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

AB-8148
File: 21-370014 Reg: 02053532

RICHARD KEUN KIM, dba Liquorama
4979 West Washington Boulevard, Los Angeles, CA 90016,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: June 10, 2004
Los Angeles, CA
ISSUED AUGUST 24, 2004

Richard Keun Kim, doing business as Liquorama (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 15 days for his 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 Richard Keun Kim, appearing through his counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 1, 2000. On August 12, 2002, the Department filed an accusation against appellant charging that on

[1]The decision of the Department pursuant to Government Code section 11517, subdivision (c), dated May 20, 2003, is set forth in the appendix, as is the proposed decision of the administrative law judge, dated October 23, 2002.

October 18, 2001, his clerk sold an alcoholic beverage to 19-year-old Belen Lopez. Although not noted in the accusation, Lopez was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on October 22, 2002, documentary evidence was received, and testimony concerning the sale was presented by Lopez (the decoy), and by Los Angeles police officers Chris Porter and Anthony Pack.

Following the hearing, the administrative law judge (ALJ) submitted to the Department a proposed decision, dated October 23, 2002, dismissing the accusation. On December 12, 2002, the Department issued a notice that it would not adopt the proposed decision. On April 22, 2003, the Department issued an order under Government Code section 11517, subdivision (c), directing the ALJ to make additional findings regarding the decoy's appearance. On May 2, 2003, the ALJ submitted a "Proposed Decision (Additional Findings of Fact)" in which he made an additional finding (Finding of Fact VI) regarding the appearance of the decoy.[2] On May 20, 2003, the Department issued its decision under Government Code section 11517, subdivision (c). It adopted, from the original proposed decision, Findings I, II, III, IV, and V; Legal Basis for Decision I, II, and III; and Determination of Issues I. It also adopted Finding VI from the ALJ's additional findings of fact. The Department made new Determinations of Issues II through V, and ordered the license suspended for 15 days. Below the order the Department's chief counsel, Matthew D. Botting, certified the decision as the Department's, adopted on May 20, 2003.

---

[2]The Department's Order Under Government Code Section 11517, subdivision (c) (Apr. 22, 2003), and the ALJ's Proposed Decision (Additional Findings of Fact) (May 2, 2003) are included in the appendix.

Appellant filed a timely appeal making the following contentions: 1) The Department's decision violated appellant's right to due process, 2) rule 141(b)(2) was violated, and 3) rule 141(a) was violated.

After this appeal was filed, appellant filed a Motion to Augment Record, asking the Board to order the Department to include as part of the record on appeal, a Department form called "Report of Hearing."[3] The Board made such an order, but the Department declined to comply. We discuss this aspect of the appeal following our discussion of the due process issue.

DISCUSSION

I

Appellant contends that his right to due process was violated because the Department's chief counsel, Matthew Botting, was both prosecutor and decision maker in this case. The Department's Web site, appellant points out, says that "Botting oversees all legal issues related to ABC, and a legal staff of nine attorneys"; therefore, appellant asserts, Botting is the Department's "highest ranking prosecutor," charged with oversight in the prosecution of this case. The Department's decision was made by Botting, according to appellant, and Botting also signed and certified the decision, thus "conflating the roles of advocate and decision-maker" and depriving appellant of his due process right to a fair hearing before an unbiased tribunal. Appellant cites *Nightlife*

[3]The Report of Hearing appears to be a standardized report prepared by the attorney representing the Department following an administrative hearing. It contains primarily factual information such as the identification of the case heard; the ALJ, parties, and witnesses present; the issues; any stipulations; whether the case was completed or continued; and the recommendation for discipline made by the attorney at the hearing. In addition, a section is included titled "Discussion," with directions to "Summarize evidence for and against with reasons for the recommended decision."

Partners, Ltd. v. City of Beverly Hills (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234] (*Nightlife*) in support of his contention.

In *Nightlife*, *supra*, Nightlife petitioned the superior court for a writ of administrative mandate to set aside the city's denial of Nightlife's application for renewal of its adult entertainment permit. In Nightlife's unsuccessful administrative appeal of the permit denial, the hearing officer was assisted during the hearing by an assistant city attorney who had advised the city in its initial denial of Nightlife's permit renewal application. The trial court concluded that Nightlife's due process rights had been violated, granted the petition, and ordered the city to grant Nightlife a new hearing.

