

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

AB-8294

File: 20-350445 Reg: 03056298

MAURICE ABDELMESSIH and SUZIE ABDELMESSIH dba Playa Vista Texaco
8162 Lincoln Boulevard, Los Angeles, CA 90045,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: May 5, 2004
Los Angeles, CA

ISSUED JUNE 30, 2005

Maurice Abdelmessih and Suzie Abdelmessih, doing business as Playa Vista Texaco (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk, Ashraf Shaker, having sold a 24-ounce can of Bud Light beer to Ashley Christine Martin, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Maurice Abdelmessih and Suzie Abdelmessih, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated May 20, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 11, 1999. On November 20, 2003, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on October 11, 2003.

An administrative hearing was held on April 2, 2004, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Los Angeles police officer Robin Richards, a witness to the transaction at issue, and that of Ashley Christine Martin ("the decoy"). Ashraf Shaker, the clerk who made the sale, testified on behalf of appellants.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and ordered the suspension from which this timely appeal has been taken.

Appellants contend that there was no compliance with Rule 141(b)(5).² Appellants have also filed a Motion to Augment Record, requesting that a document entitled "Report of Hearing" be included in the administrative record, and have 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.

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.

DISCUSSION

I

Appellants assert that the only face to face identification which might otherwise have satisfied Rule 141(b)(5)³ occurred *after* the citation was issued, and thus was not timely.

Rule 141(b)(5) requires that the face to face identification required by the rule be “not later than the time a citation, if any, is issued.” Non-compliance with 141(b)(5), or other provisions of Rule 141, creates a defense to a charge of selling an alcoholic beverage to a minor.

Appellants point to what they say are conflicts in the testimony of the Department’s witnesses, and assert that testimony of the clerk who made the sale establishes that the face to face identification found by the ALJ to satisfy the requirement of the rule occurred after the clerk had been issued and signed a citation.

Officer Richards testified that he observed the decoy and fellow officer Lo enter the store. Watching from outside the store, he saw the decoy purchase a can of beer and leave the store with a 24-ounce can of Bud Light beer. According to Richards, Officer Lo did not leave the store. The decoy returned to the store in the company of Richards and another officer. At that time, according to Richards, Officer Lo asked the

³ 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 purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

decoy who sold her the beer. The decoy pointed to the clerk and said that he was the one who sold her the beer. The clerk was the same clerk Richards had seen make the sale. The decoy and the clerk were facing each other.

The decoy testified that she followed Officer Lo into the store. Officer Lo was behind her when she purchased the beer, left the store when the decoy left, and, according to the decoy, returned after the decoy had been asked, "Who was the person who sold you the alcohol?" The decoy testified that, in response, she pointed to the clerk and identified him. She and the police officers and the clerk then went to the side of the store, at which point she became aware Officer Lo was standing next to her. The officers questioned the clerk, and the decoy was then photographed with the clerk while pointing to him. She was then taken out of the store.

Shaker, the clerk, testified that, as a new employee, he was undergoing training on the day of the sale. His training shift concluded concurrently with the sale, he testified, and he left the store. While standing outside, he was asked to return to the store by an "Asian young lady," whom he later learned was a police officer. She reentered the store with him. When he reentered the store, a fellow clerk was behind by the cash register. Shaker stated that the only time anyone identified him was as the photograph was being taken.

On cross-examination, Shaker said that after the Asian police officer (Officer Lo) brought him back into the store, and while he was standing behind the counter, she told him he had sold beer to a an underage girl.

The thrust of appellant's position is that there was only one identification which would have satisfied the requirement of Rule 141(b)(5), and that identification was untimely, since it occurred after a citation had been issued.

At the hearing, appellants' counsel suggested that the initial identification may well have been of the clerk who had not made the sale. He also argued that Officer Lo, who ultimately issued the citation, must have done so before the photograph was taken, since she escorted the decoy back to the van immediately afterward. The decoy, however, testified that she did not know whether Officer Lo remained at the van with her, and also testified that she had not seen the clerk sign anything.

The ALJ sorted out the testimony this way (Finding of Fact III):

After paying for the beer, the decoy exited the store with it. Approximately a minute to 1 ½ minutes later, the decoy returned to the store, accompanied by two Los Angeles police officers. One of these officers, or possibly another officer, then asked the decoy to identify the person who sold the beer to her. The decoy identified Shaker as the seller. During the identification, Shaker was on the clerk's side of the counter, and the decoy was on the customers' side. They were face-to-face. Officer Robins [sic] witnessed the identification, which complied with the Department's Rule 141(b)(5).

The ALJ deemed the second identification irrelevant, thus mooting the question whether it preceded or followed the issuance of the citation.

Our brief summary of the testimony exposes only some of the many conflicts and inconsistencies the ALJ had to resolve. Where there are such conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Appellants cite *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195, and argue that the ALJ failed to explain why he did not believe the clerk's claim that his identification was preceded by the issuance of the citation. The Appeals Board has made it clear in earlier decisions (see, e.g., *Circle K Stores, Inc.* (2003) AB-7977, and *7-Eleven Corporation, Inc./Huh* (2001) AB-7680) that it does not consider the *Holohan* case as meaningful, or binding, precedent. The *Holohan* case was explaining what was required to support a finding that rejected the claim of a Social Security disability claimant, involving completely unrelated factual and legal issues.

We are not inclined to reweigh the evidence, as appellants would have us do. The resolution of conflicts and issues of credibility is the province of the Department, not this Appeals Board.

II

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 (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").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.

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 administrative law judge (ALJ) had

⁴The 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 has petitioned the California Supreme Court for review. The court has yet to act on the petition.

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.⁵

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

⁵ 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.