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

AB-8270
File: 20-386403 Reg: 03054895

BP WEST COAST PRODUCTS LLC, dba Arco AM/PM # 5574
2010 Churn Creek Road, Redding, CA 96002,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: April 7, 2005
San Francisco, CA
Redeliberation: May 5, 2005

ISSUED JUNE 9, 2005

BP West Coast Products LLC, doing business as Arco AM/PM # 5574 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for its 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, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

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[1]The decision of the Department, dated March 18, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 15, 1991. On April 22, 2003, the Department instituted an accusation against appellant charging that, on January 10, 2003, appellant's clerk, Dustin Silkwood (the clerk), sold an alcoholic beverage to 18-year-old Grace Carmichael. Although not noted in the accusation, Carmichael was working as a minor decoy for the Shasta County Sheriff's Department at the time.

An administrative hearing was held on October 28, 2003, at which time documentary evidence was received and testimony concerning the sale was presented by Carmichael (the decoy), by Shasta County sheriff's investigator Wes Collett, and by Department investigator Bill Rowe.

The testimony established that on January 10, 2003, the decoy entered appellant's licensed premises while the two investigators, Collett and Rowe, waited outside. The decoy took two bottles of Smirnoff Ice malt liquor from the cooler and took them to the counter. The clerk sold her the alcoholic beverages without asking her age or for identification. The decoy left the store with a bag containing the malt liquor and met the investigators outside.

A few minutes later, the decoy reentered the premises with the investigators. As they entered, the decoy indicated to the investigators which of the two clerks standing at the counter sold her the alcoholic beverages. The decoy and the investigators approached the counter where the clerk the decoy had indicated was working, and the investigators identified themselves as law enforcement officers. One of them told the clerk he had just sold alcohol to a minor, and the decoy gestured toward the clerk and said that he was the one who sold to her. At this time the decoy was standing across

the counter from the clerk, about four feet away from him. The investigators, the decoy, and the clerk then went to another part of the store where investigator Collett asked the decoy if this was the person who sold alcohol to her, and the decoy responded that he was the one. The decoy was about eight feet from the clerk at this time. A picture was taken of the decoy and the clerk and a citation was issued to the clerk.

The Department's decision determined that the violation charged was proved and no defense was established. Appellant filed an appeal contending that rule 141(b)(5)[2] was 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

Appellant contends the decoy operation did not comply with rule 141(b)(5), which requires, after a sale of an alcoholic beverage to a minor decoy, that the "officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy . . . make a face to face identification of the alleged seller of the alcoholic beverages." Failure of the law enforcement agency to comply with any of the provisions of rule 141 provides a complete defense to a sale-to-minor charge. (Cal. Code Regs., tit. 4, § 141, subd. (c).)

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[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.

Appellant contends the rule was violated in this case because the clerk did not know he was being identified and because one of the investigators actually made the identification, not the decoy.

The ALJ dealt with the decoy's identification of the clerk in Findings of Fact IV:

> Decoy Carmichael returned to the premises shortly thereafter with Sheriff's Investigator Wes Collett and Department Investigator Bill Rowe. Carmichael identified the clerk who sold her the alcoholic beverages from the store's front door as she entered and told Investigator Collett which of the two clerks behind the counter sold her the alcoholic beverages. A second identification took place moments later at the check-out counter. The clerk was then asked to join the two investigators and the decoy in an alcove away from the check-out counter and the four persons moved to that area to avoid disrupting the store's operation. In the alcove the decoy again identified the clerk as the person who sold her the alcoholic beverages. This face to face confrontation was from a distance of about eight feet. Carmichael pointed at the clerk and identified the clerk, Dustin Silkwood, as the person who sold her the alcoholic beverages. The clerk admitted selling Carmichael the alcoholic beverages and stated he did not have time to ask for her identification. The clerk was then cited.

Appellant is correct that the clerk did not know he was being identified, but only one of the three times the decoy identified him for the investigators. As the investigators walked into the premises with the decoy after she had made the purchase, one of the investigators asked her which of the two clerks at the counter was the one who sold to her. She indicated which one from just inside the door, about 10 feet away from the check-out counter. It is clear from the testimony that the clerk would not have been aware, or have any reason to be aware, of this identification. There is no question that this identification did not comply with rule 141(b)(5).

However, according to the testimony, the decoy identified the clerk twice more in the next few minutes. She identified the clerk as she was standing across from him at the counter, and she identified the clerk again a few minutes later when the investigators took the decoy and the clerk into another part of the store.

It is with regard to this last identification that appellant contends the investigator, not the decoy, made the identification. Appellant argues that, at that point, the clerk had been singled out and the decoy was not asked to make an identification, but directed to say that he was the one who sold alcohol to her. This contention is based on the response of investigator Collett when he was asked what happened when the investigators took the decoy and the clerk into another part of the store: "I had Miss Carmichael identify and verbally say that the gentleman standing in front of her was the one that sold her the alcohol." [RT 38.]

Appellant's contention appears to be very similar to arguments made in other cases that an identification was "unduly suggestive" because the law enforcement officer asked the decoy "Is this the person who sold to you?" rather than asking "Who sold you the beer?," or because the officer talked to the clerk first and then asked the decoy to identify who sold the alcoholic beverage.

In *Albertson's, Inc*. (2004) AB-8146, the decoy testified the officer asked her "if this is the man that sold [the beer] to you," while the officer testified he asked the decoy to "point out the individual that had sold the beer." The appellant argued that the decoy's version would mean that rule 141(b)(5) was violated. The Board responded:

> [A]ppellants' argument is fundamentally flawed because it relies on the erroneous conclusion that the face-to-face identification would not have complied with the rule if the officer asked the decoy "Is this the person who sold to you?" rather than asking "Who sold you the beer?". The Board has rejected this type of argument in a number of cases, and the same rationale applies here. (*7-Eleven, Inc./Vameghi* (2004) AB-8065; *The Vons Companies, Inc*. (2004) AB-8058.) We do not regard either form of the question as unduly suggestive, especially since both witnesses are describing a small part of an event which took place nearly a year earlier. What is important is that there was a face to face identification, not that there is some semantic difference in the testimony of different witnesses as to how it was sought.

In *7-Eleven, Inc./M&N Enterprises, Inc.* (2003) AB-7983, the appellants argued that rule 141(b)(5) was violated when the officer contacted the clerk before the decoy made his identification. The Board said:

> The fact that the officer first contacts the clerk and informs him or her of the sale to a minor has been used to show that the clerk was aware of being identified by the decoy. (See, e.g., *Southland & Anthony* (2000) AB-7292; *Southland & Meng* (2000) AB-7158a.) ¶ . . . ¶ As long as the decoy makes a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error, we do not believe that the officer's contact with the clerk before the identification takes place causes the rule to be violated.

It does not matter in the present case what exact words were used when the officer asked the decoy to identify who sold to her, nor does it matter that the investigators talked to the clerk about selling to the minor before the decoy "officially" identified the clerk. The crucial facts are that the decoy, standing in reasonable proximity to the clerk, clearly identified the clerk as the person who sold alcoholic beverages to her. It appears to us that this occurred not once, but twice: first, at the counter when the investigators brought the decoy back into the store and, second, when the investigators took the decoy and the clerk to another part of the store. This more than fully complies with the dictates of rule 141(b)(5).

II

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").[3]

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.)

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[3]The Department filed petitions for review with the 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 yet to act on the petition.

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.[4]

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

[4]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.