The city appealed, and the Court of Appeal held that the administrative appeal hearing failed to meet minimum constitutional due process standards. The court stated that procedural due process in administrative proceedings requires a fair hearing before an unbiased decision maker, and Nightlife's administrative hearing had the appearance of unfairness and bias because of the city attorney's dual roles of advocate and adviser to the decision maker.

Nightlife involved a single attorney assuming the roles of advocate and adviser to the decision maker. The court distinguished the cases cited by the city "because they do not involve this same objectionable overlapping of *advocacy* and decisionmaking roles. In those cases, [citations], the same attorney did not act as both a partisan advocate and as an adviser to the neutral decision maker." (*Nightlife*, *supra*, 108 Cal.App.4th at pp. 94-95.)

In the present case, appellant argues that one person on the Department's legal staff, Botting, served both as prosecutor and decision maker, violating the holding in *Nightlife*, *supra*. The Department does not deny that Botting made the Department's

decision in this case; indeed, in oral argument before this Board, the Department conceded that Botting was the decision maker, that duty being informally delegated to him by the Director of the Department. Nevertheless, the Department's argument seems to treat ALJ Lo, who conducted the administrative hearing, as the decision maker. However, the ALJ is not the decision maker; the Department, acting through the Director, is always the decision maker. The ALJ conducts the hearing and prepares a proposed decision, but the decision to accept or reject the ALJ's proposed decision, and the ultimate decision if the proposal is rejected, is vested in the Director. Botting was, as appellant contends, the decision maker in the present case.

Botting was not, however, the prosecutor in this case. A staff attorney for the Department, David W. Sakamoto, represented the Department at the hearing. Neither Botting's general oversight of all the Department's legal matters nor his position as ultimate supervisor of Sakamoto made him the prosecutor in this case.

These conclusions do not end the matter, however. Even though the roles of advocate and decision maker were not performed by the same individual, as in *Nightlife*, *supra*, the roles were performed by two individuals from the same legal staff, and "[due process] concerns do not disappear simply because different lawyers in the same office perform the two functions." (*Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586 [5 Cal.Rptr.2d 196] (*Howitt*).)

In *Howitt*, *supra*, the county sheriff's department was to be represented by a deputy county counsel at a hearing before a county employment appeals board regarding the transfer and suspension of an employee of the sheriff's department. The county counsel would advise the appeals board at the hearing and during the decision making process, and would prepare the appeals board's written decision. The

employee requested the county counsel's office to disqualify itself from advising the board, but the county counsel refused and the superior court denied the employee's petition for a writ of mandate. The appellate court held that the county counsel's office could both act as an advocate and advise the decision maker "only if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate." (*Howitt*, *supra*, 3 Cal.App.4th at p. 1586.)

The court in *Nightlife, supra*, 108 Cal.App.4th 81, at pages 93-94*,* described the position taken by the court in *Howitt*:

> The *Howitt* court did recognize that administrative procedures may depart, to some extent, "from the *pure* adversary model of a passive and disinterested tribunal hearing evidence and argument presented by partisan advocates," and yet still comply with constitutionally mandated due process when used as the means for resolving disputes in " '[t]he incredible variety of administrative mechanisms [utilized] in this country. . . . ' " (*Howitt, supra,* 3 Cal.App.4th at p. 1581, quoting *Withrow [v. Larkin* (1975)] 421 U.S. [35] at p. 52 [95 S.Ct. [1456] at p. 1467].) . . . .
>
> However, a problem arises once an administrative agency "chooses to utilize the adversary model in large part but modifies it in a way which raises questions about the fairness of the resulting procedure." (*Howitt, supra,* 3 Cal.App.4th at p. 1581.) Thus, when both the agency and the citizen are represented by counsel at a formal hearing before a supposedly neutral decision maker who has not participated in the initial factfinding process of the agency's investigation and prosecution of a matter, and then, "in the midst of this seemingly adversary system," the same lawyer who represented the agency as advocate also advises the hearing officer with regard to its decision affecting that agency, "[t]he mental image comes to mind of a hearing in which [the agency's lawyer, while representing the agency,] raises an objection and then excuses himself from counsel table to consult with the [hearing officer] as to whether the objection should be sustained." (*Id.* at p. 1582.) What makes this scenario objectionable is that the "advocacy and decision-making roles are combined." (*Id.* at p. 1585, italics omitted.)

