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

AB-8784
File: 21-439425 Reg: 07065681

GARFIELD BEACH CVS, LLC, dba CVS Pharmacy #9698
100 West Foothill Boulevard, Upland, CA 91786,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 4, 2008
Los Angeles, CA

ISSUED MARCH 18, 2009

Garfield Beach CVS, LLC, doing business as CVS Pharmacy #9698 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its off-sale general license for 15 days for appellant's clerk, Lanarae Anderson, selling a six-pack of Budweiser beer, an alcoholic beverage, to Erendida Gonzalez, an 18-year-old minor decoy working with the Upland Police Department and the Department of Alcoholic Beverage Control, 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,

[1]The decision of the Department, dated November 29, 2007, is set forth in the appendix.

Valoree Wortham.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 10, 2006. On May 7, 2007, the Department filed an accusation against appellant charging that, on April 9, 2007, appellant's clerk, Lanarae Anderson (the clerk), sold an alcoholic beverage to 19-year-old Erendida Gonzalez. Although not noted in the accusation, Gonzalez was working as a minor decoy for the Upland Police Department and the Department at the time.

At the administrative hearing held on September 28, 2007, documentary evidence was received, and testimony concerning the sale was presented by Gonzalez (the decoy) and by Eric Burlingame, a Department investigator.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no affirmative defense under Rule 141 had been established.

Appellant has filed an appeal making the following contentions: (1) the Department lacked appropriate screening measures to ensure the non-appearance of bias in the administrative proceeding; (2) the Department engaged in improper ex parte communications; and (3) the incomplete record raises the specter of ex parte communication. Contentions (1) and (2) are interrelated and will be discussed together. Appellant has also filed a motion to augment the record by the addition of any ABC Form 104 report of hearing, as well as a copy of General Order No. 2007-09.

DISCUSSION

I and II

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

The administrative hearing in this case took place on August 16, 2007, after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007. A copy of the Order is attached to the Department's brief. The Order sets forth changes in the Department's internal operating procedures which, it states, the Director of the Department 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, 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 occurred in any given case.
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> **Procedures**:
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> 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:
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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 is to amend the internal operating procedures of the Department that have resulted in more than 100 cases having been remanded to the Department by the Appeals Board for an evidentiary hearing regarding claims of ex parte communications between litigating counsel and the Department's decision makers.[2] Although not identified in the Order, the "appellate decisions" to which it refers undoubtedly include in their numbers the decision by the California Supreme

[2]We understand that these cases were ultimately dismissed by the Department.

Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] *(Quintanar)*, and Court of Appeal decisions in *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th116 [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 answers the question raised in earlier appeals, i.e., whether the Department's long standing practice of having its staff attorneys submit ex parte recommendations in the form of reports of hearing, has been officially changed to comply with the requirements of *Quintanar* and the cases following it. It replaces an earlier, less formal procedure used by the Department to address the problems of ex parte communications, one which the Appeals Board found was not an effective cure for the problem endemic within the Department, with one intended to isolate the Department decision maker from any potential advice or comment from the attorney who litigated the administrative matter, as well as the Department's entire Legal Unit.

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, supra; Rondon, supra*), for its argument that the burden is on the Department to disprove the existence of 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. Without evidence that the procedure outlined in the Order was disregarded, we believe

it would be unreasonable to assume that any ex parte communication occurred.

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 appears to resolve that issue by effectively removing the litigating attorneys from the review process entirely.

In light of the result we reach, we see no need to withhold our decision in this matter until the California Supreme Court resolves *Morongo Band of Mission Indians v. State Water Resources Control Board* (rev. granted October 24, 2007, S155589). Similarly, there is no need to augment the record as requested by appellant.

III

Appellant alleges that the accusation must be dismissed because the certified record provided by the Department did not include certain pleadings and written arguments of the parties. According to appellant, the missing documents are: (1) Motion to Compel; (2) Points and Authorities in Support of Motion to Compel (re Discovery); (3) Department's Opposition to Motion to Compel Discovery; and (4) Order Denying Motion to Compel Discovery. Appellant describes these missing documents as "key documents and arguments made by both Parties regarding the Proposed Decision." (App. Br., p.13.)

Appellant argues that omission of these documents from the certified record violates rule 188 of the Appeals Board (4 Cal. Code Regs., § 188) and makes it unclear whether and when the documents were considered by the decision maker or the decision maker's advisors.

Board Rule 188 states what is to be included in the record on appeal:

> (1) The file transcript, which shall include all notices and orders issued by the administrative law judge and the department, including any proposed decision by an administrative law judge and the final decision issued by the department; pleadings and correspondence by a party; notices, orders, pleadings and correspondence pertaining to reconsideration;
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> (2) the hearing reporter's transcript of all proceedings;
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> (3) exhibits admitted or rejected.

We will take appellant at its word that the documents to which appellant refers should have been part of the record on appeal. We will also take appellant at its word that the Department's certification of the record is incomplete or inaccurate. We also note that, until explained by Department counsel during argument, we have been at a loss to understand the Department's seeming reluctance or inability to provide a complete record on appeal, especially after *Quintanar*, *supra*, and its progeny, which all started with an attempt to get additional documents into the record.

In spite of our concerns, however, we do not believe that this decision should be reversed on the basis of an incomplete record. In the first place, this is at most a procedural error, which is rarely sufficient by itself to justify reversal of a Department decision. As the court explained in *Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345],

> since the appeals board exercises a "strictly 'limited' " power of review over the Department's " 'exclusive power' to issue, deny, suspend or revoke licenses" (*Martin v. Alcoholic Beverage etc. Appeals Board* [(1959)] 52 Cal.2d 238, 246 [[340 P.2d 1]]), the decisions of the Department should not be defeated by reason of "any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the [reviewing body] shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

Secondly, we cannot see that appellant has suffered any prejudice. Appellant has not articulated any prejudice that could conceivably be viewed as resulting in a

miscarriage of justice.

We also note that appellant did not include these documents among those it asked for in its Motion to Augment Record. It seems clear to us that appellant is less interested in the state of the certified record than it is in finding a technical reason for reversing the Department's decision, since it has no substantive basis for seeking reversal.

Finally, if there were any doubt on our part that this issue lacks merit, we add that appellant has not raised any issue in this appeal with respect to its having been denied discovery, nor has it raised any issue about the appearance of the minor decoy in this case, the sole reason for the discovery motion at the administrative hearing.[3]

ORDER

The decision of the Department is affirmed.[4]

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

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[3] Appellant's counsel have routinely in decoy cases moved to compel the Department to produce records relating to decoy operations over an extended period, arguing that it will assist them in their challenge under Rule 141(b)(2) to the decoy's appearance. These motions have consistently been denied, and only infrequently are they included among the issues on appeal.

[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.