

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

AB-8396

File: 20-386497 Reg: 04057565

BP WEST COAST PRODUCTS LLC, dba Thrifty 9628
11454 Balboa Boulevard, Granada Hills, CA 91344,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

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

ISSUED: FEBRUARY 3, 2006

BP West Coast Products LLC, doing business as Thrifty 9628 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ 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 Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated February 3, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 21, 2002. On June 30, 2004, the Department filed an accusation against appellant charging that, on May 8, 2004, appellant's clerk, Zia Kahn (the clerk), sold an alcoholic beverage to 18-year-old Edward Ahn. Although not noted in the accusation, Ahn was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on December 21, 2004, documentary evidence was received and testimony concerning the sale was presented by Ahn (the decoy) and by Los Angeles police officers Roger Johnson and Tracy Callis.

The Department's decision determined that the violation charged was proved and no defense was established. Appellant then filed an appeal making the following contentions: (1) Rule 141(b)(2)² was violated, and (2) appellant's right to due process was violated by ex parte communications.

DISCUSSION

I

Appellant contends on appeal that the ALJ erred in concluding that the decoy's appearance was that which could generally be expected of a person under the age of 21, as required by rule 141(b)(2). Appellant argues that the ALJ "failed to review all evidence that establishes a Rule 141(b)(2) defense, and then concludes that the defense was not established." The evidence purportedly ignored by the ALJ was testimony about the decoy's training. This "error," appellant insists, "is an outrage and an absolute violation of Appellant's Due Process Rights." (App. Br. at p. 5.)

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.

Appellant waived this issue by not raising it at the hearing. The only issue raised there with respect to rule 141 had to do with the face-to-face identification required by rule 141(b)(5). The decoy's police training was only mentioned in passing during the decoy's testimony, and appellant did not even cross-examine him about it.

In any case, there is no merit to appellant's contention. The ALJ is not required to discuss every bit of evidence presented. In addition, the Board has routinely rejected the contention that a decoy's experience or training necessarily makes the decoy appear to be over the age of 21. (See, e.g., *7-Eleven, Inc., & Azzam* (2001) AB-7631.)

II

Appellant asserts the Department violated its 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. Appellant 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 here collectively as "*Quintanar*" or "the *Quintanar* cases").³

³The 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

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 *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

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.)

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 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.

Under the circumstances of this case and our disposition of the due process issue raised, appellant is 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. Appellant's motion is denied.

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.