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

AB-8373
File: 20-386358 Reg: 04057291

BP WEST COAST PRODUCTS LLC, dba Arco # 9598
633 Birmingham, Encinitas, CA 92007,
Appellant/Licensee

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

BP West Coast Products LLC, doing business as Arco # 9598 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's 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 appellant BP West Coast Products LLC, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Claire C. Weglarz, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 7, 2002. On May 14, 2004, the Department filed an accusation against appellant charging that, on November 22, 2003, its clerk, Yvonne Wilhelm (the clerk), sold an alcoholic beverage to 16-year-old Tyler Gordon. Although not noted in the accusation, Gordon was working as a minor decoy for the San Diego County Sheriff's Department at the time.

At the administrative hearing held on September 30, 2004, documentary evidence was received, and testimony concerning the sale was presented by Gordon (the decoy) and by Kenneth Jones, a San Diego County Sheriff's deputy. Their testimony established that the decoy took a six-pack of Coors Light beer from the cooler and took it to the counter. The clerk asked to see identification, and the decoy gave her his California driver's license with his correct date of birth and a red stripe bearing the words "AGE 21 IN 2008." The clerk looked at the driver's license, asked the decoy his zip code, and sold him the beer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense was established.

Appellant has filed an appeal making the following contentions: (1) Appellant was deprived of due process, and (2) rule 141(a)[2] was violated.

DISCUSSION

I

Appellant contends that the Department's decision was made after the Department's decision maker received an ex parte communication from the Department's trial counsel, which violates due process.

[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.

The Appeals Board considered virtually identical allegations of due process violations, and reversed the Department's decisions, in three appeals: *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").[3]

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 a document entitled "Report of Hearing" before the Department's decision is made.

Although the legal issue here is the same as that in the *Quintanar* cases, there is a factual difference that requires a different result. In each of the three cases involved in *Quintanar*, the administrative law judge (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 this 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

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[3]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.)

communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellant has 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 appellant has 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 appellant, it appears to us that appellant received the process that was due to it 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.

II

Appellant contends that the decoy operation was not conducted "in a fashion that promotes fairness," as required by rule 141(a) because the face-to-face identification of the clerk by the decoy (required by rule 141(b)(5)) was an unduly suggestive one-person line-up, which the Court of Appeal has said is impermissible. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (*Keller*) (2003) 109 Cal.App.4th 1687, 1698 [1 Cal.Rptr.3d 339] (hereafter *Keller*).) The basis for this contention is the decoy's observation of deputy Jones inside the store, talking to the clerk, before the decoy re-entered the premises to make the identification. Appellant alleges that this, in effect, told the decoy who the deputy wanted him to identify. In addition, a second clerk was working that night. These factors, according to

appellant, created "a risk of misidentification" by the decoy.[4]

The identification of the seller is described in findings of fact II.B. and II.C.:

> B. Deputy Jones was inside the premises when the sale of the beer to the decoy took place and he witnessed the transaction. Jones had entered the premises before the decoy and Jones proceeded to the magazine rack located about ten feet from the sales counter. After the sale of the beer to the decoy, Deputy Jones approached the clerk, identified himself and advised her that she had just sold an alcoholic beverage to a minor.
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> C. The evidence established that a face to face identification of the seller of the beer did in fact take place. About one or two minutes after the sale had taken place, the decoy returned to the premises with one of the deputies. Deputy Jones then asked the decoy to identify the person who had sold him the alcohol. The decoy pointed to the clerk and stated something like, "She did." At the time of this identification, there was only one clerk on duty behind the counter and the clerk was standing behind the sales counter about two to three feet from the decoy.

The *Keller* case, *supra*, did say that an *unduly suggestive* one-person line-up is impermissible, but also noted that "single person show-ups are not inherently unfair." (*Keller*, *supra*, 109 Cal.App.4th at p. 1698.) Appellant has not shown that this identification was unduly suggestive.

Appellant apparently bases its allegation regarding a second clerk on testimony by the deputy that after the officers had closed the store to the public to conduct their investigation, they allowed another clerk, returning from a break, to come into the store

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[4]At oral argument before this Board, appellant abandoned this argument. Instead, appellant argued that decoy operations must be conducted so they *promote fairness*, which, appellant asserted, creates a higher standard of proof than simply *fairness*. A decoy operation may be conducted *fairly*, according to appellant, but still violate the rule if not conducted so that it *promotes fairness*. By this specious reasoning, appellant attempts to turn the court-approved single-person show-up into an impermissible unduly suggestive one-person line-up. Appellant did not explain the practical difference between fairness and promoting fairness, and we refuse to require law enforcement to comply with some undefinable "super-fairness" standard that simply creates more litigation-spawning opportunities.

at some point. However, there is no indication this clerk was present during the identification. In any case, contrary to appellant's assertion, the ALJ found that only one clerk was on duty behind the counter, and this finding disposes of appellant's contention.

As to the risk of misidentification, the decoy had purchased the beer from the clerk just minutes before he made the identification. It is highly improbable that he would have identified the wrong clerk. For this very reason, the courts have approved in-field one-person identifications. In *In re Carlos M.* (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447], the court found that a rape victim's identification of one of her attackers when he was brought, handcuffed, to her in the hospital immediately after she had positively identified another suspect, was not unduly suggestive. The court went on to say:

> Appellant contends, incorrectly, that single-person show-ups are impermissible absent a compelling reason. To the contrary, single-person show-ups *for purposes of in-field identifications* are encouraged, because the element of suggestiveness inherent in the procedure is offset by the reliability of an identification made while the events are fresh in the witness's mind, and because the interests of both the accused and law enforcement are best served by an immediate determination as to whether the correct person has been apprehended. [Citation.] The law permits the use of in-field identifications arising from single-person show-ups so long as the procedures used are not so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. [Citation.]

(*Id.* at p. 387.)

The Board has rejected arguments similar to appellant's in a number of appeals. (E.g., C*hevron Stations, Inc*. (2004) AB-8166; *Chevron Stations, Inc*. (2004) AB-8153; *The Vons Companies, Inc*. (2004) AB-8058.)

More than a "risk of misidentification" is required to make an identification "unduly suggestive"; the procedures used must result in "a substantial likelihood of

misidentification." (*Keller*, *supra*, at p. 387.) Appellant has speculated, but has given us no reason to think that anything the officers did created such a substantial likelihood. No allegation is made that the decoy misidentified the seller. Appellant has not shown that the identification was unduly suggestive or that the decoy operation was not conducted fairly.

ORDER

The decision of the Department is affirmed.[5]

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

[5]This 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.