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

AB-8274
File: 20-266246 Reg: 03056240

7-ELEVEN, INC., and THOMAS A. MOEBS, dba 7-Eleven Store # 2237-26688
22950 Joaquin Gully Road, Twain Harte, CA 95383,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

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

ISSUED JUNE 9, 2005

7-Eleven, Inc., and Thomas A. Moebs, doing business as 7-Eleven Store # 2237-26688 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, but stayed all 10 days on the condition that the premises remain violation-free for a period of one year, for their 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 appellants 7-Eleven, Inc., and Thomas A. Moebs, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated April 8, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 7, 1991. Thereafter, the Department instituted an accusation against appellants charging that, on June 13, 2003, appellants' clerk, Denise S. Valin (the clerk), sold an alcoholic beverage to 18-year-old Timothy Higginbotham. Although not noted in the accusation, Higginbotham was working as a minor decoy for the Toulumne County Sheriff's Department at the time.

At the administrative hearing held on March 2, 2004, documentary evidence was received and testimony concerning the sale was presented by Higginbotham (the decoy) and by Timothy J. Wertz, a Toulumne County Sheriff's deputy.

The testimony established that on June 13, 2003, the decoy entered appellants' premises while deputy Wertz waited outside. The decoy went to the cooler, removed a bottle of Budweiser beer, and took it to the counter. The clerk asked to see his identification and he handed her his valid California driver's license which showed his birth date as "08-13-84" and, in white letters on a red stripe, the words "AGE 21 IN 2005." The clerk looked briefly at the license, scanned it through a machine, said "O.K.," and handed the license back to the decoy. The decoy paid for the beer, the clerk put the bottle in a plastic bag, and the decoy left the store with the beer.

Outside, the decoy met the deputy and then re-entered the premises with the deputy. The decoy indicated to the deputy the clerk who sold him the beer. The deputy identified himself to the clerk as a law enforcement officer and told her she had sold beer to a minor. The decoy then told the clerk that he was 18 and that she had sold beer to a minor. The clerk said that the decoy's license showed he was 21, and asked to see the license again. When the license was given to her, she said that it was not

the license he had used. The deputy told the clerk that he had searched the decoy and the decoy carried no other license. The clerk said that she must have made a mistake, and the deputy issued a citation to her.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal contending that rules 141(a)[2] and 141(b)(2) were violated. Appellants 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 their 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)(2) states that the decoy's appearance must be that "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."

Appellants assert "[i]t is obvious that . . . the ALJ felt that the fact that the clerk checked the decoy's identification established that the decoy therefore had the appearance of someone [under] the age of 21."[3] (App. Br. at p. 5.) According to

[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.

[3]Appellants' brief says "over the age of 21," but we have assumed they mean "under the age of 21" in order to make sense of their argument.

appellants, since the clerk did not testify, there was no evidence presented upon which the ALJ could have based his determination; therefore, the ALJ was merely speculating about why the clerk requested the decoy's identification, and his determination cannot be based on speculation. Appellants refer to language in *BP West Coast Products LLC* (2004) AB-8131, in which the Board rejected the position of the Department that, once the decoy displays identification showing that the decoy is under the age of 21, rule 141(b)(2) no longer is relevant.

The portion of the decision in the present case dealing with the decoy's appearance consists of Findings of Fact 5, 6, and 7:

> 5. Section 141(b)(2) of Title 4, California Code of Regulations, provides that "[t]he 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." Based on a photograph of Higginbotham taken on June 13, 2003, and his testimony, appearance and demeanor, during this hearing, it is found that he displayed the appearance which could generally be expected of a person under 19 years of age, under the actual circumstances presented to Valin during the decoy operation. In fact, he could be a model for the type of decoy required by Section 141(b)(2).
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> 6. Although the driver's license that Higginbotham presented to Valin indicates erroneously that he was 6[']1" tall when the license was issued on July 6, 2001, he was, in fact, only 5'11" tall at the time of the decoy operation and at [the] time of this hearing. No explanation was given for the error on the license, but since there was no evidence that Valin was misled by it, the error is irrelevant.
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> 7. At the time of this hearing, Higginbotham's hair was crew-cut in a manner consistent with his chronological age, but his hair was not visible to Valin during the decoy operation because Higginbotham was wearing a baseball-style cap with a visor during that operation. However, the photograph that was taken of him on [June] 13, 2003 portrays him wearing the cap, and based on that photograph and the fact that Valin thought he was young enough to require identification, it is found that wearing the cap during the decoy operation did not make Higginbotham appear older than his chronological age.