The implications of the *Howitt* decision, as explained in *Nightlife*, are particularly pertinent to the present case before the Appeals Board:

> [T]o permit an advocate for one party to act as the legal adviser for the decision maker creates a substantial risk that the advice given to the decision maker will be skewed ([*Howitt*, *supra*, 3 Cal.App.4th 1575, 1585]), particularly when the prosecutor serves as the decision maker's adviser in the same or a related proceeding. Then, "[t]o allow an advocate for one party to also act as counsel to the decision-maker creates the substantial risk that the advice given to the decision-maker, 'perhaps unconsciously' as we recognized in *Civil Service Commission v. Superior Court* [(1984)] 163 Cal.App.3d [70,] 78, fn. 1 [209 Cal.Rptr. 159], will be skewed." (*Ibid.*) *Thus, an agency's staff counsel may prosecute a case before the agency when an independent hearing officer presides over the contested case hearing, if the prosecutor plays no role in the agency's deliberations.* (*Id.* at p. 1586.) *So, too, two lawyers from the same office could serve in dual capacities –one as prosecutor and one as legal adviser to the administrative agency– as long as they were effectively screened from each other.* (*Ibid.*) *However, it is improper for the same attorney who prosecutes the case to also serve as an adviser to the decision make*r. (*Ibid.*)

(Nightlife, supra, 108 Cal.App.4th at p. 93, italics added.)

The language italicized above describes two situations that may result in due process violations: first, when the agency's hearing advocate participates in the agency's deliberations or acts as an adviser to the decision maker, and second, when two lawyers from the same office serve as advocate and adviser to the decision maker without being effectively screened from each other. In the present appeal, both the Department's advocate (Sakamoto) and its decision maker (Botting), were part of the same legal staff, requiring that they be effectively screened from each other.[4] The Department bears the burden of proving that procedures exist to insulate or screen its decision maker (and the decision maker's advisers) from its advocates. (*Howitt*, *supra*, 3 Cal.App.4th at pp. 1586-1587.)

However, the Department has given no indication that such screening exists. In

[4]The first situation described, in which the agency's advocate at the administrative hearing also acts as an adviser to the decision maker, is discussed in the following section on ex parte communications.

addition, the Department asserted at oral argument that an attorney in the headquarters legal office makes the initial recommendation whether to accept or reject an ALJ's proposed decision. While reviewing the case, this attorney has available the Report of Hearing and may call the hearing advocate for information about the case. Thus, there is no screening of the adviser to the Department's decision maker, or the decision maker himself, from the Department's advocate.

The Department argues that since neither Botting nor the Department's advocate at the hearing advised or counseled *the ALJ* during the hearing, no Department attorney was engaged in the "dual-capacity" role condemned in *Nightlife*, *supra*. Additionally, the Department asserts in its brief that *Nightlife*, *supra*, is distinguishable because the Administrative Procedure Act (Gov. Code, § 11340 et seq. (APA)), which governs the Department's administrative hearing process, was not applicable to the decision making process in that case. Therefore, the Department asserts, the decision did not directly address the APA provisions, "especially as they applied to potential conflicts of interest and due process." (Dept. Supp. Resp. at p. 6.)

The Department points out that the California APA provides a "comprehensive system of formal guidelines and rules for formal decision making and for addressing potential conflicts of interest within that decision making process." (Dept. Supp. Response Br. at p. 6.) It asserts that, in issuing its own decision under section 11517, subdivision (c), the Department "compl[ied] with all aspects of the APA." (*Ibid*.) However, even if the Department had complied with the provisions of the APA, it would still be subject to the due process requirements of the federal and state Constitutions.

California courts have consistently held that in an administrative proceeding, procedural due process requires that the respondent receive notice of the proposed

action, the reasons for the proceeding, the charges and materials on which the action is based, and the opportunity to respond to the proposed action "before a reasonably impartial, noninvolved reviewer." (*Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 736-737 [150 Cal.Rptr. 475, 586 P.2d 956]; accord, *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219 [79 Cal.Rptr.2d 910]*; Linney v. Turpen* (1996) 42 Cal.App.4th 763, 770 [49 Cal.Rptr.2d 813]; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 581 [257 Cal.Rptr. 427]; *Titus v. Civil Service Com.* (1982) 130 Cal.App.3d 357, 362 [181 Cal.Rptr. 699].) "The right to a fair trial by a fair tribunal is a basic requirement of due process applying to administrative agencies which adjudicate, as well as to courts. (*Withrow v. Larkin*, *supra*, 421 U.S. 35, 46 [43 L.Ed.2d 712, 723].)" *(Burrell*, at p. 577.)

