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

AB-8504
File: 21-403847 Reg: 05059118

VUY ENTERPRISE, INC., dba Depot Deli
200 West Florida Avenue, Hemet, CA 92543,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 7, 2006
Los Angeles, CA
Redeliberation: January 11, 2007; February 1, 2007

ISSUED MARCH 23, 2007

Vuy Enterprise, Inc., doing business as Depot Deli (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a person under the age of 21, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Vuy Enterprise, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Kevin Snyder, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

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[1]The decision of the Department, dated January 5, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 9, 2004. On March 15, 2005, the Department filed an accusation against appellant charging that, on January 14, 2005, appellant's clerk, Stephen Wheeler (the clerk), sold an alcoholic beverage to 19-year-old Joshua Godsey.

At the administrative hearing held on October 17, 2005, documentary evidence was received, and testimony concerning the sale was presented by Godsey (the "minor"), by Department investigator Scott Stonebrook, and by the clerk.

The minor testified that he asked the clerk for two bottles of vodka, which the clerk sold to him without asking his age or for his identification. The minor also testified that he had never been asked for identification when he had bought alcoholic beverages at appellant's premises before, and that he had never possessed false identification. When the investigator stopped the minor outside, he searched for, but did not find, false identification. On direct testimony, the clerk testified that he had seen the minor's ID previously, but on cross examination he admitted that he had never seen the minor's ID at any time, either that night or previously.

The Department's decision determined that the violation charged was proved and appellant had not established an affirmative defense. Appellant filed an appeal contending that the ALJ erred because he did not explain the reasons for his credibility determinations. Appellant also filed a motion to augment the administrative record with any Form 104 (Report of Hearing) included in the Department's file, and a supplemental letter brief regarding the recent decision of the California Supreme Court in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*).

DISCUSSION

I

Appellant contends the decision must be reversed because the ALJ did not provide "clear and convincing reasons to disbelieve" the clerk's testimony. Appellant's contention relies on language in *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195 (*Holohan*).

The Board has considered, and rejected, many times over, the authority cited by appellant, finding that the court's view expressed in *Holohan* "is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California." (*7-Eleven, Inc./ Huh* (2001) AB-7680; accord *7-Eleven & Singh* (2002) AB-7792, *Lewis Salem, Inc.* (2003) AB-8054, *Chevron Stations, Inc*. (2005) AB-8223.) There is no reason for us to decide the issue differently in the present appeal.

Appellant also appears to argue that the ALJ violated due process because he believed some parts of some testimony and disbelieved other parts. The Board rejected an argument similar to that made here by appellant and discussed the legal standard applicable to credibility determinations in *BP West Coast Products, LLC* (2005) AB-8366:

> It is inherent in the process of resolving conflicts that the trier of fact will reject some testimony but accept some other. "[A] trier of fact 'is entitled to accept or reject all or any part of the testimony of any witness or to believe and accept a portion of the testimony of a particular witness and disbelieve the remainder of his testimony.'" *(Friddle v. Epstein* (1993) 16 Cal.App.4th 1649, 1659 [21 Cal.Rptr.2d 85], quoting *Mosesian v. Bagdasarian* (1968) 260 Cal.App.2d 361, 368 [67 Cal.Rptr. 369] [citations omitted].)
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> > The trier of fact may believe and accept a part of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its effect. On appeal that part which supports the judgment must be accepted, not that part which would defeat, or tend to defeat, the judgment. Unless

> it clearly appears that upon no hypothesis whatever is there substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal. (*Chan v. Title Ins. & Trust Co.*, 39 Cal.2d 253, 258 [246 P.2d 632]; *Industrial Indem. Co. v. Industrial Acc. Com.*, 115 Cal.App.2d 684, 692 [252 P.2d 649]; *Postier v. Landau*, 121 Cal.App.2d 98, 101 [262 P.2d 565].)

(*Murphy v. Ablow* (1954) 123 Cal.App.2d 853, 858-859 [268 P.2d 80].)

Appellant's due process arguments are rejected.

II

On November 13, 2006, the California Supreme Court held that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. (*Quintanar*, *supra*, 40 Cal.4th 1.) In *Quintanar*, the Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access to the report of hearing, establishing, the court held, "that the reports of hearing were provided to the agency's decision maker." *(Id.* at pp. 15-16.)

In the present case, appellant contends a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar* has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.[2]

ORDER

The decision of the Department is affirmed as to all issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[3]

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

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[2]The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

[3]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.