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

AB-8765
File: 20-381737 Reg: 07065483

7-ELEVEN, INC., and RAJEEV WALIA ENTERPRISES, dba 7-Eleven 2136 26270
10610 Magnolia Boulevard, North Hollywood, CA 91601,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

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

ISSUED FEBRUARY 23, 2009

7-Eleven, Inc., and Rajeev Walia Enterprises, doing business as 7-Eleven 2136 26270 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their 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 appellants 7-Eleven, Inc., and Rajeev Walia Enterprises, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Cottrell.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 20, 2001. Thereafter, the Department instituted an accusation against appellants charging that, on January 26, 2007, appellants' clerk sold an alcoholic beverage to 18-year-old Courtney Van Heyningen. Although not noted in the accusation, Van Heyningen was working as a minor decoy for the Los Angeles Police Department at the time.

An administrative hearing was held on August 7, 2007, at which time documentary evidence was received, and testimony concerning the sale was presented by Van Heyningen (the decoy) and by Carol Sawamura, a Los Angeles police officer.

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 Board should withhold its decision pending action by the California Supreme Court in a case pending on review; (2) the Department lacked proper screening to eliminate the appearance of bias by attorneys implicated in the adjudication of this matter; and (3) the Department must prove it did not engage in ex parte communications. These issues are interrelated, and will be discussed together.

DISCUSSION

Appellants contend 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. They rely 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*). They assert that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred.

In a declaration signed by Department staff attorney Dean Leuders, who represented the Department at the administrative hearing, Leuders 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 appellants 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. Appellants argue that the declaration is inadequate. We agree with appellants.

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, 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.

ORDER

The matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[3]

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

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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].)

[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.