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

AB-8725
File: 20-439588 Reg: 07064671

GARFIELD BEACH CVS, LLC, dba CVS Pharmacy 9706
9038 Balboa Boulevard, Northridge, CA 91325,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED FEBRUARY 19, 2009

Garfield Beach CVS, LLC, doing business as CVS Pharmacy 9706 (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 police 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 Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated August 16, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 7, 2006. In January 2007, the Department filed an accusation against appellant charging that, on November 17, 2006, appellant's clerk, Justin Brumer (the clerk), sold a 24-ounce can of Bud Light beer, an alcoholic beverage, to 19-year-old Mariana Olvera Reyes. Although not noted in the accusation, Olvera Reyes was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on May 22, 2007, documentary evidence was received, and testimony concerning the sale was presented by Olvera Reyes (the decoy) and by Carl Oschmann, a Los Angeles Police officer. Appellant presented no witnesses. The evidence established that the decoy was not asked her age or for any identification.

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 Board should withhold its decision pending the decision of the California Supreme Court in *Morongo Band of Mission Indians v. State Water Resources Control Board* (S155589) (October 24, 2007); (2) the Department lacked effective screening procedures; (3) the Department engaged in ex parte communications in violation of the Administrative Procedure Act; (4) the administrative law judge erred in denying appellant's request for a continuance; and (5) the overall appearance of the decoy violated Department Rules 141(a) and 141(b)(2). Appellant has also moved to augment the record with any report of hearing, and documents related to General Order No. 2007-09. Issues 2 and 3 are

interrelated and will be discussed together.

DISCUSSION

I

Appellant suggests that the Board withhold its decision pending the decision of the California Supreme Court in *Morongo Band of Mission Indians v. State Water Resources Control Board* (S155589)(October 22, 2007).

The Board has declined to accept the Department's suggestion in a number of cases preceding this case. We believe that the result we reach on other issues in this case makes it unnecessary to delay any decision in this case.

II and III

Appellant contends that the Department engaged in improper ex parte communications, and that it lacked effective screening to prevent the occurrence of ex parte communications between its prosecutors and its decision maker.

Appellant 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. 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, or any of the numerous other cases this Board has seen on this issue, that the "standard Department procedure" had changed during the time this case was pending at the Department level. 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.[2] 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

[2] The Department's General Order No. 2007-09 was not issued until after the administrative hearing in this case.

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 other cases, that is, remand this matter to the Department for an evidentiary hearing.

IV

Appellant moved for a continuance on the ground that a subpoenaed witness, the District Administrator who signed the accusation, was not present at the hearing. The administrative law judge (ALJ) denied the motion.

Appellant made an offer of proof that the District Administrator could provide explanation and insight into the Department's suggested penalty in this matter, as well as speak to any salient facts which might justify any deviation from the suggested penalty set forth in the Department's Penalty Guidelines (4 Cal. Code Regs., §144). The ALJ rejected appellant's argument on relevancy grounds, stating (Proposed Decision, p.5, fn. 2): "Absent an unusual situation not brought to the attention of the court, Section 144 of Chapter 1, title 4, California Code of Regulations provides all the insight to which Respondent is entitled."

It appears to be the case that the District Administrator advises the attorney charged with litigating the case of the penalty the attorney is to recommend to an ALJ.

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[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].)

Of course, an ALJ is not bound by the Department's recommendation made at the hearing, and may depart from the Penalty Schedule in Rule 144 if the evidence warrants such.

We do not see how the District Administrator's view, prior to any hearing, as to what would be an appropriate penalty has any meaningful bearing on what penalty an ALJ chooses to recommend after a hearing. The ALJ hears evidence developed in an adversary setting, where a licensee has the opportunity to argue why the evidence supports a departure from the penalty urged by Department counsel, or where the Department may argue for an aggravated penalty under the same penalty guidelines. The ALJ is not bound by the Department's suggestion, and, we know from the many cases we have heard, an ALJ often imposes a penalty more lenient than the Department has urged.

Aside from the usual rules treating settlement discussions as inadmissible in evidence, we see little or no relevance in an ALJ knowing what the District Administrator might seek in the way of a suspension to settle a charge before the filing an accusation. An ALJ relies on an objective assessment of the evidence after listening to testimony and the partisan appeals of counsel, and ultimately is guided by that assessment and the Penalty Schedule of Rule 144, including its criteria for aggravated or mitigated penalties.

Injecting the pre-hearing views of a District Administrator would, in our opinion, only serve to add delay. The motion for continuance was properly denied.

