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

AB-8260
File: 20-386375 Reg: 03055983

BP WEST COAST PRODUCTS, LLC, dba Arco AM/PM # 9539
2937 East Chapman, Orange, CA 92869,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED JULY 12, 2005

BP West Coast Products, LLC, doing business as Arco AM/PM # 9539 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's 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 BP West Coast Products, LLC, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

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[1]The decision of the Department, dated March 4, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 26, 2002. On October 2, 2003, the Department filed an accusation against appellant charging that, on May 16, 2003, appellant's clerk, Dario Rebosura (the clerk), sold an alcoholic beverage to 19-year-old Huy Nguyen. Although not noted in the accusation, Nguyen was working as a minor decoy for the Orange Police Department (OPD) at the time.

At the administrative hearing held on January 6, 2004, documentary evidence was received, and testimony concerning the sale was presented by Nguyen (the decoy) and by Michael Taylor, an Orange police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense was established.

Appellant has filed an appeal contending that Department rules 141(a) and 141(b)(5)[2] were violated. Appellant also filed a Motion to Augment Record, requesting that a document entitled "Report of Hearing" be included in the administrative record, and asserted that the Department violated its due process rights when the attorney who represented the Department at the hearing before the administrative law judge (ALJ) provided a Report of Hearing to the Department's decision maker after the hearing, but before the Department issued its decision.

DISCUSSION

I

Rule 141(b)(5) provides:

> Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who

[2]References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

> purchased alcoholic beverages to make a face to face identification of the alleged seller of alcoholic beverages.

Appellant contends that the findings do not support the determination that the decoy's identification of the clerk complied with the rule because there is no evidence that the clerk was aware that he was being identified.

Finding of Fact 12 deals with the face-to-face identification of the clerk:

> Once outside the store, Nguyen met OPD Officer Belville [Belville]. Within a minute or so, Nguyen was escorted back into the store by Belville. Nguyen was asked if he could identify who had sold him the beer. He said he could and when asked, pointed to clerk Rebosura. A photograph was taken of decoy Nguyen pointing at the selling clerk. (Exhibit 3.) When this was done Nguyen and Rebosura were standing across the sales counter from each other.

Appellant argues that the officer's testimony about the identification differed from the decoy's, but under neither version is there compliance with rule 141(b)(5). Appellant's argument misses the mark because it is addressed to the *testimony*, not the *finding* in the decision. The ALJ performed his job of resolving any conflict in the evidence, and his finding, unless it is so unreasonable as to be an abuse of discretion, is the pertinent version of the facts. Nevertheless, we have examined appellant's contention, and it is meritless.

The officer, according to appellant, testified he asked the decoy *whether* he could identify who sold to him and then asked the decoy to point at the clerk so the officer could take a picture. This testimony, appellant argues, shows that the officer, not the decoy, identified the seller. However, the testimony of the officer was that he asked the decoy "if he was able to identity the person that sold him the beer," to which the decoy answered "Yes." The officer then asked the decoy "to point at the subject that sold him the beer," and took a photograph of the decoy pointing at the clerk.

Nowhere in this testimony is there any indication that the officer told the decoy to whom he should point.

The decoy's testimony, says appellant, "is unclear whether the identification apprised the salesclerk that he was being identified." The decoy did not say "he sold me the beer," but merely pointed at the clerk, and this, asserts appellant, is not a proper identification under the rule. The transcript reveals, however, that the clerk was only about five feet away from the decoy when the decoy pointed at him, and a photograph was taken of the two at that time. Under these circumstances, we are convinced that the clerk was aware, or ought to have been aware, of being identified. That is all that is required. (See, e.g., *7-Eleven & Pattaphongse* (2004) AB-8110; *7-Eleven & Kim* (2004) AB-8198.)

II

Rule 141(a) requires that law enforcement agencies conduct decoy operations "in a fashion that promotes fairness." Appellant contends that this provision was violated because the decoy's goal during the operation was to "make a sale."

When the decoy went to the sales counter with the beer, the clerk asked to see his identification. The decoy took his wallet out, opened it, and showed the clerk his California driver's license, which was visible behind a clear plastic window in the wallet.[3] The clerk looked at the driver's license for five to ten seconds, but he did not ask the decoy to remove it from the wallet before he completed the sale of beer to the decoy.

