

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

AB-8485

File: 20-324611 Reg: 05059354

CHEVRON STATIONS, INC. dba Chevron #1581
4211 Sierra College Boulevard, Rocklin, CA 95677,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

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

ISSUED OCTOBER 6, 2006

Chevron Stations, Inc., doing business as Chevron #1581 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, 5 days of which were conditionally stayed for one year, for its clerk, Jamie Lynn Clenney, having sold a six-pack of Bud Light beer to Courtney Lenihan, an 18-year-old Department of Alcoholic Beverage Control decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, 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, Dean Lueders.

¹The decision of the Department, dated October 20, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 21, 1997.

Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on February 19, 2005.

An administrative hearing was held on September 7, 2005, at which time oral and documentary evidence was received. At that hearing, Courtney Lenihan testified that she selected a six-pack of Bud Light beer from the cooler in appellant's store and took it to the counter, where she was asked for her identification. Lenihan handed her California driver's license to the clerk who examined it, looked at a piece of paper attached to the register, and went forward with the sale. Lenihan further testified that she left the store with the beer, and then returned to identify Jamie Lynn Clenney as the person who sold her the beer. Clenney did not testify.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven, and appellant had not established 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; and (2) there was no compliance with Rule 141(b)(2).

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

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.)

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 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 there was no compliance with Rule 141(b)(2), arguing that the Department used a decoy who exhibited the appearance of a young woman in her early to mid-twenties. Appellant asserts that the ALJ failed to consider that the decoy wore make-up and jewelry because the clerk requested identification from the decoy.

The clerk did not testify In this case. LeAnn Contreras, a station manager and back-up trainer for appellant, testified that when a transaction involves an age-restricted product (i.e, alcohol or tobacco), the register screen will so indicate, and the clerk must enter a birth date or strike a "continue" key and override the system.

The clerk made the sale after examining the decoy's valid California driver's license. The record does not indicate which method the clerk used to override the system.

Appellant's challenge is to Conclusion of Law 9, where the ALJ wrote, in part:

Respondent argued that the decoy had participated in numerous prior decoy visitations to other licensed premises, and in the process she became a "professional decoy".

Respondent claims that Lenihan's prior experience as a decoy made her appear older as did makeup and jewelry worn by the decoy. Left unexplained is why the clerk asked the decoy for identification.

Appellant quotes the ALJ's statement, "Left unexplained is why the clerk asked for

identification,” and argues that the ALJ relied on the clerk’s request for identification as evidence the decoy appeared not to be 21 years of age.

Appellant relies on the Board’s decision in *BP West Coast Products, LLC* (2004) AB-8131. In that case, the Board concluded that the failure of the ALJ to explain his conclusion regarding the decoy’s appearance compelled reversal in spite of the fact that the clerk had seen the decoy’s identification which showed him to be a minor.

In what can only be described as a reluctant reversal, the Board stated:

The Department argues that, once identification has been displayed showing that the decoy is under the age of 21, the issue of the decoy’s appearance is no longer relevant. We have disagreed with the Department on this question in other cases, because we read the court of appeal decision in *Acapulco Restaurants, Inc., supra*, to hold that there must be compliance with the provisions of the rule even though there is other evidence that would suggest that compliance with the rule is unnecessary. In *Acapulco Restaurants, Inc.*, there was no compliance with Rule 141(b)(5), because the decoy failed to identify the seller of the alcoholic beverage. The court reversed the Appeals Board and the Department even though a police officer had witnessed the entire transaction and was able to identify the person who made the sale. In the present case, there was no compliance with Rule 141(b)(2).

Were we writing on a clean slate, we would affirm the Department. We are not, and we do not.

This case is different. The ALJ in this case explained how he reached his conclusion that the decoy possesses the appearance required by Rule 141(b)(2)

(Finding of Fact 9):

The overall appearance of decoy Lenihan, including her demeanor, poise and physical appearance were consistent with that of a person under the age of twenty-one and her overall appearance at the time of the hearing was similar to her appearance on the evening of the decoy operation at Respondent’s licensed premises. Although Lenihan feels she was confident at the hearing and at the time of the sale, she exhibited no more poise or self-confidence during the hearing than one would expect from a person her age. Lenihan’s voice was that of a young person’s and her poise and self confidence were consistent with those of a person under age 21.

We do not think the ALJ’s speculation as to why the decoy’s identification might

have been requested is enough to outweigh his particularized assessment of the decoy's appearance as measured by the standard of Rule 141(b)(2). Had he based his finding only on the fact that identification was requested, appellant's challenge might have possessed merit. As it is, however, we see this as just another case where this Board is asked to substitute its judgment for that of the ALJ, something we are not allowed to do.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
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.