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

AB-8696
File: 21-429750 Reg: 06062704

CHAFFEY LIQUOR, LLC dba Chaffey Liquor
10451 Lemon Avenue, Suite A, Rancho Cucamonga, CA 91737,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 7, 2008
Los Angeles, CA

ISSUED MAY 30, 2008

Chaffey Liquor, LLC, doing business as Chaffey Liquor (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Ronnie Yazgi, having sold a 24-ounce can of Budweiser beer to Jennifer Gasway, a 19-year-old law enforcement minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chaffey Liquor, LLC, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Shannon Y. Humphrey, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on October 21, 2005. Thereafter,

[1]The decision of the Department, dated April 5, 2007, is set forth in the appendix.

the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on February 27, 2006.

An administrative hearing was held on January 23, 2007, at which time oral and documentary evidence was received. At that hearing, the evidence established that the Budweiser beer was sold to the decoy after the clerk asked for, and was shown, the decoy's California Driver's license, which contained her true date of birth and a red stripe containing the words "AGE 21 IN 2008." The clerk was engaged in a telephone conversation throughout the sale transaction. He did not testify at the administrative hearing.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved, and no affirmative defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department communicated ex parte with its decision maker in violation of the APA; (2) appellant was denied proper discovery; and (3) the decoy did not display the appearance required by Rule 141(b)(2).

DISCUSSION

I

Appellant contends the Department violated the APA by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision. It relies on the California Supreme Court's holding in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*) and appellate court decisions

following *Quintanar*, *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6] (*Chevron*) and *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274 [60 Cal.Rptr.3d 295] (*Rondon*). It asserts that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred.

The Department makes no argument on appeal, but states that none of the documents requested in the motion to augment exist. Attached to this statement is a declaration signed by Department staff attorney David W. Sakamoto, who represented the Department at the administrative hearing. In this declaration, Sakamoto states that at no time did he prepare a report of hearing or other document, or speak to any person, regarding this case. The Department argues that the Board should accept the declaration as conclusive evidence that the documents requested do not exist.

We agree with appellant that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar*, *supra*.

The Department apparently believes that it need only include a declaration denying the existence of an ex parte communication for the Appeals Board to rule in its favor. The appellant argues that the declaration is inadequate. We agree with appellant.

Three courts have now issued published decisions in which the Department's practice of ex parte communication with its decision maker or the decision maker's advisors is determined to be endemic in that agency. (*Quintanar*, *supra*, 40 Cal.4th 1, 5

[ex parte provision of report of hearing was "standard Department procedure"]; *Rondon*, *supra*, 151 Cal.App.4th 1274, 1287 ["widespread agency practice of allowing access to reports"]; *Chevron*, *supra*, 149 Cal.App.4th 116, 131 [ex parte communication not unique to *Quintanar* case, "but rather a 'standard Department procedure'"].) The Department has presented no evidence in this case, or any of the numerous other cases this Board has seen on this issue, that the "standard Department procedure" has changed. The Department has not provided, for example, a written policy, with a date certain, from which we could conclude that the Department has instituted an effective policy screening prosecutors from the decision makers and their advisors. The Department bears the burden of proving that it has adequate screening procedures (*Rondon*, *supra*), and without evidence of an agency-wide change of policy and practice, we would be exceedingly reluctant to affirm or reverse on the basis of a single declaration, especially where there has been no opportunity for cross-examination.[2]

For the foregoing reasons, we will do in this case as we have done in so many other cases, that is, remand this matter to the Department for an evidentiary hearing.

