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

AB-8785
File: 20-350839 Reg: 07065137

7-ELEVEN, INC., JYOTSANA N. SHAH, and NARENDA J. SHAH,
dba 7-Eleven Store # 2171-13967
725 East Grand Boulevard, Corona, CA 92879,
Appellants/Licensees

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 MAY 22, 2009

7-Eleven, Inc., Jyotsana N. Shah, and Narenda J. Shah, doing business as 7-Eleven Store # 2171-13967 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 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., Jyotsana N. Shah, and Narenda J. Shah, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 29, 1999. On February 27, 2007, the Department filed an accusation against appellants charging that appellants' clerk sold an alcoholic beverage to 19-year-old David Glassick on December 8, 2006. Although not noted in the accusation, Glassick was working as a minor decoy for the Corona Police Department at the time.

At the administrative hearing held on October 3, 2007, documentary evidence was received and testimony concerning the sale was presented by Glassick (the decoy) and by Jason Waldon, a Corona police officer.

The Department's decision determined that the violation was proved and no defense to the charge was established. Appellants then filed an appeal contending: (1) The Department's legal staff lacked appropriate screening procedures to prevent ex parte communications and the appearance of bias in the administrative proceeding; (2) the Department engaged in improper ex parte communications; and (3) the administrative law judge (ALJ) improperly denied appellants' motion to compel discovery and the record does not include the Order Denying Motion to Compel. The first two issues are interrelated and will be discussed together. Appellants have also filed a motion to augment the record with various documents, including any report of hearing and General Order No. 2007-09.

DISCUSSION

I and II

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

This is an appeal in which the administrative hearing took place after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007. (The administrative hearing took place on October 3, 2007.) The Order 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, directed to all offices and units of the Department, provides:

> **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.
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> 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.
>
> 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 license 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.
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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.
>
> 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 investigative hearings regarding claims of ex parte communications between litigating counsel and the Department's decision maker.[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 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, on an ex parte basis, recommendations in the form of reports of hearing, has been

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

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 to the problem endemic within the Department, with one intended to isolate the Department decision maker from any potential advice or comment not only from the attorney who litigated the administrative matter, but the Department's entire Legal Unit as well.[3]

Appellants have not affirmatively shown that any ex parte communication took place in this case. Instead, they have relied on the authorities cited above *(Quintanar, supra; Chevron, supra; Rondon, supra*), for their 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. 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 the Department's litigating attorneys from advising the 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.

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[3]Appellants asked the Appeals Board to refrain from deciding this issue until it was resolved by the California Supreme Court in *Morongo Band of Mission Indians v. State Water Resources Control Board*, S155589 (*Morongo*), but the Board had no reason to delay. As explained in the text, the Department's Order effectively prevents the issue from arising, so the Court's decision could have no effect on this Board's analysis. On February 9, 2009, the Court issued its decision in *Morongo*, rejecting the position espoused by appellants by holding that the separation of prosecutorial and advisory functions within an administrative agency may be made on a case-by-case basis.

In light of the result we reach, we see no need to augment the record as requested by appellants.

III

Appellants contend that the ALJ erred in denying their Motion to Compel Discovery. However, they also assert that the Board cannot review the denial of the motion because the Department did not include the Order Denying the Motion to Compel (ODMC) in the administrative record; therefore, they urge, the accusation should be dismissed. Nevertheless, appellants proceed to argue the issue as if the Board could decide it.

Appellants are correct that the Department did not include the ODMC, or any other papers pertaining to the motion, in the administrative record. However, there are several reasons why that is not a basis for dismissing the accusation.

First, this is really 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, it is appellants, as initiators of this appeal, who bear the burden of convincing this Board that the Department erred. Because of this, they bear the ultimate responsibility of providing a complete record for this Board's review. "Error is

never presumed but must be affirmatively shown, and the burden is on the appellant to present a record showing it." (*Beamon v. Dept. of Motor Vehicles* (1960) 180 Cal.App.2d 200, 210 [4 Cal.Rptr. 396]; *Hothem v. City* (1986) 186 Cal.App.3d 702, 705 [231 Cal.Rptr. 70].) Failure to do so "precludes adequate review and results in affirmance of the [Department's] determination." *(Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1 [84 Cal.Rptr.2d 73].)

It is true that the Department necessarily bears the responsibility of compiling the administrative record, since the Department arranges the recording and transcription of the hearing, has custody and control of the exhibits and other evidence, and has a duty to maintain an adequate record. However, an appellant cannot just sit back and expect this Board to find in his or her favor.

> [T]he burden is always upon an appellant to use reasonable diligence to perfect and prosecute his appeal. Where some step is required by the rules to be taken by an officer of the court and such officer delays unreasonably the appellant cannot sit by indefinitely and do nothing. He must exercise a reasonable amount of diligence to investigate any unwarranted delays and if necessary take steps to see that the legal duty is performed.

(Flint v. Board of Medical Examiners (1946) 72 Cal.App.2d 844, 846 [165 P.2d 694].)

In the present case, appellants did not include the ODMC among the documents asked for in their Motion to Augment Record. A Motion to Augment is the appropriate way to deal with items that appellants think should have been included in the record. Appellants did not even make the effort to send an informal message or make a telephone call to the Department to attempt to have the record completed. Nor did they provide the documents themselves to the Appeals Board, which they easily could have done, since they produced the Motion to Compel and of necessity received the ODMC.

The result is that we consider this contention waived by appellants, since they have done nothing to allow this Board to properly review it.

ORDER

The decision of the Department is affirmed.[4]

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

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

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