We disagree with appellants' contention. Their theory rests on their assertion that the ALJ based his determination of the decoy's apparent age solely on the fact that the clerk asked to see the decoy's identification. However, the ALJ finds that the decoy's appearance complies with rule 141(b)(2) in paragraph 5 of the Findings of Fact, not in paragraph 7, where the language to which appellants take exception is found. In paragraph 7, the ALJ is discussing the effect, or lack of effect, wearing the cap had on the decoy's apparent age. This is after the ALJ's conclusion in paragraph 5 that the decoy complied with the requirement of rule 141(b)(2).

Additionally, it is clear to us from Finding of Fact 5 that the ALJ did not base his determination of the decoy's apparent age on any one factor, but on all evidence available to him regarding the decoy's appearance at the hearing and during the decoy operation. This is not at all like the situation the Board rejected in *BP West Coast Products LLC*, *supra*. Here, the ALJ did not consider rule 141(b)(2) irrelevant because the decoy displayed his identification showing that he was under the age of 21; had he done so, he would not have needed to bother writing Findings of Fact 5, 6, and 7.

Since the ALJ did not base his determination of the decoy's apparent age on the clerk's request for the decoy's identification, appellants' argument that the determination is not supported by the evidence is baseless.

II

Rule 141(a) requires that decoy operations be conducted in a "fashion that promotes fairness." Appellants contend that this requirement was violated by the decoy wearing a baseball cap while in appellants' premises. This, they argue, "partially obscured" how the decoy looked, and "substantially prejudiced any prospective seller, including the seller in this case." (App. Br. at p. 6.) Appellants go so far as to assert

that the decoy operation was unfair because the decoy "used a 'tool' that had the potential to mislead and/or possibly trick licensee establishments." (App. Br. at p. 7.)

In Findings of Fact 7, quoted *ante*, the ALJ addressed, and rejected, the contention that the decoy's baseball cap made him appear older. On appeal, appellants do not argue that the cap made the decoy appear older in violation of rule 141(b)(2), but that the baseball cap unfairly interfered with the ability of the clerk to assess the decoy's age, thereby violating rule 141(a).

While it is true that wearing a cap could conceivably obscure facial features in some instances, there is simply no evidence supporting appellants' contention that, in this case, the cap obscured the decoy's face. The ALJ apparently did not think so because he commented that the cap hid the decoy's hair but did not make any reference to the cap obscuring anything else. The photograph of the decoy wearing the hat shows his face clearly. (Exhibit 2.) The hat is not pulled down past the decoy's hairline in front, and although the bill of the cap throws a shadow over part of the decoy's face in the picture, it is easy to see why the ALJ said at the hearing that "no one could mistake [this decoy] for someone over the age of nineteen." [RT 58.]

The only testimony regarding the effect of the decoy's cap was elicited during cross-examination of deputy Wertz by appellants' counsel, Mr. Labin [RT 59]:

MR. LABIN:	When Mr. Higginbotham wears that baseball cap would you agree that it obscures part of his appearance?
MR. WIEWORKA:	Objection.
THE [ALJ]:	Overruled. Do you have an opinion?
THE WITNESS:	I would say no.

While simply the deputy's opinion, the testimony was presumably based on his observation of the decoy during the entire decoy operation that night.[4]

In addition, and perhaps most importantly, there is no evidence that the clerk had difficulty seeing the decoy's face or was misled as to his age because of the cap. Appellants have not shown that rule 141(a) was violated by the decoy wearing a cap.

III

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").[5]

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[4]The decoy testified he wore the cap during the whole decoy operation. [RT 9.]

[5]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 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. 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 to 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.[6]

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

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[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.