II

Appellant asserts in its brief that the ALJ improperly denied its pre-hearing motion to compel discovery. Its motion was brought in response to the Department's failure to comply with those parts of its discovery request that sought copies of any

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[2]"The general rule in civil actions is that absent statutory authorization, stipulation of the parties, or a waiver by failure to object, an affidavit (Code Civ. Proc., § 2003) or a declaration under penalty of perjury (Code Civ. Proc., § 2015.5) is not competent evidence; it is hearsay because it is prepared without the opportunity to cross-examine the affiant. (Evid. Code, §§ 300, 1200; see Code Civ. Proc., § 2009; Witkin, Cal. Evidence (2d ed. 1966) § 628, p. 588.)"
(Windigo Mills v. Unemployment Ins. Appeals Bd.(1979) 92 Cal.App.3d 586, 597 [155 Cal.Rptr. 63].)

findings or decisions which determined that the present decoy's appearance was not that which could be generally expected of a person under the age of 21 and all decisions certified by the Department over a four-year period which determined that any decoy failed to comply with rule 141(b)(2). For all of the decisions specified, appellant also requested all photographs of the decoys in those decisions.

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 appellant failed to show that the requested items were relevant or would lead to admissible evidence. Appellant argues that the items requested are expressly included as discoverable matters in the APA and the ALJ used erroneous standards in denying the motion.

This Board has discussed, and rejected, this argument numerous times before. Just as appellant's arguments are the same ones made before, our response is the same as before. We see no reason to once again go over our reasons for rejecting these arguments. Should appellant wish to review those reasons, it may find them fully set out in *7-Eleven, Inc./Virk* (2007) AB-8577, as well as many other Appeals Board opinions.

III

Appellant contends that the decoy, by virtue of her four years' experience as a police Explorer, possessed a level of maturity and demeanor that prevented her from displaying the appearance required by Rule 141(b)(2), i.e., that "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." Appellant further contends that the finding that there was compliance with the rule rests

on an incomplete and inappropriate test.

Is there anything about the ALJ's determination that there was compliance with the rule that warrants a reversal of this aspect of the decision? We do not think so. Appellant's arguments ignore the administrative law judge's careful and thorough consideration of the evidence, which, of course, includes his own opportunity to view the decoy while she testified.

ALJ McCarthy's findings (Findings of Fact 5, 10, and 11) do not in the least indicate that he applied an inappropriate or incomplete test:

> FF 5: Gasway appeared at the hearing. She stood about 5 feet, 6 inches tall and weighed approximately 135 pounds. On February 27, 2006, at Respondent's store, Gasway was about [the] same height and within a few pounds of the same weight. At the store and at the hearing Gasway was dressed as is shown in Exhibit 6, wearing blue jeans and a long-sleeved brown sweater with a V-neck. As seen in Exhibits 5 and 6, the decoy's brown hair was pulled tightly away from her face. It was worn in a pony-tail. She wore her hair in about the same style at the hearing, except the pony-tail was a little longer. She wore no makeup at Respondent's store and had an especially bright countenance with red rosy cheeks. Decoy Gasway appeared substantially the same at the hearing as she did in front of Respondent's clerk at the Licensed Premises on February 27, 2006.
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> FF10: The investigation of February 27, 2006, was the first decoy operation for Jennifer Gasway. At that time, she had been an Explorer with the San Bernardino Sheriff's Department for about 4 1/2 years. As an Explorer, Gasway has done station work, ride-a-longs and performed in competitions. She mainly observes, but has had some public interaction. She wears a uniform, a white shirt that identifies her as an Explorer and tan pants. In the competitions, she competes against other Explorer posts in various aspects of police work. There may be 2 or 3 competitions a year. The impact these activities had on her overall appearance was not established.
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> FF11. Decoy Gasway is a female adult who appears her true age, recently turned 20 years of age at the hearing. Based on her overall appearance, *i.e.*, her physical appearance, dress, poise, demeanor, maturity and mannerisms shown at the hearing, and her appearance/conduct in front of Respondent's clerk at the Licensed Premises on February 27, 2006, Gasway displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to the clerk. Gasway appeared her true age.

We see appellant's argument as an attempt to persuade this Board to substitute its judgment about the appearance of a decoy it has seen only in a photograph for that of an ALJ who saw and heard her testify.

We extend our usual deference to the ALJ, and reject appellant's arguments.

ORDER

The decision of the Department is affirmed as to issues other than that involving the alleged ex parte communication, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing discussion.[3]

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

[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.