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

AB-8459
File: 20-377045 Reg: 05058864

7-ELEVEN, INC., BALWINDER KAUR DHILLON, and JASPREET S. DHILLON
dba 7 Eleven 2136 20958
6766 Tampa Avenue, Reseda, CA 91335,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED JUNE 2, 2006

7-Eleven, Inc., Balwinder Kaur Dhillon, and Jaspreet S. Dhillon, doing business as 7-Eleven 2136-20958 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 25 days for their clerk, Ravi Parmar, having sold a 24-ounce can of Budweiser beer to Vladimir Negri, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Balwinder Kaur Dhillon, and Jaspreet S. Dhillon, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Andres R. Garcia, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated July 5, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 6, 2001. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor on October 20, 2004.

An administrative hearing was held on May 24, 2005, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved and no defense under Rule 141 had been established.

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; and (2) there was no compliance with Rules 141(b)(2) and 141(a).

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 "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.

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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.)

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 assert there was no compliance with Rule 141(b)(2) because the decoy did not display the appearance required by the rule. They also contend, in the alternative, that even if the decoy did display the appearance required by Rule 141(b)(2), the police violated the "fairness " requirement of Rule 141(a) by using a decoy with a receding hair line.[3]

Appellants acknowledge the Board's general practice of deferring to the judgment of the ALJ with respect to whether there has been compliance with Rule 141(b)(2), in the absence of extraordinary circumstances, but say this case is different. They stress what they describe as the decoy's mature facial features and a receding hair line, and the testimony of the clerk that he believed the decoy to be older than 21 because of his receding hair line as reasons why the Board should substitute its judgment for that of the ALJ.

The ALJ addressed the Rule 141 issues in findings of fact 5 and 6, and Determination of Issues and Conclusions of Law 9, stating:

> FF5: At the hearing the minor appeared to be his age both physically and by demeanor, poise and maturity. At the time of the violation the minor was 5' 9" tall and weighed between 180 and 190 pounds. He was dressed casually and did not wear any facial hair or jewelry. His hair was spiked on top and on the sides.
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> FF6: There is nothing in the evidence to support the assertion that the minor had a receding hairline. The nature of his haircut permitted one to see his scalp but there was no evidence that he was balding or that by reason of the style of his haircut he projected the appearance of a person 21 years of age or older.

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[3] 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 decoy may only use minor as decoys "in a fashion that promotes fairness."

DICL 9: Under Rule 141(b)(2) (under 21 years of age) the complainant has complied with this part of the rule based on findings of fact 5 and 6. The decoy displayed the appearance which could generally be expected of a person under 21 years of age at the time of the sale.

The ALJ had the opportunity to see the decoy as he testified. He flatly rejected the contention that the decoy had a receding hairline. It is also obvious from his ruling that he did not believe the decoy's facial features were those of a person older than 21. This Board does not believe the photograph in Exhibit 2 requires it to reject the ALJ's factual finding.

Similarly, the ALJ is the judge of credibility (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]*; Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807]), and he chose not to accept the clerk's testimony that he was misled by the decoy's receding hair line. As he was entitled to do, the ALJ took into account the fact that the clerk remains an employee, and is a relative of the Dhillon family.

Appellants' contention lacks merit.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] 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.