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

AB-8716
File: 20-423593 Reg: 06063832

7-ELEVEN, INC., and JASMIN ENTERPRISES, INC., dba 7-Eleven #17450
7733 Palm Avenue, Lemon Grove, CA 91945,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: September 4, 2008
Los Angeles, CA

ISSUED: DECEMBER 3, 2008

7-Eleven, Inc., and Jasmin Enterprises, Inc., doing business as 7-Eleven #17450 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their clerk selling an alcoholic beverage to a Sheriff's Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Jasmin Enterprises, Inc., appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

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[1]The decision of the Department, dated July 26, 2007, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 2, 2005. On September 14, 2006, the Department instituted an accusation against appellants charging that, on May 18, 2006, appellants' clerk, Sampson (the clerk), sold a six-pack of Coors Light beer, an alcoholic beverage, to 17-year-old Breanna Julien. Although not noted in the accusation, Julien was working as a minor decoy for the San Diego County Sheriff's Department at the time.

An administrative hearing was held on September 14, 2006, at which time documentary evidence was received, and testimony concerning the sale was presented by Julien (the decoy) and by Todd Murphy, a Sheriff's Department deputy.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal making the following contentions: (1) The Department engaged in ex parte communications; (2) the Department lacked effective screening measures to prevent ex parte communications; (3) the Board should withhold its decision pending the decision in the *Morongo* case; (4) the record should be augmented. Issues 1 and 2 are interrelated, and will be discussed together.

DISCUSSION

I and II

Appellant contends the Department violated the APA and due process by engaging in ex parte communication with the Department's decision maker, and by its failure to maintain effective screening procedures within the legal staff to prohibit its prosecutors from engaging in ex parte communications with the decision maker or the

advisors to the decision maker. The Department denies that an ex parte communication was made. A declaration by the staff attorney who represented the Department at the administrative hearing asserts that at no time did the attorney prepare a report of hearing or other document, or speak to any person, regarding this case.

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. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 5 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*) [ex parte provision of report of hearing was "standard Department procedure"]; *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274, 1287 [60 Cal.Rptr.3d 295] (*Rondon*) ["widespread agency practice of allowing access to reports"]; *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116, 131 [57 Cal.Rptr.3d 6] (*Chevron*) [ex parte communication not unique to *Quintanar* case, "but rather a 'standard Department procedure'"].)

The Department insists that it need only include a declaration denying the existence of an ex parte communication for the Appeals Board to rule in its favor. We disagree. Declarations and affidavits are generally considered not to be competent evidence.[2] Because they are hearsay statements, they cannot, by themselves, support

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[2]In *Windigo Mills v. Unemployment Ins. Appeals Bd*. (1979) 92 Cal.App.3d 586, 597 [155 Cal.Rptr. 63], the court stated:

> 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

a finding.

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.[3]

As did the California Supreme Court in *Quintanar*, *supra*, we decline to address appellant's due process argument.

> Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

(*Quintanar*, *supra*, 40 Cal.4th at p. 17, fn. 13.)

There is another reason we need not consider this issue. The situation giving rise to appellant's due process claim existed at the time of the administrative hearing

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> 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.

The Department has not pointed out any reason the declaration should be considered an exception to the general rule just stated.

[3] We are acutely aware of the Department's adoption of General Order No. 2007-09 on August 10, 2007, shortly after the hearing and decision in this case.

and should have been raised then. Since appellant did not, the Board is entitled to consider it waived. (*Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1141-1142 [67 Cal.Rptr.3d 2]*; Vikco Ins. Servs. v. Ohio Indem. Co*. (1999) 70 Cal.App.4th 55, 66-67 [82 Cal.Rptr.2d 442]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167]; 9 Witkin, Cal. Procedure (4th ed. 1997 & 2007 supp.) Appeal, §394.)

III

Appellant asks the Appeals Board to reserve judgment in this appeal until the California Supreme Court has decided *Morongo Band of Mission Indians v. State Water Resources Control Board* (review granted October 24, 2007, S155589.) Appellants state that the case "implicates the same due process issues and appearance of bias issues as in the instant appeal," and that, if the Board does not wait for the Court's decision, appellant will be compelled to pursue judicial review of any decision otherwise affirming the Department's decision.

The Appeals Board in a number of recent appeals has declined to accept this invitation, and we do not believe we should do so in this case. We see no need to delay a decision to remand this case to the Department for further proceedings, especially when this matter can be resolved under existing law.

IV

Appellant filed a motion to have the record augmented with any report of hearing

in the Department's file regarding this case and with General Order No. 2007-09 and any documents related to it.

We have said in other appeals where this motion has been made that our conclusion regarding the ex parte communication issue makes augmenting the record unnecessary; that is, if an evidentiary hearing is held, the primary focus of it will be whether or not a report of hearing was prepared and, if so, it will become part of the record.

Appellant also requests that General Order No. 2007-09 (the order) be made part of the record. A copy of a document purporting to be this order is attached to appellant's motion to augment as Exhibit 3. The order is a document issued by the Department over the signature of the director, Stephen M. Hardy, dated August 10, 2007, which is also designated as the order's effective date.

The order notes the court cases putting an end to the Department's practice of ex parte communications with the decision maker and placing the burden on the Department to show that no ex parte communication occurred in a particular case. It then sets out the procedures to be implemented by the Department to comply with the courts' directives.

Appellant wants to use this order to show that the Department's procedures before August 10, 2007, did *not* comply with the courts' directives. It's not the strongest argument, and it seems unnecessary since it is the Department that must show that it did comply. In any case, this too is more appropriately included in a record created during an evidentiary hearing.

ORDER

This matter is remanded to the Department for an evidentiary hearing on the issue of ex parte communication, in accordance with the foregoing discussion.[4]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[4]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.