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

AB-8723
File: 21-439459 Reg: 07065019

GARFIELD BEACH CVS, LLC, dba CVS Pharmacy 9645
8225 Garvey Avenue, Rosemead, CA 91770,
Appellant/Licensee

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

Garfield Beach CVS, LLC, doing business as CVS Pharmacy 9645 (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 Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

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 M. Cottrell.

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

PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 10, 2006. On February 9, 2007, the Department filed an accusation against appellant charging that, on November 17, 2006, appellant's clerk, Grace Ruiz (the clerk), sold an alcoholic beverage to 19-year-old Ricardo Vasques. Although not noted in the accusation, Vasques was working as a minor decoy for the Department at the time.

At the administrative hearing held on June 19, 2007, documentary evidence was received, and testimony concerning the sale was presented by Vasques (the decoy) and by George Campana, a Department investigator. 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 engaged in ex parte communications; (2) the Department lacked effective screening measures to prevent ex parte communications; (3) the Department refused to provide required discovery; (4) there was no compliance with Department Rule 141(b)(5); (5) the Board should withhold its decision pending the decision in the *Morongo* case; and (6) its motion to augment the record should be granted. 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 Civ. Proc., § 2003) or a declaration under penalty of perjury (Code Civ.

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.

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 and should have been raised then. Since appellant did not, the Board is entitled to

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> 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.

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 asserts in its brief that the administrative law judge (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 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.

IV

Appellant contends that the finding that there was a face to face identification that complied with Department Rule 141(b)(5) (4 Cal. Code Regs., §141, subd.(b)(5)) was contrary to the evidence.

Appellant argues that the ALJ "engaged in mental gymnastics leaping far beyond logic and reason in concluding that there was a face to face identification that complied with the rule." The ALJ wrote (Conclusion of Law 6):

> Respondent argued that the face-to-face identification was defective under Rule 141(a) and 141(b)(5) because the decoy himself testified that clerk Ruiz was not looking at him, but was looking down and talking with an investigator at the time of his identification of her. Ruiz is supposed to be reasonably aware of the occurrence of the identification and both she and the decoy testified that she was not so aware. Further, the identification was unfairly done because the investigators isolated clerk Ruiz prior to asking the decoy who sold to him. He had no choice but to identify Ruiz. Neither of these complaints is meritorious. As to the isolation of clerk Ruiz, there is no evidence that the identification of decoy Vasques was coerced or that he identified the wrong person. While clerk Ruiz claimed to have been unaware she was being identified, Exhibit 3 strongly suggests otherwise. Ruiz would have to be a lot duller an individual than the person who testified at the hearing to pose for the Exhibit 3 photograph and honestly believe she was not being pointed out as the seller of the can of beer.

Exhibit 3 is a photograph of the clerk and the decoy. The clerk is smiling and looking directly at the camera. The decoy is holding a can of beer and is pointing at the decoy, who is standing about one foot from her.

We read the last sentence of Conclusion of Law 6 as an implicit finding that the

clerk was not to be believed when she claimed not to know she had been identified by the decoy as the seller of the beer. He testified he was facing her from about two feet away when he pointed to her and said she was the person who sold him the beer. She may have been looking down, and may have been speaking with the investigators, but neither of these factors compels the conclusion she was unaware she was being accused as the seller. The scene has to be viewed in context. The clerk had been isolated by the investigators; she had just sold the beer; she had just been told she had sold to a minor; the minor stood two feet away from her, pointed to her, and said she had sold him the beer; and, finally, the two were then posed side by side for a photograph. Taken in context, we have no difficulty in agreeing with the ALJ that clerk Ruiz was aware or reasonably should have been aware she was being singled out as the seller of the beer.

The Appeals Board in *Chun* (1999) AB-7287, stated:

> The phrase 'face to face' means that the two, the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller."

That standard was met in this case.

V

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.

VI

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 hearing.

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

The decision is affirmed with respect to the issue concerning face to face identification, and this matter is remanded to the Department for an evidentiary hearing on the issue of ex parte communication, in accordance with the foregoing discussion.[3]

FRED ARMENDARIZ, CHAIRMAN
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.