141(b)(2) was rejected.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) there was no compliance with Rule 141(b)(2); (2) the administrative law judge (ALJ) improperly refused to permit appellants to call the decoy as a witness; (3) appellants' motion to compel discovery was improperly denied; and (4) appellants were denied due process.

DISCUSSION

I

Appellants contend that the 17-year-old decoy did not display the appearance required by Rule 141(b)(2), i.e., that he display the appearance which could generally be expected of a person under 21 years of age. They stress what they describe as the

decoy's muscular build, mature demeanor, high purchase success rate (four purchases during nine store visits)[2] and his training as a police Explorer.

The ALJ's determination that the decoy displayed the appearance required by Rule 141(b)(2) is a factual determination which we are required to accept unless patently erroneous. None of the factors appellants stress, neither in isolation nor as a whole, is such that this Board is persuaded to substitute its judgment for that of an ALJ who observed the decoy as he testified and was satisfied his appearance met the standard required by the rule.

The ALJ's assessment of the decoy's appearance is set forth in Findings of Fact 5, 9, and 10:

> 5. Poulos appeared at the hearing. He stood about 5 feet, 10 inches tall and weighed approximately 155 pounds. His dark brown or black hair was cut short. Poulos's hair appears almost identical in the Exhibits 2, 3 and 4 photographs as it did at the hearing, except it was a bit longer at Respondents' store so the gel he used had a bit more effect. He wore no jewelry and no facial hair when he visited Respondents' store. On December 29, 2004, at Respondents' store, Poulos wore a [sic] blue jeans and a black shirt. (*See* Exhibits 2 and 3.) His height and weight were about the same as at the hearing. Poulos did not exhibit any particular effects as a result of either weight lifting or working out. At Respondent's [sic] Licensed Premises on the date of the decoy operation, Poulos looked substantially the same as he did at the hearing. At the time of the hearing, decoy Poulos was 18 years of age.
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> 9. December 29, 2004, was the fourth date that decoy Poulos worked as a police decoy trying to buy alcoholic beverages. He had purchased an alcoholic beverage earlier that night from another location. Poulos has been a police Explorer and that played a role in his selection as a decoy. His experience as an Explorer was not shown to bear any relevance to the above-described decoy operation or to his apparent age.

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[2] We are unable to locate any record support for appellants' assertion (App. Br. at page 2) that the decoy was able to purchase an alcoholic beverage at four of the nine stores he visited, including three of the final five. Appellants refer to an "ABC 338" form, but this is not part of the record. The only record evidence on the subject is the decoy's testimony that he may have visited seven stores before going into appellants' store, and may have made purchases at some of them. [RT 15-16.]

> 10. Decoy Poulos is a male adult who appears his age, 18 years of age at the hearing. Based on his overall appearance, *i.e*., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of clerk Granado at the Licensed Premises on December 29, 2004, Poulos displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to Granado, Poulos appeared his true age. It should be noted he was a juvenile on the date of the beer sale.

The ALJ considered the same criteria that appellants claim show the lack of compliance with Rule 141(b)(2), and reached a conclusion contrary to that urged by appellants. We do not find this particularly surprising, considering the ALJ's apparent objectivity and appellants' partisan advocacy.

II

Appellants contend that the refusal of the ALJ to permit appellants to call the decoy as a defense witness prejudiced their ability to establish a Rule 141(b)(2) defense. They argue that they should have been able to question the decoy about the number of premises he visited and his purchase success rate in the course of those visits.

Appellants' request to present the decoy as a defense witness came only after their counsel had already cross-examined the decoy at length; indeed, after appellants concluded their cross examination, Department counsel asked a single question on redirect examination, prompting appellants' counsel to ask additional questions on re-cross examination. The only attempt by counsel to establish any information of the kind they now say they were precluded from obtaining is that referred to in footnote 2, *ante*. The opportunity to pursue the subject was not acted upon.

Appellants acknowledge that the ALJ was entitled to curtail a cross-examination which was unduly protracted, frivolous, or related to irrelevant or admitted matters or

matters already covered. It is apparent from the hearing transcript that counsel could well have sought the information now claimed so essential to their defense during their cross examination and re-cross examination of the decoy.

Indeed, appellants' reference to the ABC 338 form suggests they had that information at the hearing and chose not to introduce it.

Finally, we are not convinced that appellants suffered any real prejudice from the ruling. They have briefed this appeal as if they established the record facts they say are essential to their defense (see footnote. 2, *ante*), and we have found their argument unpersuasive. The claim lacks merit.

III

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,[3] persuades us that ALJ Gruen did not abuse his discretion in denying appellants' motion.

IV

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

[3] 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").[4]

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

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[4] 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.[5]

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

[5] 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.