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

**AB-8449**
File: 20-379900 Reg: 04058522

7-ELEVEN, INC. dba 7 Eleven 2237 22738
111 West Walnut Avenue, Visalia, CA 93277,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 6, 2006
San Francisco, CA

**ISSUED JULY 24, 2006**

7-Eleven, Inc., doing business as 7-Eleven 2237 22738 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for its clerk, Adela Rivera Bucio, having sold a 12-pack of Budweiser beer to Matthew Flaw, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant 7-Eleven, Inc., 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, Nicholas R. Loehr.

PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 24, 2001.

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[1]The decision of the Department, dated June 9, 2005, is set forth in the appendix.

On December 22, 2004, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on November 18, 2004.

An administrative hearing was held on April 28, 2005, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged, and appellant had failed to establish any affirmative defense.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant was denied due process as a result of the Department's ex parte communication; and (2) there was no compliance with the fairness requirement of Rule 141(a).

DISCUSSION

I

Appellant asserts the Department violated its 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. 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 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 "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

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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.)

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 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 it 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, 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.

II

Appellant claims that the decoy operation violated the requirement of Rule 141(a) that a decoy operation be conducted in a manner which promotes fairness. It argues that the police took advantage of a clerk who was nervous, shaking and in fear of harm because she was aware of a fight which occurred outside the store three hours earlier, and had been interviewed by a female police officer two and one-half hours earlier. The clerk testified that she told the police officer she had not seen the fight, but reported it to her manager.

The Department argued that there was no evidence the police conducting the decoy operation were aware that there had been a fight near the premises, so had no reason to believe the clerk was distracted or frightened.

The ALJ agreed with the Department's argument, stating (Determination of Issues II):

> In the present case, there is no evidence that the law enforcement officers involved in the decoy operation tried to take advantage of Bucio's fright, or that they even knew Bucio was frightened. In fact, there is no evidence that the officers were aware that a fight occurred outside Respondent store some three hours earlier.

Appellant quotes language from *KV-Mart* (2000) AB-7459, where the Board saw it conceivable that where "an unusual level of patron activity injects itself into a decoy operation," and law enforcement officials seek to take advantage of the distraction or confusion which results, "relief might be appropriate."

We agree with the ALJ that the police officers could not be said to be acting unfairly, or conducting a decoy operation in a manner which does not promote fairness in the circumstances of this case. They were not seeking to take advantage of a clerk's nervousness, fright or distraction when they had no reason to know such might be

present.

The clerk informed the manager (who was apparently present in the store, see RT 55) of the fight, but did not ask to be relieved.

Appellant's suggestion (App. Br., pages 11-12) that the Department and the police should "take all reasonable measures" to ensue that clerks at target locations are not distracted or confused strikes us as ludicrous, and would make a mockery of Rule 141. It is enough that there is no intent or purpose to take advantage of such distraction or confusion.

The continued employment of a confused or distracted clerk creates the same risk of a sale to a non-decoy minor as a sale to a decoy. In either case, it is the responsibility of store management to deal appropriately with such situations to prevent such sales from occurring.

ORDER

The decision of the Department is affirmed.[3]

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

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[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.