

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

AB-8357

File: 20-215181 Reg: 04057175

7-ELEVEN, INC., SANDRA J. WOODS, and BOBBY F. WOODS
dba 7-Eleven Store #2121-13643
6615 Linda Vista Road, San Diego, CA 92111,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 1, 2005
Los Angeles, CA

ISSUED: NOVEMBER 9, 2005

7-Eleven, Inc., Sandra J. Woods, and Bobby F. Woods, doing business as 7-Eleven Store #2121-13643 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days, 10 of which were conditionally stayed, subject to one year of discipline-free operation, for their clerk, Ryan Dunnum, having furnished an alcoholic beverage to Michael Moriarty, a 17-year-old minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Sandra J. Woods, and Bobby F. Woods, 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, John W. Lewis.

¹The decision of the Department, dated October 28, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988.

Thereafter, the Department instituted an accusation against appellants charging in two counts, the sale or furnishing of alcoholic beverages to Brandon Houston (count 1) and Michael Moriarty (count 2), both 17-year-old minors.

An administrative hearing was held on September 9, 2004, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Larry Darwent, a San Diego police detective, and Moriarty concerning the alleged sale or furnishing of an alcoholic beverage to Moriarty. Houston was not present at the hearing and count 1 of the accusation was dismissed pursuant to Business and Professions Code section 25666.

Subsequent to the hearing, the Department issued its decision which determined that the charge of count 2 of the accusation, the furnishing of an alcoholic beverage to Moriarty, had been established, and ordered the partially stayed suspension from which this timely appeal has been taken.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) appellants were denied due process; and (2) the record does not establish a furnishing or sale violation.

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. The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants alleged due process violations similar to those 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.)

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.

II

Appellants assert that the findings with respect to count 2 do not support a furnishing or sale violation. They argue that Houston purchased the alcoholic beverages, and that Moriarty merely helped carry a 12-pack of beer to the counter and then out of the store, while Houston carried the remainder of the purchases in a paper bag. They describe Moriarty as a “mere companion” of Houston, and argue that if anyone later furnished alcohol to Moriarty, it was Houston.

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals. 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

"Substantial evidence" is relevant evidence which reasonable minds would

³The 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].

accept as a reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as in the instant matter, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].) Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (*Brookhouser v. State of California* (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

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 ALJ was confronted with a factual situation in which two 17-year-old minors entered the premises together, each carried alcoholic beverages they had selected from the cooler, and took them to the counter. Among the items was the 12-pack of Miller beer which Moriarty had removed from the cooler. The clerk, a high school

classmate and friend of the two, rang up the items as a single transaction, and was paid by Houston. Houston, carrying a paper bag containing several bottles of alcoholic beverages, left the counter. Shortly thereafter, Moriarty picked up the 12-pack of beer from the counter and carried it outside. These events were recorded by a surveillance camera, and the videotape recording was placed in evidence and reviewed by the ALJ prior to the preparation of his proposed decision.

Detective Darwent testified without objection that he was told by the clerk that “he sold the alcohol to his *friends* for the prom,” and that “*they* had chipped in for the alcohol.”

It was reasonable for the ALJ to have viewed these facts as reflecting a transaction in which Moriarty and Houston acted as partners, at least in the eyes of the clerk. They entered the store together, selected alcoholic beverages, took them to the counter, and left the store carrying the alcoholic beverages each had selected from the cooler. The clerk’s statements to Detective Darwent show that he, the clerk, knew the alcoholic beverages were for both Houston and Moriarty, and, possibly, other of their classmates.

In *Circle K Stores, Inc.* (2004) AB-8209, which involved the purchase of beer by one person who was 21 years old, accompanied and helped by several other people who were not yet 21, the Board said:

The clerk is the person in control of the sale. He or she must be alert to the substance of the transaction, and cannot ignore circumstances that ought to raise questions in the mind of a reasonably prudent person. When the transaction is in the nature of a group purchase, as the one in this case appeared to be, a clerk must establish that each of those who are involved in the transaction are 21 or over. It is not enough that the person who assembles the various selections and pays for them is 21. A clerk may not close his or her eyes to the reality of what is taking place. The critical fact in this case is not the mere presence of minors, it is their

participation in the transaction, all of which took place in front of the clerk.

Business and Professions Code section 23001 declares that “the subject matter of this division involves in the highest degree the economic, social, and moral well-being and safety of the state and of all its people,” and mandates that “all provisions of this division shall be liberally construed for the accomplishment of these purposes.” It would be an unduly restrictive reading of the word “furnish” to accept appellant’s contention that there was no furnishing in this case.

The facts of the present case are even stronger, such that any reasonable person would conclude that there was a furnishing in violation of the statute.

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.