

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

AB-8197a

File: 20-353424 Reg: 03054887

7-ELEVEN, INC., AJAYPAL SINGH SIDHU, and RAMANDEEP KAUR SIDHU
dba 7-Eleven #2237-16999D
396 West Gettysburg Avenue, Clovis, Ca 93612,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: October 6, 2005
San Francisco, CA

ISSUED: DECEMBER 12, 2005

7-Eleven, Inc., Ajaypal Singh Sidhu, and Ramandeep Kaur Sidhu, doing business as 7-Eleven #2237-16999D (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold an alcoholic beverage to a minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Ajaypal Singh Sidhu, and Ramandeep Kaur Sidhu, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Clare C. Weglarz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

FACTS AND PROCEDURAL HISTORY

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

¹The decision of the Department, dated April 15, 2005, is set forth in the appendix.

reversed the decision of the Department for the failure of the administrative law judge (ALJ) to make adequate findings with respect to the appearance of the decoy. Drawing upon an earlier Board decision in *Circle K Stores, Inc.* (1999) AB-7122, the Board explained why it felt the decision needed to be reversed:

The Board's concerns, in [that] and similar cases, was that the burdens imposed upon the Department by Rule 141, imposed for the purpose of making a more fair decoy operation, were being overlooked by a mechanical assessment of the decoy's appearance based only upon how the decoy looked from a physical point of view, one which ignored other indicia of age that may have shifted the balance, if considered.

At the outset of the hearing, as Department counsel elicited the decoy's testimony about his height, weight, manner of dress, and facial hair, the ALJ commented [RT 12]: "I make the observation that, as testified you have three or four days of facial hair growth now, it is very short and sparse. I'm able to see the flesh of your face clearly through the growth."

Then, after hearing the closing argument of counsel for appellants, the ALJ stated:

I would take notice on the record that, in my opinion, the decoy in this matter, even today, has such youthful appearance that is only consistent with somebody under the age of, let's say, 19, let alone 21. So if I were to look at that young man, even today, with what he tells us is three days growth of facial hair, I would not find him to be more than 18 years old. His appearance is totally consistent with his chronological age and no more than that.

The ALJ's finding with respect to the decoy's appearance is little different from his remarks during closing argument, except for the added reference to the "clear" indication of age on the decoy's driver's license.

The Department argues that, since the ALJ gave no indication that his assessment of the decoy's apparent age was limited to physical aspects of his appearance, it follows that it would be speculative to assume he limited his assessment in that manner.

Our concern is that the opposite is just as true - since he gave no indication of what factors he considered, other than those to which he made specific reference, it follows that he may well have considered only the decoy's physical appearance. While we cannot speculate as to the ultimate outcome, we think this case must be reversed and remanded to the Department for further findings by the ALJ concerning the decoy's appearance, with specific reference

to factors considered.

The Department remanded the matter to the ALJ, directing him to conduct such further proceedings as he determined to be appropriate, including “further findings regarding the nonphysical aspects of the decoy’s appearance.”

Thereafter, the ALJ issued a second proposed decision in which he augmented his original proposed decision by the addition of a new factual finding, which we quote:

There was nothing remarkable about the decoy’s nonphysical characteristics during the administrative hearing, and there was no evidence - other than that the clerk asked him for identification, from which it is inferred that his overall appearance was consistent with his chronological age - of what those characteristics were at the time of the decoy operation. In the absence of evidence to the contrary, it must be assumed that a person looks and acts their age, which in the case of this decoy was eighteen. It is, therefore, found that at the time of the decoy operation, the decoy’s non-physical characteristics, as well as his physical ones, caused his overall appearance to be that of a person under 21 years of age.

Appellants challenge this finding as “non-descriptive” and “bareboned,” and say that it disregards this Board’s mandate, ignores evidence in the record of the non-physical characteristics of the decoy during the decoy operation and erroneously states that no such evidence exists.

DISCUSSION

I

We cannot agree with the appellants that the ALJ ignored this Board’s order.

The concern the Board expressed in *Circle K Stores, Inc.*, *supra*, was that nonphysical characteristics that might have made a decoy appear older than his or her chronological age might be ignored if the focus of what the ALJ considered was too narrowly directed at his or her physical appearance. In this case, we are satisfied that the ALJ’s assessment of the decoy’s nonphysical appearance was not the mechanical

one that we cautioned against in *Circle K Stores, Inc.*, *supra*, and other cases.

There can be no doubt that, on remand, the ALJ focused on nonphysical characteristics of the decoy's appearance, although he did not identify what they were. We understand the substance of what he wrote to mean that he saw no evidence that the decoy would have appeared any different at the time of the decoy operation than he did at the hearing. We take this to mean that, in the ALJ's judgment, the decoy's experience as an Explorer, and his lack of nervousness would have had minimal impact on his overall appearance.

The ALJ is not required to negate every possible nuance of appearance when making the determination required by Rule 141(b)(2). We know that he is drawing on his experience both as a judge and as a person in assessing the appearance of the decoy in the case before him. This is a factual determination, and he is in a much better position to make it than are we.

II

Appellants assert the Department violated their right to procedural due process when the attorney representing the Department at the hearing before the ALJ (the advocate) 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.)

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.

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.)

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.