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

AB-8770
File: 21-425676 Reg: 07065485

SHARMEEN'S ENTERPRISES, INC., dba La Placita Market
10402 Laurel Canyon Boulevard, Pacoima, CA 91331,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 7, 2008
Los Angeles, CA

ISSUED: NOVEMBER 18, 2008

Sharmeen's Enterprises, Inc., doing business as La Placita Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for having sold an alcoholic beverage to Jessica Kerry Anthony, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Sharmeen's Enterprises, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, 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 October 31, 2007, is set forth in the appendix.

PROCEDURAL HISTORY

Appellant's off-sale general license was issued on June 13, 2005. The Department instituted an accusation against appellant on April 9, 2007, charging the sale of an alcoholic beverage to a minor on July 20, 2006.

An administrative hearing was held on August 20, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented by Jessica Kerry Anthony, the decoy, and Sandra Rojas, the clerk who made the sale.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proved, and appellant had failed to establish an affirmative defense under Department Rule 141 (4 Cal. Code Regs., §141).

Appellant filed a timely notice of appeal, and raises the following issues: (1) The Department did not screen its prosecutors from its decision maker; (2) the Department communicated ex parte with its decision maker; and (3) the administrative law judge failed to conduct a factual analysis as to whether there was compliance with Rule 141(b)(5). Appellant also requests the Board to withhold its decision until a matter pending in the California Supreme Court is resolved. Issues 1 and 2 will be discussed together.

DISCUSSION

I and II

Appellant contends that the Department did not adequately screen its prosecutors from its decision maker and engaged in ex parte communications.

This is the first appeal to be heard by the Board where the administrative hearing took place after the adoption by the Department of General Order No. 2007-09 on August 10, 2007. (The administrative hearing took place on August 20, 2007.) The Order, a certified copy of which is attached to a declaration by Matthew G. Ainley accompanying the Department's brief,[2] sets forth changes in the Department's internal operating procedures which it has determined are "the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications," changes which consist of "a reassignment of functions and responsibilities with respect to the review of proposed decisions." The Order, signed by the Director and directed to all offices and units of the Department, provides:

> **Background**:
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> In 2006 the California Supreme Court found that the Department's practice of attorneys preparing a report following an administrative hearing, and the Director and his advisors having access to or reviewing that report, violated the Administrative Procedures [*sic*] Act's prohibition against *ex parte* communications. Subsequent cases in the courts of appeal extended the reasoning of the Supreme Court in holding that such a statutory violation continues to exist even if the Department adopted the administrative law judge's proposed decision without change. In addition, the courts of appeal placed the burden on the Department to establish that no improper *ex parte* communication in any given case.

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[2] Appellant's attorneys, who have been the driving force behind the long string of *Quintanar*-affected cases, have not challenged the authenticity of the Order. At the Board hearing, they argued, without supporting evidence, that the reassignment of responsibilities called for by the Order, had not been implemented at the time the administrative hearing in this matter took place.

Procedures:

Although the Supreme Court held that a physical separation of functions within the Department is not necessary, in light of subsequent appellate decisions the Director has determined that the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications, a reassignment of functions and responsibilities with respect to the review of proposed decisions is necessary and appropriate.

Effective immediately, the following protocols shall be followed with respect to litigated matters:

1. The Department's Legal Unit shall be responsible for litigating administrative cases and shall not be involved in the review of proposed decisions, nor shall the Chief Counsel or Staff Counsel within the Legal Unit advise the Director or any other person in the decision-making chain of command with regard to proposed decisions.

2. The Administrative Hearing Office shall forward proposed decisions, together with any exhibits, pleadings and other documents or evidence considered by the administrative law judge, to the Hearing and Legal Unit which shall forward them to the Director's Office without legal review or comment.

3. The proposed decision and included documents as identified above shall be maintained at all times in a file separate from any other documents or files maintained by the Department regarding the licensee or applicant. This file shall constitute the official administrative record.

4. The administrative record shall be circulated to the Director via the Headquarters Deputy Division Chief, the Assistant Director for Administration and/or the Chief Deputy Director.

5. The Director and his designees shall act in accordance with Government Code Section 11517, and shall so notify the Hearing and Legal Unit of all decisions made relating to the proposed decision. The Hearing and Legal Unit shall thereafter notify all parties.

6. This General Order supersedes and hereby invalidates any and all policies and/or procedures inconsistent to [*sic*] the foregoing.

The obvious purpose of the Order was to revise internal operating procedures of the Department that have resulted in more than 100 cases having been remanded to the Department by the Appeals Board (and ultimately dismissed by the Department) for investigative hearings regarding claims of ex parte communications between the

Department's litigating counsel and the Department's decision makers. Although not identified in the Order, the "appellate decisions" to which it refers undoubtedly include in their numbers the decision by the California Supreme Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Quintanar)* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585, 145 P.3d 462], and Courts of Appeal decisions in *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*), case authorities routinely cited in appellate briefs asserting that the Department engaged in improper ex parte communications.

The Order effectively responds to the questions raised in those earlier appeals, i.e., whether the Department's long standing practice of having its staff attorneys submit, on an ex parte basis, recommendations in the form of reports of hearing, was improper. The Order effectively insulates the Department decision maker from any potential ex parte advice or comment not only from the attorney who litigated the administrative matter, but from the entire Department Legal Unit responsible for prosecutions.

Appellant has not affirmatively shown that any ex parte communication took place in this case. Instead, it has relied on the authorities cited above *(Quintanar, supra; Chevron, Inc., supra, and Rondon, supra*), for its argument that the burden is on the Department to disprove the existence on any ex parte communication.

We are now satisfied, by the Department's adoption of General Order No. 2007-09 that it has met its burden of demonstrating that it operated in accordance with law at the time of the administrative hearing in this case. Without evidence that the procedure

outlined in the Order was disregarded, we believe it would be unreasonable to believe that any ex parte communication occurred. It was appellant's responsibility to show that the Order was ignored or disregarded, and appellant has not done so.

While the Order does not specifically address the question whether there was an adequate screening procedure to prevent Department attorneys who acted as litigators from advising the Department decision maker in other matters, by its terms it resolves that issue by effectively removing the litigating attorneys from the review process entirely.[3]

In light of the result we reach, we see no need to withhold our decision in this matter until the resolution in the California Supreme Court of *Morongo Band of Mission Indians v. State Water Resources Control Board* 2007 WL 2007994 (2007).

III

Appellant contends that the administrative law judge (ALJ) failed to analyze the issue of seller identification adequately, asserting that he did not address its contention that activities of the police officers, at the time the decoy identified the clerk as the seller, effectively prevented the clerk from being aware of the identification.

The ALJ made a specific finding that the face to face identification complied with the requirements of Rule 141(b)(5). He also pointed out that, although the clerk testified on appellant's behalf, she said nothing about whether or not she was aware of the identification. Indeed, when asked by appellant's counsel, she said she remembered the person to whom she sold, and identified her in a photograph (Exhibit

[3] We note that the Ainley declaration disclaims having advised the decision maker or any of his advisors with respect to any disciplinary matters prosecuted by other Department attorneys since the year 2001.

2) she was shown.

The decoy testified that the clerk was just waiting, not helping another customer. The decoy was standing within two to six or seven feet from the decoy when she identified her, and was photographed with the clerk.

Appellant's brief would have the Appeals Board believe that so much was going on with the police officers that the clerk was unaware of being identified as the seller. Our reading of the record satisfies us that there is no merit to that argument.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.