

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

AB-8181a

File: 20-214389 Reg: 02052209

7-ELEVEN, INC., GURDIP CHEEMA, and BALDEV CHEEMA
dba 7-Eleven #2173-26916
1212-A West Anaheim Street, Harbor City, CA 90710,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: None

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED AUGUST 23, 2005

7-Eleven, Inc., Gurdip Cheema, and Baldev Cheema, doing business as 7-Eleven #2173-26916 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk, Tarsem Lal, having sold beer to Josaphat Orozco, a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Gurdip Cheema, and Baldev Cheema, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

This is the second appeal in this matter. In the original appeal, the Appeals

¹The September 30, 2004, decision of the Department following a decision of the Alcoholic Beverage Control appeals Board, is set forth in the appendix.

Board affirmed the decision of the Department dated July 31, 2003, except as to the penalty (a 25-day suspension), and remanded the case to the Department for reconsideration of the penalty without reference to the Department's penalty guidelines.

In its decision following the remand, the Department again ordered a 25-day suspension, stating, in part:

The Department has reviewed the entire record in [this] matter. The record reveals that the licensee's [sic] clerk, Tarsem Lal, sold beer to an 18-year old, Josaphat Orozco, on November 7, 2001. The clerk asked Orozco for his identification prior to making the sale and he presented Mr. Lal with his valid California Driver License. Orozco's California Driver License indicated his true date of birth; 12-27-82, and bore the inscription AGE 21 IN 2003 (State's Exhibit 3). At this point, Mr. Lal was put on actual notice that Orozco was only 18-years [sic] old, but he sold an alcoholic beverage to the minor anyway. Prior to this incident, another of licensee's [sic] employees, Ajit Singh, sold beer to 18-year old Elizabeth Andrew on April 4, 2000 (State's Exhibit 5).

The respondent/licensee presented no evidence of extenuation or mitigation in this case. In particular, no evidence was presented pertaining to any training the licensees or their employees may have received either before or after the first sale to minor incident in April 2000. Furthermore, the licensees presented no evidence of preventative measures they may have undertaken or employed to halt the sale of alcoholic beverages to minors in their store.

In determining the appropriate discipline ordered herein, no consideration is given or has been given to the Department's penalty guidelines. Instead, the ordered discipline is based on the facts of this case, case law precedent, and the Department's constitutionally granted authority to discipline licensees.

Appellants have filed a timely appeal in which they contend that the Department violated appellants' procedural rights when the Chief Counsel for the Department signed and certified the Department's decision, conflating the roles of advocate and decision-maker. Appellants have also moved to augment the record to have included any ABC Form 104 in the file, the report of hearing contained in the file, as well as any related documents.

DISCUSSION

Appellants assert the Department violated their right to procedural due process when the attorney (the advocate) 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.

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.)

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.)

This case is very different. The Department's decision on the merits of the accusation had already been affirmed by the Appeals Board. The Department has simply reconsidered the penalty, per the Board's order of remand in the original appeal. The only task for the Department was to impose a penalty without reference to penalty guidelines the Board had concluded were an underground regulation.

The penalty imposed by the Department, a 25-day suspension, was identical to that originally imposed. Appellants have not challenged that aspect of the Department's order. The Department articulated its reasons for the degree of discipline it chose, and, under the circumstances, we have no reason to believe that the penalty order was anything other than a proper exercise of the Department's discretion.

We find no merit in appellants' appeal. We similarly find no merit in their motion to augment the record, and deny that motion as well.

ORDER

The decision of the Department is affirmed.³

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, 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.