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

AB-8795
File: 21-427584 Reg: 07066435

AMINA MAHERALI and SHEHZAD MAHERALI, dba Downtown Liquors
301 Grand Avenue, South San Francisco, CA 94080,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: January 15, 2009
San Francisco, CA

ISSUED MAY 21, 2009

Amina Maherali and Shehzad Maherali, doing business as Downtown Liquors (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Mandip Singh, selling a 24-ounce can of Budweiser beer, an alcoholic beverage, to Steven Massoni, a 19-year-old police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Amina Maherali and Shehzad Maherali, 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, Heather Cline Hoganson.

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[1]The decision of the Department, dated January 8, 2008, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale general license was issued on December 30, 2005. Thereafter, the Department instituted an accusation against appellants charging that, on September 30, 2006, appellants' clerk, Mandip Singh (the clerk), sold an alcoholic beverage to 19-year-old Steven Massoni. Although not noted in the accusation, Massoni was working as a minor decoy for the South San Francisco Police Department at the time.

An administrative hearing was held on October 25, 2007, at which time documentary evidence was received, and testimony concerning the sale was presented by Massoni (the decoy) and by Kenneth Chetcuti, a South San Francisco 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 Department lacked appropriate screening mechanisms; (2) the Department engaged in improper ex parte communications; (3) the denial of appellants' motion to compel discovery denied appellants a reasonable opportunity to defend this action; and (4) the decision must be reversed because the motion to compel and related documents were omitted from the certified record. Appellants have also filed a motion to augment the record with the addition of any ABC Form 104 and related documents in the file, and General Order No. 2007-09 and related documents. Issues 1 and 2 are interrelated and will be discussed together.

DISCUSSION

I and II

The administrative hearing in this case took place on October 25, 2007, after the

adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007. 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**:
> 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.
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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 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 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 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

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

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.

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 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 appellants.

III

The contention that the Department erroneously denied appellants' motion to compel discovery has been uniformly rejected by the Board. The Board's reasoning is set forth in the case of *7-Eleven/Virk* (2007) AB-8577, among others.

IV

Although appellants assert in their brief that the Department failed to include in the certified record the documents relating to their discovery motion, they do not explain why that omission compels a reversal of the Department's decision. Instead, they argued at the hearing that certain documents were improperly included in the record that could have influenced the Director in his decision-making process. There appears to be no evidence to support this claim, and we suspect that appellants' counsel may have confused the facts of this case with those of some other case where that, in fact, did happen.

Appellants have filed a motion to augment the record, but say nothing in that motion or its supporting memorandum about the discovery documents supposedly absent from the record. If these documents are essential to the Board's ability to review the decision of the Department, one would think they would have referred to such documents in their moving papers. Their attorneys undoubtedly have copies of those documents in their files, so augmenting the record poses no problems for them if

their arguments are sincere.

We have already pointed out in part III of this discussion that we disagree with appellants as to the merits of their discovery contentions, arguments we have rejected in many cases before this.

ORDER

The decision of the Department is affirmed.[3]

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

[3] 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.