

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

AB-8370

File: 21-112932 Reg: 04057642

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: October 6, 2005
San Francisco, CA

ISSUED: DECEMBER 12, 2005

Chan Y. Bang and Insook Bang, doing business as Amity Market (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which revoked their license 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 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.

¹The decision of the Department, dated December 23, 2004, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on October 21, 1981. Thereafter, the Department instituted an accusation against appellants charging that, on April 13, 2004, appellants' clerk, Chan Soon Bang (the clerk), sold an alcoholic beverage to 18-year-old Mick Wasco. Although not noted in the accusation, Wasco was working as a minor decoy for the San Francisco Police Department at the time.

At the administrative hearing held on October 27, 2004, documentary evidence was received and testimony concerning the sale was presented by Wasco (the decoy), by San Francisco police officer Rose Meyer, and by the clerk. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense was established.

Appellants filed an appeal making the following contentions: 1) Rule 141(b)(2)² was violated and 2) the Department violated appellants' due process rights.

DISCUSSION

I

Rule 141(b)(2) requires that a decoy "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." Appellants contend the administrative law judge (ALJ) erroneously added a requirement that the clerk had to have relied on what appellants call "the decoy's mature features" when he made the sale in order for appellants to qualify for the rule 141(b)(2) defense. They also argue that the ALJ erroneously relied on the decoy's

²References 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.

"altered appearance" at the hearing to determine that he complied with the rule at the time of the illegal sale.

The ALJ described the decoy's appearance and appellants' argument at the hearing in Findings of Fact V and VII:

V. At the time of this decoy operation, Wasco was 5'1" tall and weighed 180 pounds. He was wearing Jeans, a blue zip-up jacket and skateboard shoes. He had no jewelry other than a wristwatch. He had spiked his dark hair with gel so that it stood up. He had shaved the previous afternoon. At the hearing, he weighed five pounds more, but his height was the same as on April 13. His hair was the same as on April 13. He had shaved earlier in the morning on the day of this hearing. [Fn. omitted.]

[¶] . . . [¶]

VII. In raising this defense, respondents rely upon the following factors:

1. Wasco's history and experience as a decoy. The evidence shows that Wasco, other than the instant occasion, had served as a decoy once every two weeks for a number of months before April 13. He continues to do so occasionally. On April 13, he felt comfortable and not nervous while in the premises.

2. Wasco had not shaved for about 20 hours before the operation on April 13 and must have had some shadow on his face. Respondents argue that it is unusual for a person Wasco's age to shave daily and that it is natural to suspect that he must have had facial hair on the date and time of the transaction.

3. Wasco had applied a gel to his hair that caused it to stand up spike-like and thereby show more of his scalp than one would expect of a person under the age of 21 years. It is true that, at the hearing, more of his scalp showed than would have had he not applied the gel.

4. Wasco, urge respondents, has an interesting facial feature for someone under the age of 21 years. His brow wrinkles when he does not smile. When his expression is serious, his forehead is furrowed. Wasco showed this appearance during his testimony. He also testified that during the transaction he did not smile and that his demeanor was sober as at the hearing.

Respondents argue that, based upon the combination of the above factors, it was only natural for the seller to state he did not think Wasco was a minor when told by Meyer he had sold beer to a person under 21 years of age.

In Determination of Issues II³ through IV, the ALJ addressed the contentions made by appellants about the decoy's appearance:

II. In the case at bar, the decoy appeared at the hearing dressed similarly as on the purchase date. The major difference in his appearance was the fact that he had shaved prior to arriving at the hearing but had not done so for some 20 hours prior to the transaction. Respondents argue that he must have had facial hair when he bought the beer. However, the clerk did not establish the extent of his facial hair at that time in any way. He simply informed the police officer that he could not recall selling the beer to the person who identified him as the seller. In his testimony, the clerk made no mention at all of the appearance of the decoy. His only defense was to deny with certainty that he sold anything to the decoy. He made no mention of the decoy's hair or scalp, his presence or demeanor, or his poise or level of maturity. He simply denied ever selling him anything.

[IIA.] While it is true that the characteristics of maturity argued by respondents at the hearing could certainly have an effect upon the seller of alcoholic beverages, there is no evidence to indicate that the clerk relied upon what respondents urge was the mature appearance of the decoy when the transaction occurred. Respondents have, in effect, raised an affirmative defense based solely upon speculation.

