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

AB-8456
File: 20-367064 Reg: 05058727

7-ELEVEN, INC., PENGKIE KAUR, and INDNESH P. SINGH
dba 7-Eleven #2171-22809
41440-A Big Bear Boulevard, Big Bear Lake, CA 92315,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

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

ISSUED: MAY 3, 2006

7-Eleven, Inc., Pengkie Kaur, and Indnesh P. Singh, doing business as 7-Eleven #2171-22809 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk having sold a 24-ounce can of Budweiser beer to Kristopher Boakes,[2] 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., Pengkie Kaur, and Indnesh P. Singh, appearing through their counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

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[1]The decision of the Department, dated June 30, 2005, is set forth in the appendix.

[2] Although the decision refers to the decoy throughout as "Voakes," he spells his name in the way we have used it in the text. (See RT 8.)

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 21, 2000. Thereafter, the Department instituted an accusation against appellants charging the sale of beer to a minor.

An administrative hearing was held on April 27, 2005, at which time oral and documentary evidence was received. The evidence at the hearing established that the clerk sold the beer to the decoy without asking him his age or for his identification. The decoy left the store, returned and identified the clerk as the seller, and a citation was issued to the clerk.

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 a defense under Department Rule 141(b)(2).

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

DISCUSSION

I

Appellants assert in their brief that their pre-hearing motion seeking discovery of all decisions certified by the Department over a four-year period "where there is therein a finding or an effective determination that the decoy at issue therein did not display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense," was improperly denied. Appellants allege that ALJ Gruen,

who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellants failed to show that the requested items were relevant or would lead to admissible evidence.

Appellants spend much of their brief arguing that the provisions of the Civil Discovery Act (Code Civ. Proc., §§ 2016-2036) apply to administrative proceedings, a contention this Board rejected in numerous cases in 1999 and 2000 (see, e.g., *The Southland Corporation/Rogers* (2000) AB-7030a), all of which were argued by the same law firm representing the present appellants. Those decisions of the Appeals Board held:

> "[T]he exclusive right to and method of discovery as to any proceeding governed by [the APA]" is provided in §11507.6. (Gov. Code, §11507.5.) The plain meaning of this is that any right to discovery that appellants may have in an administrative proceeding before the Department must fall within the list of specific items found in Government Code §11507.6, not in the Civil Discovery Act. . . . . [¶] In addition, §11507.7 requires that a motion to compel discovery pursuant to §11507.6 "shall state . . . the reason or reasons why the matter is discoverable *under that section* . . . ." [Emphasis added.] [¶] Therefore, we believe that appellants are limited in their discovery request to those items that they can show fall clearly within the provisions of §11507.6.

Appellants' arguments in the present appeal, repeating, almost verbatim, the arguments made in 1999 and 2000, are no more persuasive today than they were six or seven years ago.

Appellants argue they are entitled to the materials sought because they will help them "prepare its [sic] defense by knowing . . . what factors have been considered by the Department in deciding how a decoy's appearance violated the rule" (App. Br. at p.14) so that they can compare the appearance of the decoy who purchased alcohol at their premises with the "characteristics, features and factors which have been shown in the past to be inconsistent with the general expectations . . . of the rule." (App. Br. at p.

13.) They assert "it is more than reasonable" that decisions in which decoys were found not to comply with rule 141(b)(2) "could assist the ALJ in this case by comparison." (*Ibid*.) However, appellants do not explain how an ALJ is expected to make such a comparison.

It is conceivable that each decoy found not to display the appearance required by the rule had some particular indicium, or combination of indicia, of age that warranted his or her disqualification. We have considerable doubt, however, that any such indicia, which an ALJ would only be able to examine from a photograph or written description, would be of any assistance in assessing the appearance of a different decoy who is present at an administrative hearing.

The most important indicium at the time of the sale is probably the decoy's facial countenance, since that is the feature that confronts the clerk more than any other. Yet, it is, in every case, an ALJ's overall assessment of a decoy's appearance that matters, not simply a focus on some narrow aspect of a decoy's appearance.

We know from our own experience that appellants' attorneys represent well over half of all appellants before this Board. We would think, therefore, that the vast bulk of the information appellants seek is already in the possession of their attorneys, a fact of which the Board can take official notice. This, coupled with the questionable assistance the information sought could provide to an ALJ in assessing the appearance of a decoy present at the hearing,[3] persuades us that ALJ Gruen did not abuse his discretion in denying appellants' motion.

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[3] Unless a minor is deceased or too ill to be present, or unless the minor's presence is waived, he or she must be produced at the hearing by the Department in all cases charging violations of Business and Professions Code sections 25658, 25663, and 25665. (See Bus. & Prof. Code, §25666.)

II

Appellants assert the Department violated their right to procedural due process when the attorney 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. 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").[4]

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.

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[4] 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 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 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.

