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

AB-8350
File: 21-112932 Reg: 03055052

CHAN Y. BANG and INSOOK BANG dba Amity Market
3350 Taraval Street, San Francisco, CA 94116,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: January 5, 2006
San Francisco, CA

ISSUED MAY 9, 2006

Chan Y. Bang and Insook Bang, doing business as Amity Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk, Chan Soon Bang, having sold or furnished a 40-ounce bottle of Budweiser beer, a 12-pack of Miller Light beer, and two 12-packs of Budweiser beer to Lisa De Voto, an 18-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Chan Y. Bang and Insook Bang, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Claire C. Weglarz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated October 14, 2004, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 26, 1981. The Department instituted an accusation against appellants on June 10, 2003, charging the sale or furnishing of alcoholic beverages to a minor on February 7, 2003.

An administrative hearing was held on August 2, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) appellants were denied due process of law by reason of the Department's ex parte communication; and (2) the decision does not contain adequate findings.

DISCUSSION

I

Appellants assert the Department violated their right to procedural due process when the attorney representing the Department at the hearing before the administrative law judge (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").[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.)

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[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.)

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 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.

II

Citing *Topanga Assn for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836], appellants contend that the Department's decision violates the mandate of the Supreme Court that an administrative agency "set forth findings to bridge the analytical gap between the raw evidence and the ultimate decision or order." They assert that "nowhere in this decision does the ALJ state how, on what bases, or on what grounds, he proceed [sic] on to find that the facts outlined under the 'Findings of Fact' section evidence a violation of Business and Professions Code section 25658(a)." They ask, rhetorically, "Did the ALJ find that Appellants sold alcohol to a person under 21 years of age? Did the ALJ find that Appellants furnished alcohol to a person under the age of 21 years? Did the ALJ find that Appellants gave alcohol to a person under the age of 21 years?" In effect, appellants contend, they - and the Appeals Board - cannot tell under which basis of section 25658, subdivision (a), the ALJ found liability.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by

substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[3]

Where there are 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, 826-827 [40 Cal.Rptr. 666].)

The evidence in this case established that both Lisa De Voto and Gillian Silver selected one 40-ounce bottle and three 12-packs of beer from the cooler and placed them on the counter. This much is not in dispute.

The Department argues that the ALJ made findings that, fairly read, make it clear that he premised appellants' liability on their clerk having furnished or caused to be furnished alcoholic beverages to De Voto.

The ALJ found that De Voto handed Gillian Silver a $20 bill while the two were

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[3]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

standing side by side directly in front of the clerk, who appeared to be looking at them (Finding of Fact II), and that the clerk "either saw or should have seen the exchange of money between the two." (Determination of Issues II.1.) The ALJ also found it "both logical and reasonable that Silver paid for the beverages with the twenty-dollar bill given her by De Voto at the time." (Determination of Issues II.2.)

Misdemeanor liability arises under section 25658, subdivision (a), for "every person who sells, furnishes, gives, or causes to be sold, furnished or given away, any alcoholic beverage to any person under the age of 21 years." The means of delivery are stated in the alternative, the intent all embracing. It is the plain import of the statute that it violates the law to cause an alcoholic beverage to come into the possession of a minor, whether by gift, sale, or simple favor. In this case the ALJ concluded, from the evidence (the raw facts, to use *Topanga's* and appellants' terminology) that appellants' clerk had done exactly that. It seems to us of relatively little importance, in the context of this case, which of the alternative statutory bases was the one the ALJ relied upon - it could have been either selling or furnishing. The clerk is charged with the knowledge that the minor was the source of the purchase money. That is enough.

At the administrative hearing, appellants' counsel argued that the Department had not made a case of selling or furnishing because it had not established that the clerk saw the transfer of the $20 from De Voto to Silver. The ALJ made a factual finding to the contrary. Further, the inference he drew, that the $20 was to go toward the purchase of the alcoholic beverages, was entirely reasonable, given the time, place, and manner of its transfer from De Voto to Silver.

We are instructed by the legislature that the Alcoholic Beverage Control Act involves "in the highest degree the economic, social, and moral well-being and safety of the State and of all its people," and that all provisions of the Act "shall be liberally construed." (Bus. & Prof. Code §23001.) With this in mind, we do not think appellants are entitled to relief even if it can be said that the decision of the Department does not specify whether the violation was a sale or furnishing.

ORDER

The decision of the Department is affirmed.[4]

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

[4] 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.