III. Having observed the physical appearance of the decoy, as well as his poise, presence, demeanor and level of maturity, at the hearing and having heard the testimony of the clerk who sold the alcohol to the decoy, the decoy clearly displayed the appearance of a person under the age of 21 years at the hearing. In fact, he had the appearance of his true age. There is no reason to conclude, nor does the evidence show, that he did not appear the same to the clerk when the transaction occurred.

IV. Respondents did not establish a defense under Rule 141(b)(2).

Appellants state that "the ALJ made explicit Findings that Rule 141(b)(2) was not complied with." However, they have not pointed out which finding that might be, and we have not discovered one that could reasonably be understood as saying that the rule was not complied with.

³There are two paragraphs numbered with the Roman numeral II. For ease of reference, we will refer to the second such paragraph as "IIA."

Appellants focus on the statement in Determination of Issues IIA, above, that "characteristics of maturity argued by respondents at the hearing⁴ could certainly have an effect upon the seller of alcoholic beverages." They contend that the ALJ "disregards this" because they did not establish that the clerk relied on the decoy's appearance. The rule 141 defense, appellants argue, depends on the Department's failure to strictly comply with the rule and is completely independent of any reliance on the part of the seller. The ALJ, they assert, placed an improper burden on appellants and, therefore, did not properly apply rule 141(b)(2).

We disagree. The ALJ did not condition a rule 141(b)(2) defense on a showing that the clerk sold beer to the decoy in reliance on the decoy's appearance. The clerk said nothing in his testimony indicating the decoy looked older at the time of the sale; indeed, he said nothing at all about the decoy's appearance. Determination II simply reviews the evidence, or lack of it, in the clerk's testimony about the decoy's appearance.

Determination IIA acknowledges that the "characteristics of maturity" appellants insisted the decoy possessed "could" influence a seller, but finds no evidence of such influence on the clerk in this case. The ALJ does *not* say that the decoy had the characteristics of maturity asserted by appellants or that a clerk's judgment of age would invariably be affected by such characteristics if they existed. The final sentence of the Determination does not set up a requirement, but assesses the basis of appellants' assertion of the defense.

The only evidence of the decoy's appearance at the time of the sale was a rather fuzzy photograph of the decoy taken before the decoy operation began, which the ALJ

⁴Appellants omit the words "argued by respondents at the hearing" when making this argument in their appeal brief.

stated "was not helpful." With no other evidence, the ALJ properly relied on the evidence he had: the decoy's appearance and testimony at the hearing.

Appellants have not mentioned Determination of Issues III, but that is the determinative paragraph on the issue of rule 141(b)(2). In that paragraph, the ALJ explicitly states that, at the hearing, the decoy had the appearance of a person under the age of 21, and no evidence showed that he appeared differently when the clerk sold beer to him.

Appellants also argue, however, that the ALJ improperly relied on the decoy's appearance at the hearing, because the decoy had recently shaved when he appeared at the hearing, but on the night of the illegal sale, he had not shaved for about 20 hours. This "major difference in [the decoy's] appearance," appellants assert, means that the ALJ could not have accurately evaluated the decoy's appearance as it was during the decoy operation. Therefore, appellants conclude, the ALJ's findings are not entitled to the deference usually accorded them by the Board.

Appellants cite several cases where the Board did not defer to the ALJ's findings regarding the appearance of the decoy. Those cases are distinguishable from this one. In each of the cases cited, there was some extraordinary circumstance, or combination of circumstances, leading the Board to conclude the ALJ's determination that the decoy complied with rule 141(b)(2) was unreasonable. There is no extraordinary circumstance here. Appellants did not establish that there was a perceptible difference between the decoy's appearance at the hearing, a few hours after shaving, and his appearance at appellants' premises, almost a full day after shaving. Even if appellants had been able to show that there was a difference in the decoy's appearance, they could not prevail on this issue unless the difference was so significant that it would be

unreasonable for the ALJ to make the determination he did. We find nothing in the record indicating that the ALJ's determination regarding the decoy's appearance was unreasonable.

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 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 this issue at some length, and reversed the Department's decisions, in three appeals in which the appellants alleged due process violations virtually identical to the issue 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

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.

⁵The 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 to them in this administrative proceeding. Under these circumstances, and with the potential for 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.

ORDER

The decision of the Department is affirmed.⁶

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

⁶This 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.