III

Appellants contend that the decoy did not display the appearance required by Rule 141(b)(2), and his use by the police violated the "fairness" requirement of Rule 141(a).[5] They assert that his purchase success rate (five purchases while visiting only seven or eight locations), coupled with his admission he has a receding hairline, demonstrates that he lacked the appearance required by the rule.

The ALJ discussed the decoy's appearance at great length (two findings of fact (FF 5 and 11), and a single legal conclusion (CL 5)) in the course of rejecting appellants' arguments:

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[5] Rule 141(b)(2) provides that a decoy "shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." Rule 141(a) provides that a law enforcement agency may only use minors as decoys "in a fashion that promotes fairness."

FF 5 Voakes appeared at the hearing. He stood about 5 feet, 10 inches tall and weighed about 150 pounds. His sandy brown hair was worn in a longish crew cut. When Voakes visited Respondent's [sic] store on December 3, 2004, he was dressed as is shown in Exhibit 3, with a hooded, gray, long-sleeved sweatshirt that had reddish flames along the sleeves and blue jeans. His height and weight were the same as at the hearing. His hair was styled the same but might have been even longer at Respondents' store. (*See* Exhibit 3.) Voakes was clean shaven at Respondents' store. At the hearing and, from what can be seen in Exhibit 3, at Respondents' store, Voakes had active acne visible on his face and/or neck. There was testimony about a "receding hair line." While a little more forehead was visible at the hearing than in Exhibit 3 and his hairline is not exactly straight across the forehead, hair loss appears quite minor and more to do with overall hair length than a loss of hair due to aging processes. At Respondent's [sic] Licensed Premises on the date of the decoy operation, Voakes looked substantially the same as he did at the hearing. At the time of the hearing, decoy Voakes was 18 years of age.

FF 11 Decoy Voakes is an adult male who appears his age, 18 years of age at the hearing. Voakes was a capable witness, but was quite soft-spoken on the witness stand. He did not claim nervousness either at the hearing or at Respondents' store on the date in question. Based on his overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing, and his appearance/conduct in front of clerk Portmann at the Licensed Premises on December 3, 2004, Voakes displayed the appearance that could generally be expected of a person substantially less than 21 years of age under the actual circumstances presented to Portmann. Voakes appeared his true age. In spite of the 68-71 percent of premises that sold him alcoholic beverages that night, and in spite of any claimed receding hairline, Voakes could not reasonably have been confused with a person 21 years of age or over.

CL 5 Respondents argued there was a failure to comply with section 141(b)(2) of Chapter 1, title 4, California Code of Regulations [Rule 141]. Therefore, Rule 141(c) applies and the Accusation should be dismissed. Respondents argued that decoy Voakes believes he has a receding hairline and that it is therefore unfair to impose any sort of suspension on them. They argued that the decoy did not present the appearance required by Rule 141(b)(2) and the Accusation should be dismissed. First, after carefully observing the decoy's hairline, both at the hearing and in the Exhibit 3 photograph, the court finds no support for Respondents' contention that Voakes hairline recedes enough to conclude that his apparent age fails to comply with the rule. (*See* Findings of Fact, ¶ 5.) Of equal or perhaps greater concern is the question why such a high percentage of businesses sold him alcoholic beverages that night? The only conclusion that fairly can be reached is that it did not have to do with Voakes' appearance. The apparent age of decoy Voakes was addressed above in Findings of Fact, paragraphs 5 and 11. Voakes' appearance in front of clerk Portmann and at the hearing fully complied with the rule. Respondent's [sic] rationale for contending Voakes looked too old is not persuasive in this case. The Rule 141(b)(2)

defense asserted by Respondents is rejected.

Appellants rely on the Board's decision in *The Southland Corporation/Te and Young* (1999) AB-7430, a case in which the Board was critical of the use of a decoy who had a receding hairline. The Board there said that the use of a decoy with a prematurely receding hairline is "unacceptable." In retrospect, the Board's language may have been broader than it needed to be, since it may not be every case where a receding hairline is so noticeable or having the effect of making the decoy appear older than he is. We do not think the case should be read as creating a per se rule. That being said, we think the present case is distinguishable on its facts.

In *Southland/Te and Young*, *supra*, there was no dispute as to the decoy's receding hairline. Here, to the contrary, the ALJ found that the decoy's hairline on the day of the sale had no effect on his apparent age. (See FF 5.) This is a finding of fact which the ALJ made after having had the opportunity to observe the decoy both in person and in photographs. We cannot go behind it, or ourselves reweigh the evidence. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The same is true with respect to the ALJ's treatment of the purchase ratio. While "success" in five of seven attempts is, on the surface, an impressive statistic, it is not controlling, and the ALJ found it not controlling. The ALJ's finding that the decoy displayed the appearance of a person younger than 21 years of age, and appeared his true age, outweighs the speculative possibility that other sellers reasonably thought him to be older than 21. We cannot ignore the reality that some sellers are less diligent than others when it comes to policing sales to minors. That would appear to be the

situation here.

ORDER

The decision of the Department is affirmed.[6]

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

[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.