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

AB-8390
File: 20-405107 Reg: 04057094

KAYO OIL COMPANY and ALI M. MAHMOODI dba Circle K 76 #2705613
375 Ignacio Boulevard, Novato, CA 94949,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

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

ISSUED MAY 9, 2006

Kayo Oil Company and Ali M. Mahmoodi, doing business as Circle K 76 #2705613 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Vijay Sharma, having sold a 750 ml. bottle of Wild Vines Strawberry Zinfandel wine to Laura Le Duc, a 16-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Kayo Oil Company and Ali M. Mahmoodi, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Robert Wieworka.

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[1]The decision of the Department, dated January 27, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 5, 2003. Thereafter, the Department instituted an accusation against them charging the sale of an alcoholic beverage to a minor on December 29, 2003.

An administrative hearing was held on December 15, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) appellants were denied due process as a result of an ex parte communication; (2) there was no compliance with the fairness requirement of Rule 141(a);[2] and (3) there was no compliance with Rule 141(b)(2).

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

[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.

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").[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 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.)

Although the legal issue in the present appeal is the same as that in the

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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.)

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

Rule 141(a) provides, in pertinent part, that law enforcement agencies may only use minor decoys "in a fashion that promotes fairness." Appellants claim the decoy operation was conducted in an unfair manner because the police officers went forward with the operation even though they were aware that the clerk was engaged in an argument with two earlier customers about correct change due them, and, as a result, sufficiently distracted as to neglect to ask the decoy for identification.

In *KV Mart Company* (2000) AB-7459, the Board said that "it was conceivable that where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate." Appellant argued that the decoy operation had been conducted during a "rush hour," but the Appeals Board found no unfairness, noting that the record showed only that one of the two clerks was away from his station while several customers were in line at the open station.

We have no testimony from the clerk. According to Novato police officer Dianne LaFrance, the clerk claimed that he was distracted, explaining that he was engaged in a discussion with two customers about the amount of change they were to receive.

The decoy testified that the two men stood aside when she placed the bottle of wine on the counter, and none of the three were speaking in a loud voice, nor did either of the customers say anything while the clerk was ringing up her sale.

As far as we can tell from the record, there is no evidence that the police officers or the decoy knew anything was amiss when she approached the counter with her

purchase. The ALJ resolved the issue against appellants, stating (Finding of Fact 7):

> The conversation between the clerk and the two men, prior to the Le Duc sale, was conducted in normal conversational tone without any shouting, yelling or apparent anger. The conversation ended when the two men stepped aside and allowed the next customer, Le Duc, to make her purchase. The evidence did not establish whether the men stepped aside voluntarily or Sharma asked them to do so. The men left no items on the sales counter.
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> After one of the police officers identified herself and advised Sharma that he had sold to a minor, he stated that he had been distracted by two men who had been arguing with him about the amount of change due them.
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> Sharma was not personally present and did not testify at the administrative hearing in this matter. His credibility could not be evaluated or tested. His presence was necessary, under the circumstances of this case, to determine if a factual basis exists for his out of court statement. The respondents offered no witnesses in support of its [sic] contention that the decoy operation was not conducted in a fashion that promotes fairness. The testimony of the two witnesses who testified in this matter, the decoy and a police officer, did not support respondents' contention. Their testimony clearly established that there was no distraction and that the decoy operation did not violate the requirement that it be conducted in a fashion that promotes fairness. The police officer was two to five feet from the clerk. She heard the conversation between the clerk and the two men and observed the sale to the minor decoy.

And, in Determination of Issues 2, he added the following:

> Respondents argue that the decoy operation must not only be fair, but that it also must "promote fairness." Without deciding upon subtle distinctions or niceties involving the concept of "fairness" versus that of "promoting fairness", or determining whether a decoy operation could be fair but not promote fairness, the only factual basis for respondents' contention in this matter is that a distracting occurrence was present during the decoy operation. The evidence does not support such contention. [Fn. omitted.]

For us to disagree with the findings and conclusions of the ALJ, we would have to conduct our own review and reweigh the evidence. It is well settled that we do not have the power to do so. 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.[4]

There is no dispute that there was a sale to a minor. The ALJ carefully considered the evidence relating to the claim of unfairness in the operation of the decoy operation and found appellants' claims lacked merit. We see no basis for questioning his decision.

III

Appellants contend that the decoy did not display the appearance required by Rule 141(b)(2), that is, that she display the appearance which could generally be expected of a person under 21 years of age. They point to her height (5' 8") as much taller than most women, and causing her to appear older than her actual age. Appellants also argue that the decoy, because of her prior experience as a decoy and as a participant in the Youth Reserve Program was not nervous during the transaction, and was wearing eyeliner and lipstick.[5]

They further contend that the ALJ's statement that the decoy's appearance at the hearing allowed him to opine how she would have appeared a year earlier should not be afforded great weight "especially when he did not adequately consider the

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[4]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].

[5] The decoy testified (RT 49), and the ALJ found (Finding of Fact 5), that she was not wearing makeup.

minor's height in his findings of fact."

Once again we must remind these appellants, and, more particularly, their counsel, that the Appeals Board will not substitute its judgment for that of the ALJ except in very unusual circumstances. (See, e.g., *7-Eleven, Inc./Waslien* (2005) AB-8360.) There are no such circumstances present here. The sale was to a young teenager who, in appellants' view, simply happened to be taller than the average female.

The decoy was *16 years old* when she purchased the bottle of wine. One year later, when she was 17, the ALJ said that she "appear[ed] to be well under the age of 21." (Finding of Fact 5.) Nothing appellants have said leads us to believe the ALJ was mistaken in his judgment of Le Duc's apparent age, either at the hearing or at the time of the transaction.

ORDER

The decision of the Department is affirmed.[6]

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

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[6] 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.