At the hearing, the decoy testified regarding his manner of showing the clerk his California driver's license [RT 38-39]:

[3]The driver's license showed the decoy's correct date of birth and bore a red stripe with white lettering that said "AGE 21 IN 2004."

Q. The fact that you were actually able to make a purchase at this location, did that have any effect on your state of condition [sic] or nervousness?

A. I think a tad bit because I was doing a decoy with another person, too, so I used his method, because he had a sale before I did and I used his method and it worked.

Q. When you say "method," what –

A. Just the way of how you approach with the ID thing.

Q. Okay.

A. Because other times they would ask to take it out and I tried it his way, which was to flap the wallet thing, because the clerk didn't ask me to take it out. I used it that way and got the purchase.

Appellant contends the decoy operation was unfair based on the decoy's testimony that his goal was to "make a sale" during the decoy operation. This violates the "spirit and policy" behind rule 141, which appellant asserts is to test compliance, not to catch as many licensees as possible selling alcoholic beverages to minors.

The ALJ responded to this argument in Conclusion of Law 7:

> There is no question that the attitude about the decoy operation displayed by Nguyen at the hearing was not appropriate. The objective of decoy operations is not to "get" licensees to unlawfully sell alcoholic beverages. Rather it is to encourage compliance with the law. However, the secret objectives of the decoy do not by themselves take the operation out of compliance with the fairness requirement. Neither does a display of identification from within a wallet make an operation unfair. It is not unusual for a person asked to present identification to display it inside a wallet. That is all Nguyen did in this case. He indicated readiness to remove the ID from the wallet, *if asked*. He simply was not asked to do so. He also would likely have handed the ID to the clerk, again, *if asked.* He was not asked to do so. Without more, the operation was conducted fairly and no more was established on that subject.

Appellant argues that the decoy's "secret objective" matters greatly, and if the decoy uses methods that tend to trick or mislead sellers, "this de facto renders the entire decoy operation unfair, in violation of Rule 141(a)."

This Board had occasion to consider a contention similar to appellant's in *7-Eleven, Inc./Mousavi* (2002) AB-7833. There, the Board agreed that the decoy operation had not been conducted in a manner that promoted fairness, where after one decoy purchased beer at the appellants' premises, the police sent in a second decoy, who was refused. However, the Board rejected the contention that unfairness arose simply because the alleged main purpose of the police conducting this decoy operation was to have the decoys purchase alcoholic beverages, rather than to test whether a clerk was willing to sell to a minor. The Board said that, "[e]ven if the police purpose was not the proper one, that by itself does not make the decoy operation unfair."

The analysis of the ALJ in this case is appropriate. As long as no action is taken that is unfair, there is no rule violation. A decoy cannot violate the fairness requirement of rule 141(a) simply by having a "secret objective" to have someone sell him or her an alcoholic beverage. It is only when the decoy does or says something that the rule prohibits, or fails to do or say something that the rule requires, that a violation can be found. In such a case, it is up to the licensee to show affirmatively that the violation occurred, since rule 141 is an affirmative defense.

Appellant states that the decoy himself turned the operation "from a 'let's see if the licensee complies with the law' into a 'let's find a way to get the licensee to violate the law' operation" by his conduct. Appellant does not specify what that conduct was, and, as the ALJ noted, the decoy displayed his ID in a common manner and there is no evidence that the license was in any way obscured or unreadable. While it is true that the decoy did not take the driver's license out of the wallet and hand it to the clerk, the clerk did not ask him to so. On these facts, we cannot say that the decoy operation was conducted unfairly.

III

Appellant asserts the Department violated its 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. Appellant 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").[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.

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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 *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615 [25 Cal.Rptr.3d 821]. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. (127 Cal.App.4th 615; ___ Cal.Rptr.3d ___). The Department petitioned the California Supreme Court for review, but the Court has not acted on the petition as of the date of this decision.

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. 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 appellant at the hearing. Appellant has 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 appellant has 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 appellant, it appears to us that appellant received the process that was due to it 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, appellant is 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. Appellant's motion is denied.

ORDER

The decision of the Department is affirmed.[5]

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

[5]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.