The APA has several provisions designed to ensure the impartiality of the adjudicator in administrative proceedings, among them being sections 11425.30 (specified persons not to serve as presiding officer), 11425.40 (disqualification of presiding officer), and 11430.10 through 11430.80 (prohibiting ex parte communications). The Department asserts that ALJ Lo was qualified to serve as presiding officer in this matter under Government Code section 11425.30 because he had not served, nor was he subject to the authority, direction, or discretion of a person who had served, as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. It also asserts that Botting was not a "presiding officer" in an "adjudicative proceeding," and even if he were to be considered as such, he would not be disqualified pursuant to section 11425.30. We do not doubt those assertions, but they are not relevant here; ALJ Lo's qualifications as a presiding officer are not in question, and no contention has been made that Botting was a presiding officer.

What is relevant here is whether there was sufficient "separation of functions" to satisfy due process, as described in *Howitt*, *supra*. As explained above, the Department had no separation or screening between the attorney acting as its advocate and the attorneys acting as its decision maker and adviser to its decision maker. We conclude that this violated the due process rights of appellant.

II

As noted above, appellant filed a Motion to Augment Record, asking that a Departmental form entitled Report of Hearing be included in the record on appeal. This report, prepared by the attorney representing the Department following an administrative hearing, contains factual information about the hearing, the discipline recommended by the attorney at the hearing, and a summary of "evidence for and against with reasons for the recommended decision."

Appellant based his motion on his allegations that Matthew Botting, the Department's chief counsel, was the decision maker in this case and that Botting relied upon the documents requested in rejecting the ALJ's proposed decision and making the Department's decision under Government Code section 11517, subdivision (c). Appellant contends that "The interrelationship and interdepartmental communications between prosecutor and trier of fact . . . [constitute] just exactly that type of inappropriate communication constituting a denial of Due Process." He asserts that the documents he seeks to place in the record are necessary for this Board to review in order to "accurately assess the propriety" of the Department's decision.

The Appeals Board issued an order on February 26, 2004, directing the Department to produce the requested report. The Board ordered the document to be filed under seal until its further order. By letter dated March 22, 2004, the Department

refused to produce the Report of Hearing, contending the Board was without authority to augment and seal the record and asserting that the Report of Hearing was a privileged communication. The Department stated that the Report of Hearing "is completed after the hearing . . . before any proposed decision is received . . . [and] is provided to appropriate Department employees as a direct attorney-client communication (the ALJ does not receive a copy)." At oral argument, the Department indicated that, in all likelihood, both the chief counsel and the headquarters attorney reviewing the ALJ's proposed decision would receive copies of the report to use in making their evaluations of the proposed decision.

The issue regarding the Motion to Augment is related to the due process issue discussed above. To satisfy due process, the functions of advocacy and advising the decision maker must be adequately separated. This means that the Department's advocate cannot also be an adviser to the decision maker. By providing the Report of Hearing to the Department's decision maker, the Department's advocate takes on the role of adviser to the decision maker, violating the prohibition, discussed above, against one attorney performing the dual roles of advocate and adviser to the decision maker.

We conclude that the Report of Hearing must be made part of the record, as requested in appellant's Motion to Augment. This is because the Report of Hearing, a communication outside the hearing from one of the parties to the decision maker, is an ex parte communication governed by the APA.

The APA provides that a presiding officer may not receive an ex parte communication from either party while a proceeding is pending. (Gov. Code, § 11430.10.) If a presiding officer receives an ex parte communication, he or she must make the communication part of the record, along with any response to the

communication and the identity of the person from whom the presiding officer received the communication; notify all parties that the ex parte communication has been made part of the record; upon request, allow a party to comment on the communication; and, in his or her discretion, allow a party to present evidence concerning the subject of the communication or reopen a hearing that has been concluded. (*Id*., § 11430.50.) Receipt of a prohibited communication may also be grounds to disqualify the presiding officer, if necessary to eliminate the effect of the communication. (*Id*., § 11430.60.)

