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

AB-8722
File: 21-439295 Reg: 07064995

GARFIELD BEACH CVS, LLC, dba CVS Pharmacy #8893
602 North El Camino Real, San Clemente, CA 92676,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: November 6, 2008
Los Angeles, CA

ISSUED MARCH 13, 2009

Garfield Beach CVS, LLC, doing business as CVS Pharmacy #8893 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's clerk, Erlinda Scott, selling, in violation of Business and Professions Code section 25658, subdivision (a), a six-pack of Bud Light beer, an alcoholic beverage, to Jotti Dhillon, an 18-year-old minor decoy, in a decoy operation conducted by the Department of Alcoholic Beverage Control.

Appearances on appeal include appellant Garfield Beach CVS, LLC, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Cottrell.

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[1]The decision of the Department, dated August 22, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 10, 2006. On February 7, 2007, the Department filed an accusation against appellant charging that, on December 2, 2006, appellant's clerk, Erlinda Scott (the clerk), sold an alcoholic beverage to 18-year-old Jotti Dhillon. Although not noted in the accusation, Dhillon was working as a minor decoy for the Department at the time.

At the administrative hearing held on June 21, 2007, documentary evidence was received, and testimony concerning the sale was presented by Dhillon (the decoy) and by Benjamin Delarosa, a Department investigator. The evidence established that, when asked by the clerk for identification, the decoy handed the clerk her California driver's license. The license (Exhibit 2) carried a blue stripe with the words "PROVISIONAL UNTIL AGE 18 IN 2006," and a red stripe with the words "AGE 21 IN 2009." The clerk asked no questions concerning the decoy's age or the information on the driver's license, and rang up the sale. To complete the sale, the clerk entered her own date of birth into the register. The decoy left the store with the beer, and returned to the store and identified Scott as the person who sold her the beer.

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

Appellant has filed an appeal making the following contentions: (1) the Department lacked effective screening measures to prevent ex parte communications; (2) the Department engaged in ex parte communications; (3) the incomplete record raises the specter of ex parte communications. Contentions 1 and 2 are related and will be discussed together. Appellant has also filed a motion to augment the record.

DISCUSSION

I and II

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 denies that any ex parte communication occurred. Accompanying its brief is a declaration signed by Department staff attorney Jennifer Cottrell, who represented the Department at the administrative hearing. In her declaration, Cottrell states that at no time did she prepare a report of hearing or other document, or speak to any person, regarding this case.

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 argues 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 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,[2] 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]

For the foregoing reasons, we will do in this case as we have done in so many

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[2] General Order No. 2007-09, had not been issued at the time this case was heard by the Department. The order directs the immediate implementation of an operational and structural reorganization of the Department's attorneys to deal with the problems that this case typifies.

[3] "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].)

other cases, that is, remand this matter to the Department for an evidentiary hearing. That being the case, we see no need to address the motion to augment.[4]

III

Appellant asserts that the Board must reverse this case in its entirety because the record lacks "key documents and arguments made by both parties." (App. Br., pp. 11-12.) The documents in question are described as follows: "Motion to Compel; Points and Authorities in Support of Motion to Compel (re Discover: Gov't Code §11507.7); Department's opposition to Motion to Compel Discovery; and Order Denying Motion to Compel Discovery." Appellant claims the absence of these documents raises the specter of ex parte communications.

We can find no merit in appellant's contention. Appellant has not raised any issue on the merits or involving discovery, so we are unable to see how there can be any prejudice to appellant. The motion to compel discovery sought documents relating to the appearance of decoys other than the one in this case, and its denial has not been appealed.

As the Department notes in its brief, appellant undoubtedly has copies of these documents in its files. We have not been informed why the documents might conceivably be relevant to the issues on appeal, and they could easily have been included in the record by a supplemental or corrected certification. Indeed, the motion to augment the record did not even address these documents.

[4] Appellant's brief in support of its motion to augment suggests that the Board should withhold its decision in this case until the California Supreme Court issues its decision in *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (S15589) (2007), now pending in that court. In view of the result we reach under existing law, we are not inclined to delay the issuance of our decision.

At best, the omission of such documents from the certified record is a technical, procedural error that does not warrant a reversal of a decision.

We shall remand this matter to the Department for an evidentiary hearing on the ex parte communication issue, and affirm the decision as to other issues.

ORDER

This matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing discussion.[5]

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

[5] 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.