V

Appellant contends that the decoy, because of her prior experience in decoy

operations[4] and experience derived from her participation in the Los Angeles Police Department Explorer program, did not display the appearance required by Department 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."

The ALJ addressed the decoy's appearance at some length in his findings and conclusions (Findings of Fact 3, 10, and 11, and Conclusion of Law 5):

> FF 3: Olvera appeared at the hearing. She stood about 5 feet, 1 inch tall and weighed approximately 130 pounds and there had been no change in either since her visit to Respondent's store on November 17, 2006. At the store and at the hearing Olvera was dressed as is shown in Exhibit 2, wearing a brown short-sleeved T-shirt over a white long-sleeved T-shirt, and blue jeans. At the hearing, she wore black leather shoes, but at Respondent's store on November 17, 2006, decoy Olvera wore Vans sneakers. As is seen in Exhibit 2, the decoy's brown hair was worn down and came below shoulder length. She had some sort of product in it. Her hair at the hearing was styled differently and came only to her shoulders. At Respondent's store, Olvera wore a small heart-shaped pendant on a chain around her neck. She also wore black mascara both at the hearing and on November 17, 2006, and no other makeup. Decoy Olvera looked substantially the same at the hearing as she did at Respondent's store on November 17, 2006.
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> FF 10: The investigation of November 17, 2006, was perhaps the tenth such decoy operation for Mariana Olvera. She may have visited as many as 200 stores in that time. Decoy Olvera has been a police Explorer with LAPD for as long as three years. In that capacity she is taught and observes what police officers do. She also trains for competitions with other Explorer teams and travels to competitions in things like making traffic stops and hostage negotiations. These competitions amount to role playing. Olvera spends as many as 5 hours a week on Explorer activities. She has also been on two ride-a-longs, each one lasting 2-3 hours.

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[4] Appellant tells us in its brief (App. Br. p. 15) that the decoy had participated in "240 minor decoy operations." This is an exaggeration. Actually, the decoy testified she had participated in ten decoy operations prior to the one in this case. Appellant is referring to the total number of stores the decoy visited in those ten operations, based on the decoy's estimates of the average number of stores visited in each decoy operation.

> FF 11: Decoy Olvera is a female adult who appears her true age, 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 Brumer at the Licensed Premises on November 17, 2006, Olvera 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. Neither Olvera's experience as a police Explorer nor her experience as a police decoy affected her apparent age. When testifying at the hearing, Olvera would use the phrases, "[s]ir, yes sir," and "[s]ir, no, sir," as appropriate, as she has been apparently trained as an Explorer. Since there was no conversation noted between Olvera and Brumer in Respondent's store on November 17, 2006, this quirk did not come up.
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> CL 5: Respondent argued that there was a failure to comply with Sections 141(a), 141 (b)(2) and (b)(5) of Chapter 1, title 4, California Code of Regulations [Rule 141]. Therefore, Rule 141(c) applies and the Accusation should be dismissed. Respondent argued that decoy Olvera could not fairly be used as a decoy because her close ties to law enforcement (using the "[s]ir, yes, sir" language and confident demeanor) make her more suitable to work as an undercover officer than as a teen age decoy. In addition, she wore makeup (mascara), jewelry (small chain and pendant) and used "product" in her hair. While the facts argued are true, the argument is rejected in this case. Under the circumstances presented to Respondent's clerk Brumer, decoy Olvera appeared her age. The decoy's overall appearance was assessed above in Findings of Fact, paragraphs 5, 10 and 11. Mariana Olvera gave an overall appearance well within the rule.

It is readily apparent from appellant's brief that it simply disagrees with the ALJ's factual assessment of the decoy's appearance. Its argument that some of the elements of her appearance support a reasonable inference that she exhibited a comfort level and demeanor of a person over the age of 21 is nothing more than a partisan reweighing of the evidence. Appellant has not pointed to any procedural error on the ALJ's part.

As we have often said, the ALJ's factual determinations, if supported by substantial evidence, may not be set aside. He had the opportunity to view the decoy throughout her testimony, and was in a far better position that this Board to appraise the decoy's appearance. (See, e.g., *7-Eleven, Inc./Gonser* (2001) AB-7750.) His was a

factual finding, there was evidence to support it, and we have no reason to question it.

VI

Appellant has filed a motion to augment the record with the addition of any report of hearing submitted in this case and any related documents, and General Order No. 2007-09, and documents related to operational and structural modifications to the Department's attorney staff.

In light of our intention to remand this matter to the Department for an evidentiary hearing on the ex parte communication issue, we see no need for the Board to address the motion. To the extent any of the requested documents may be relevant to the issues on remand, they can be produced at that hearing.

ORDER

The decision 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.[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.