Although these provisions refer to ex parte communication with the presiding officer, usually an ALJ, they apply equally to the agency head or other person to whom the power to decide is delegated. (Gov. Code, § 11430.70.) There are limited permissible communications to the presiding officer or agency head from an employee or representative of an agency that is a party: for assistance and advice from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, as long as the assistant or adviser does not furnish, augment, diminish, or modify the evidence in the record; to advise concerning a settlement proposal advocated by the adviser; or to advise in a nonprosecutorial adjudicative proceeding. (*Id*., § 11430.30.) Other permissible communications are those required for disposition of an ex parte matter specifically authorized by statute or concerning a matter of procedure or practice that is not in controversy. (*Id*., §11430.20.)

It does not appear that any of the exceptions to the ex parte rules apply in the present case. On the record before us, we can only conclude that the Report of Hearing was a prohibited ex parte communication from a party to the decision maker or the decision maker's adviser. Therefore, the Department should have made it part of

the record, notified the parties of its inclusion, and allowed appellant an opportunity to comment on the communication.

After briefing in this matter had been completed, the Department submitted a copy of the decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board & ALQ* (1981) 118 Cal.App.3d 720 [173 Cal.Rptr. 582] (hereafter *ALQ*), asserting that this case "addressed virtually the same issue(s) raised in [the present appeal]" and that "the holding in [*ALQ*] is controlling for the issue(s) presently before the Board." We must disagree with these assertions.

In *ALQ*, the Court of Appeal vacated a decision of the Appeals Board that reversed the Department's revocation of ALQ's license. The Board had reversed the Department's decision because the Department refused to furnish to the licensee, before revoking its license, internal departmental documents demanded by the licensee that related to the Department's decision to reject the ALJ's proposed decision suspending the license and to decide the case on the record. The Board had held that due process and Government Code section 11517, subdivision (c), required the Department to provide the documents demanded by the licensee.

The Board's rationale was based on its belief that the statute required the Department itself to present to the licensee an argument in support of rejecting the proposed decision, so that the licensee could present an argument in response. The Board believed that the documents demanded by the licensee contained the Department's "argument."

The court rejected what it called the Board's "misconception of the function and authority of the Department," saying:

> At the heart of the Board's argument is its view, unsupported by anything other than its own notion, that the Department is in fact two separate departments, one which prosecutes accusations against licensees and one which adjudicates the merits of those accusations.
>
> Building on that concept, the Board contends that the opinions and recommendations communicated by one part of the agency to another constitutes [sic] the "argument" of which [ALQ] is entitled to be informed. This is contrary to the most fundamental rules of the executive decision-making process.

(*ALQ*, *supra*, 118 Cal.App.3d at p. 726.)

The court explained that "It is in the nature of administrative regulatory agencies that they function both as accuser and adjudicator on matters within their particular jurisdiction," (*ALQ*, *supra*, 118 Cal.App.3d at p. 726) and that due process required only that "the Department's decision be based upon a record which indicates that the licensee had notice of the Department's proposed action and right to be heard; that the Department made adequate findings [citation] which supports [sic] its decision, and that substantial evidence supports those findings." (*Id*. at p. 727.)

The court also noted that the Department, in deciding a case itself under section 11517, subdivision (c), and the Appeals Board and the courts, in reviewing the Department's decision, do so on the record, which "is that generated in the hearing before the administrative law judge." (*ALQ*, *supra*, 118 Cal.App.3d 720 at p. 728.) It concluded that there was "nothing in the constitutional guarantee of due process which requires or authorizes an inquiry into matters, outside of the record, which might bear on the reasoning or mental processes of the director or his subordinates in the Department." (*Ibid*.)

The factual situation in *ALQ* was not necessarily "virtually the same" as that in the present appeal, as contended by the Department. The documents at issue in *ALQ*

are not described with any specificity, and we are left with no idea whether any of them were comparable to the Report of Hearing at issue here.

More importantly, the court in *ALQ* espoused a theory of administrative agency decision making that has since been rejected in cases such as *Howitt*, *supra*, and *Nightlife*, *supra*. These more recent cases make clear that, when making adjudicatory decisions, due process requires precisely the notion, rejected in *ALQ*, that the Department has separate "departments" for prosecution and adjudication.

