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

AB-8444
File: 20-215022 Reg: 05058703

7-ELEVEN, INC., ADELAIDA HIPOLITO, and RUBEN HIPOLITO
dba 7-Eleven #2174 24207
5870 East Del Amo Boulevard, Lakewood, CA 90714,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: March 2, 2006
Los Angeles, CA

ISSUED: MAY 3, 2006

7-Eleven, Inc., Adelaida Hipolito, and Ruben Hipolito, doing business as 7-Eleven #2174-24207 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for their clerk, Armando Inaclang, having sold a six-pack of Coors Light beer to Jillian Buchanan, 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., Adelaida Hipolito, and Ruben Hipolito, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control,

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[1]The decision of the Department, dated May 10, 2005, is set forth in the appendix.

appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on December 16, 2004.

An administrative hearing was held on April 6, 2005, at which time oral and documentary evidence was received. The evidence established that the clerk did not ask the decoy her age or for identification before making the sale. The decoy left the store after her purchase, then returned and identified Inaclang as the seller.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and that appellants had failed to establish any affirmative defense.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Appellants were denied due process as a result of an ex parte communication; (2) there was no compliance with Rule 141(b)(2); and (3) there was no compliance with Rule 141(b)(5).

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 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").[2]

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

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[2] 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 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.

II

Appellants contend that the decoy lacked the appearance required by Department Rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2)), and that the ALJ abused his discretion by finding that she did display the appearance required by the rule.

Appellants point to what they describe as the decoy's fully developed, mature female figure, her height ("her tall physical stature") and weight, her "long history of law enforcement experience" (as an Explorer), and demeanor, and even her "meticulously shaped eyebrows." (App. Br., page 11).

The ALJ's description of the decoy is quite different in several important respects. He wrote (Finding of Fact V):

> The decoy was 5'7" tall and weighed 145 pounds on December 16, 2004. She wore a blue top and jeans, no jewelry, no watch and no makeup. Her hair was combed down, parted in the middle. She felt nervous while in Respondent's store. Two photographs of the decoy, and a photograph of the decoy with Inaclang, taken on December 16, show the decoy was very youthful looking.
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> On December 16, 2004, the decoy had been a Sheriff's explorer for approximately a year, and had been a decoy on at least one prior occasion. There is no evidence that the decoy's experience as an explorer and as a decoy made her appear older, or younger, than her age.
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> The decoy was 5'7" tall and weighed 145 pounds on the day of the hearing. Her appearance was very similar to her appearance in the photographs. The decoy appeared nervous when she testified, and admitted to being so.

> The Administrative Law Judge observed the decoy's mannerism, demeanor, and maturity while she testified. Based on this observation, the testimony about the decoy's appearance, and the photographs, the Administrative Law Judge finds that the decoy displayed the appearance which could generally be expected of a person under twenty-one years old when she purchased the beer from Inaclang.

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. We are not only bound by those findings, but we must assume the ALJ's observations of physical evidence support his findings. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd./ Masani* (2004) 118 Cal.App.4th 1429, 1446 [13 Cal.Rptr.3d 826].)

We see nothing to suggest that the ALJ abused his discretion in concluding that this decoy displayed an appearance which could be expected of a person under 21 years of age. Appellant's arguments to the contrary are rejected.

III

Appellants contend there is no substantial evidence in support of the ALJ's finding that there was compliance with Rule 141(b)(5). That rule requires the decoy to make a face to face identification of the alleged seller of alcoholic beverages not later than the time a citation, if any, is issued. The finding which appellants challenge (Finding of Fact IV) states:

> Sergeant Gannon of the Sheriff's Department asked the decoy to identify the person who sold the beer to her. The decoy pointed to Inaclang and also verbally identified Inaclang as the seller. At the time of the identification, the decoy and Inaclang were approximately four to five feet from each other and facing each other. The identification was in compliance with the Department's Rule 141(b)(5).

Appellants do not claim there was no face to face identification, or that the identification which took place did not comply with the rule. They concede that Sergeant Gannon conducted the face to face identification. Instead, they challenge Sergeant Gannon's testimony that he saw the citation issued after the identification. They assert that he was outside the premises, engaged in a conversation with another Sheriff's Deputy, and, as a consequence, "unable to see what the other deputy was writing on the citation." (App. Br., page 13). Appellants argue that, since there is no evidence in the record that a citation issued, the Department did not meet its burden of proof to show that the issuance of the citation did not precede the face to face identification.

A fair reading of Sergeant Gannon's testimony as a whole leaves no doubt that the citation followed the face to face identification. He testified that, although he was standing outside the door talking to another deputy, he was only six feet away from and looking at the deputy who was writing the citation - "I'm watching what's transpiring because he's under my supervision to make sure that he completed it. For officer safety reasons, we watch his back." (RT 43.) Gannon testified further that he knew that it was the citation which was handed to the clerk because "I generally recognize the entire appearance of the L.A. County Notice to Appear and I knew because I had been standing next to him just seconds, if not, a minute prior when he was completing it for that suspect." (RT 44.)

Appellants' argument is woven from whole cloth, and fails for two reasons. First, Rule 141 provides an affirmative defense. The burden of proving an affirmative defense falls on the party asserting it. Appellants do not win by default if there is no evidence one way or the other on the issue in question. The Board has repudiated the holding in *Southland Corporation/R.A.N.* (1998) AB-6967, a decision rendered in the

development of the body of law surrounding Rule 141. The absence of evidence that a citation issued is simply that. It does not support the notion that one which might have issued necessarily preceded the face to face identification.

Second, and equally, if not more persuasive, is that the record simply does not support appellants' version of the facts. Appellants' attempt to elicit testimony from Sergeant Gannon that would support their theory of what happened, or did not happen, fell flat. (See RT 42-44.) As we said earlier, a fair reading of his testimony convinces us that appellants' contentions lack any merit whatsoever.

ORDER

The decision of the Department is affirmed.[3]

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

[3] 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.