

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

**AB-8368**

File: 20-396270 Reg: 04057755

7-ELEVEN, INC., and NAJIB G. AZZAM dba 7-Eleven #2111-18977  
578 East Mission Road, San Marcos, CA 92069,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 3, 2005  
Los Angeles, CA

**ISSUED: JANUARY 30, 2006**

7-Eleven, Inc., and Najib G. Azzam, doing business as 7-Eleven #2111-18977 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 15 days for their clerk, Amin Gele, having sold a six-pack of Coors beer to Adrienne Floyd, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Najib G. Azzam, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

**FACTS AND PROCEDURAL HISTORY**

Appellants' off-sale beer and wine license was issued on March 7, 2003.

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<sup>1</sup>The decision of the Department, dated December 16, 2004, is set forth in the appendix.

Thereafter, on July 29, 2004, the Department instituted an accusation against appellants charging the unlawful sale of an alcoholic beverage to a minor. An administrative hearing was held on October 28, 2004, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Adrienne Floyd (“the decoy”), and Robert K. Jennings, a San Diego County deputy sheriff who witnessed the transaction. Najib Azzam, co-licensee and co-appellant, testified about the training in alcohol sales the clerk had received, and about a secret shopper program appellants employ to encourage vigilance on the part of their employees.

The testimony established that the decoy entered the store, selected a six-pack of Coors beer, and took it to the counter. There were two clerks at the counter. One of the clerks asked her for identification. She handed him her California driver’s license. The clerk examined the license, returned it to her, then went forward with the transaction. He did not ask the decoy her age. When the decoy left the store, Jennings directed the second clerk to take over the register, and told the clerk who had sold the decoy the beer that he had just sold alcohol to a minor. The decoy was then brought back into the store and identified the clerk as the seller while standing approximately 10 feet from him. The clerk was facing her when she made the identification.

Subsequent to the hearing, the Department issued its decision which determined that the law had been violated and imposed the suspension from which this timely appeal has been taken.

Appellants raise the following issues: (1) there was no compliance with Rule 141(b)(5); and (2) appellants were denied due process as a result of an ex parte

communication to the Department's decision maker.

## DISCUSSION

### I

It is appellants' position in this case that a face to face identification conducted between a decoy and a seller standing ten feet apart and facing each other does not satisfy the requirement of Rule 141(b)(5).

There are a number of reasons why appellants' argument is unpersuasive.

First, there is nothing in the rule that species the parties to the identification must be within a specific distance of each other. This Board has said only that the decoy and the seller must be within some reasonable proximity of each other. (*Chun* (1999) AB-7287.)

Second, the context must be taken into account. The seller has just been told that he has sold to a minor and may face arrest and the issuance of a citation. There is no assurance he will take this news calmly, and it would seem an exercise of poor judgment to place the decoy so close to the accused seller that, in a moment of anger or emotion, the decoy could be physically assaulted or otherwise placed in jeopardy. The mere presence of police officers is no bar to the possibility of such an irrational or excessively emotional response.

Third, it must be acknowledged that a distance of ten to 15 feet is relatively short. A clerk whose eyesight does not prevent him or her from the normal duties of a clerk should have no difficulty seeing the decoy identifying him or her as the seller from such a distance, absent some compelling circumstance to the contrary. There was none in this case.

## II

Appellants assert the Department violated their right to procedural due process when the attorney 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").<sup>2</sup>

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.

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<sup>2</sup> 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.)

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 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.<sup>3</sup>

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

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<sup>3</sup> 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.