Additionally, *ALQ* was decided in 1981, long before the major revision of the APA, effective in 1997, which contained the present provisions regarding ex parte communications and separation of functions. Notably, the revised APA made a significant change in the ex parte rules by making them applicable not only to the ALJ, but to the agency head or other person to whom the power to decide may be delegated. (Gov. Code, § 11430.70.) Under the present APA, the documents requested by appellant are not "outside the record," but, as ex parte communications, must be made a part of the record.

We find *ALQ* neither controlling nor persuasive in the present appeal.

III

Rule 141(b)(2) provides that "The decoy shall 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." Appellant contends that this rule was violated, as evidenced by the decoy's experience, her wearing of make-up and jewelry, and her ability to purchase alcoholic beverages in 80 percent of the licensed establishments she visited that night.

The decoy's experience consisted of her participation in the police Explorer program and in eight previous decoy operations. Appellant asserts in his brief that "Such depth of experience equipped the decoy with the demeanor and confidence expected of someone over the age of twenty-one (21) years old."

This Board has previously rejected the contention that a decoy's experience necessarily made the decoy appear to be over the age of 21. In *Azzam* (2001) AB-7631, the Board said:

> Nothing in Rule 141(b)(2) prohibits using an experienced decoy. A decoy's experience is not, by itself, relevant to a determination of the decoy's apparent age; it is only the *observable effect* of that experience that can be considered by the trier of fact. While extensive experience as a decoy or working in some other capacity for law enforcement (or any other employer, for that matter) may sometimes make a young person appear older because of his or her demeanor or mannerisms or poise, that is not always the case, and even where there is an observable effect, it will not manifest itself the same way in each instance. *There is no justification for contending that the mere fact of the decoy's experience violates Rule 141(b)(2), without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years old or older.* [Emphasis added to last sentence.]

Appellant argues that "the decoy's appearance was enhanced to appear older by make-up and jewelry." The decoy testified that the only "makeup" she was wearing during the decoy operation was clear lip gloss [RT 17, 20]. It is absurd for appellant to be arguing that the decoy appeared older because she was wearing lip gloss.

The decoy was wearing a necklace, consisting of a thin gold chain with her name on it, and earrings that were small gold loops. Appellant does not explain how these items would have made the decoy look at least 21 years old.

Appellant contends that the facts in the present case are identical to the facts in the appeal of *7-Eleven, Inc./Dianne Corporation* (2002) AB-7835 (*7-Eleven/Dianne*),

where the Board reversed the Department decision. In that case, the decoy purchased alcoholic beverages in 80 percent of the licensed premises visited, and in none of them was he asked his age or for identification. The precedent[5] set by *7-Eleven/Dianne*, appellant argues, dictates the result in the present appeal.

Appellant overlooks some of the pertinent facts in *7-Eleven/Dianne*, chief among them being the lack of similarity between the decoy's appearance at the time of the sale and at the hearing. The ALJ in *7-Eleven/Dianne* made "an implicit finding that, at the hearing, the decoy, who was still just 19 years old, clearly had the appearance of a person over 21 years of age," but, using photographs of the decoy taken just before the decoy operation as "the best evidence of how he appeared that day," found that the decoy's appearance at the time of the sale was that of a person under the age of 21. The Board reasoned that:

> the ALJ based his finding that the decoy appeared to be under 21 at the time of the sale on photographs of the decoy and on the decoy's mannerisms and demeanor at the hearing. He did so even though the physical and non-physical appearance of the decoy at the hearing was not comparable to his physical and non-physical appearance at the

---

[5]Determination of Issues IV in the Department's decision states, in part:

> Pursuant to Government Code §11425.60(a) "[a] decision may not be expressly relied on as precedent unless it is designated as a precedent decision by the agency." There is no evidence that the Department of Alcoholic Beverage Control adopted *Dianne* as a precedent decision. Thus, *Dianne* is not a precedent decision.

We are not sure what this means. Since *7-Eleven/Dianne* is a decision of the Appeals Board, it does not appear that the Department has the authority to adopt it or reject it as a precedent decision. The agency issuing the decision, not an agency that is a party to the action being decided, designates a decision as precedent.

If the Department meant to refer to the failure of the Appeals Board to adopt *7-Eleven/Dianne* as a precedent decision, the statement is still enigmatic, since the Appeals Board is not subject to chapter 4.5 of the APA, in which section 11425.60 is found.

time of the sale. We cannot say that this finding has a reasonable basis.

In *7-Eleven/Dianne*, the Board reversed the Department's decision based on "[t]he highly suggestive 'success rate' of this decoy *and* the unreliable basis used to find the decoy's apparent age." (Emphasis added.)

The Board said in *7-Eleven/Dianne* that the high purchase rate was a "strong indication" that the decoy's appearance at the time of the sale did not comply with rule 141(b)(2), and that the ALJ's finding that it did comply was undermined by the "apparent contrary belief" of 80 percent of the clerks who saw the decoy in person that night. Neither of these statements, particularly when read in the context of the entire opinion, indicates that the Board intended a per se finding of non-compliance with rule 141(b)(2) when a decoy is able to purchase alcoholic beverages, without being asked for his or her age or identification, at 80 percent or more of the premises visited.

Although an 80-percent purchase rate during a decoy operation raises questions in reasonable minds as to the apparent age of the decoy and the fairness of the decoy operation, that by itself is not enough to show that either rule 141(a) or rule 141(b)(2) was violated. Such a per se rule would be inappropriate, since the sales could be attributable to a number of reasons besides a belief that the decoy appeared to be over the age of 21. If we did not make that clear in *7-Eleven/Dianne*, we do so now.

An 80-percent purchase rate will naturally raise the question of whether the decoy's appearance was that which could generally be expected of a person under the age of 21. This factor is not determinative of lack of compliance with the rule, but neither is it totally irrelevant. It is one factor to be considered along with others such as the decoy's physical appearance, demeanor, and mannerisms.

The ALJ, in his initial proposed decision, treated the 80-percent purchase rate as determinative. The Department, in its decision pursuant to Government Code section 11517, treated the 80-percent purchase rate as totally irrelevant in determining whether the decoy's appearance complied with rule 141(b)(2). Neither of these approaches is sound; a high purchase rate is a factor to be considered, but only one factor among several.

Although we disagree with the Department's dismissive treatment of the purchase rate, we conclude that substantial evidence supports its finding that the decoy complied with rule 141(b)(2). The ALJ, in Finding of Fact VI, which was adopted by the Department, analyzed the decoy's appearance based on his observation of the decoy at the hearing, the testimony about the decoy's appearance, and the photograph taken of the decoy at the time of the sale. Based on all these factors, he concluded the decoy displayed the appearance, at the time of the illegal sale, generally to be expected of a person under the age of 21. We cannot say that, had the high purchase rate been considered by the Department as an additional factor, it would have negated or diminished the substantial evidence upon which the finding was based. Therefore, we defer to the judgment of the ALJ in making the finding as to apparent age, since he had the opportunity, which this Board did not, of observing the decoy in person.

III

Appellant contends that the decoy operation was not conducted in accordance with rule 141(a), which states that a minor decoy may only be used by law enforcement agencies "in a fashion that promotes fairness." He asserts that the decoy operation was conducted unfairly because officer Pack stood two feet behind the decoy, without any merchandise in his hands, when the decoy purchased the alcoholic beverage.

Appellant argues that this Board's decision in *Hurtado* (2000) AB-7246, is on point and compels reversal, as does language in *KV Mart* (2000) AB-7459.

In *Hurtado*, *supra*, a 27-year-old police officer, in plainclothes, entered the premises with a decoy, the two sat down at a table together, and each ordered a beer. The Board reversed the decision of the Department, finding that "the officer's active participation in the decoy operation" was "highly likely to affect how the decoy appeared and to mislead the seller."

The present case is not like *Hurtado*. The officer did not "actively participate" in the decoy operation simply because he was standing behind the decoy. No conversation or contact occurred between the decoy and the officer, and the officer did not participate in any way in the purchase of the beer.

In *KV Mart*, *supra*, the Board said:

> It is conceivable that where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate.

Appellant's reliance on the last part of this language is misplaced. There was not, and could not be, evidence that the officer took advantage of any distraction or confusion because there was no evidence presented that the seller was distracted or confused.

There was no unfairness caused by the officer standing two feet behind the decoy while in line.

CONCLUSION

In light of our determinations in parts I and II of this opinion that the Department violated due process by failing to separate its advocacy function from its adjudicatory

function and made ex parte communications prohibited by the APA, we must reverse the decision of the Department in this matter.

ORDER

The decision of the Department is reversed.[6]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[6]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.