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

AB-8798
File: 47-408727 Reg: 07065542

THE AULD DUBLINER, LLC, dba The Auld Dubliner
71 South Pine Avenue, Long Beach, CA 90802,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: February 5, 2009
Los Angeles, CA

ISSUED JUNE 2, 2009

The Auld Dubliner, LLC, doing business as The Auld Dubliner (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, with 5 days stayed for a probationary period of one year, for appellant's bartender selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant The Auld Dubliner, LLC, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

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

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general bona-fide public eating place license was issued on March 24, 2004. On April 18, 2007, the Department filed an accusation against appellant charging that, on December 14, 2006, appellant's bartender sold an alcoholic beverage to 19-year-old Jacqueline Cordova. Although not noted in the accusation, Cordova was working as a minor decoy for the Department at the time.

At the administrative hearing held on October 26, 2007, documentary evidence was received, and testimony concerning the sale was presented by Cordova (the decoy) and by Department investigators Ramund Box and Brandi Richard. David Copley, managing member of appellant, testified regarding the licensee's policies and training for alcoholic beverage service.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant has filed an appeal contending: (1) the Department lacked screening procedures to prevent any of its attorneys from acting as both prosecutor and advisor to the decision maker or to prevent ex parte communication with the decision maker; (2) the Department engaged in prohibited ex parte communications; (3) the Department provided an incomplete record on appeal; (4) the administrative law judge (ALJ) erred in denying appellant's Motion to Compel Discovery; (5) the ALJ ignored evidence of mitigating factors; and (6) the decoy's appearance violated rule 141(b)(2).[2] The first two issues are interrelated and will be discussed together. Appellant also moved to augment the record with any report of hearing, General Order No. 2007-09, and related documents.

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[2]References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

DISCUSSION

I and II

Appellant contends that the Department failed to provide adequate screening to ensure against the possibility of bias, and that the Department engaged in improper ex parte communications.

The administrative hearing in this case took place on October 26, 2007, after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007.[3] 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, in relevant part:

> 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.

[3]A copy of the Order is attached to the Department's brief as an exhibit.

> 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 evidentiary hearings regarding claims of ex parte communications between litigating counsel and the Department's decision makers.[4] The Order refers to "appellate decisions" which are not identified, but which 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 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

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

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 not only from the attorney who litigated the administrative matter, but from the Department's entire Legal Unit as well.

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.[5]

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[5]Appellant asked the Appeals Board to refrain from deciding this issue until 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 appellant, 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 appellant.

III

Appellant asserts that the accusation must be dismissed because the certified record provided by the Department did not include certain documents required to be included. The four missing documents were all prepared in connection with a motion to compel discovery: the motion; points and authorities in support of the motion; the Department's opposition to the motion; and the order denying the motion. 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.

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.

There is no dispute that the documents noted were missing from the record originally certified by the Department; nor is there any dispute that the documents should have been included in the certified record. The only question is whether the Department's decision should be reversed because of this.

Appellant insists reversal is required, but cites no authority to support this result. Nor does it present any meritorious argument in support of its contention. We conclude that the record on appeal presents no basis for reversing the Department's decision.

In the first place, the motion-to-compel documents were eventually provided to appellant and this Board at the end of October 2008. Therefore, any initial deficiency was cured.

Secondly, we cannot see that appellant has suffered any prejudice by this error.[6] Appellant was not prevented from raising or arguing any issues on appeal, since it obviously had copies of the omitted documents in its possession when it first filed this appeal: two of the documents were of its own counsel's creation and the other two would have been received by appellant's counsel before the administrative hearing. Under these circumstances, appellant's contention borders on the frivolous.

Additionally, appellant has not even suggested that these documents would aid the determination of this appeal. It is not enough to say the documents "should" be included in the record on appeal. Without a showing that they are material to the issues raised here, there can be no prejudice to appellant in omitting them from the record. Appellant attempts to create materiality by asserting that the ALJ erred in denying its motion to compel, repeating, almost word for word, arguments raised by its counsel and rejected by this Board ten years ago. The documents that were omitted simply have no bearing on the "real" issues in this appeal.

A Motion to Augment is the appropriate way to deal with items that should have been included in the record. Appellant filed a Motion to Augment along with its opening

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[6]Contrary to appellant's assertion that the Department is legally obligated to review the record before making its decision, it has long been the rule under section 11517 of the Administrative Procedure Act (Gov. Code, §§ 11340-11529) "that where the hearing officer acts alone the agency may adopt his decision without reading or otherwise familiarizing itself with the record." (*Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 399 [184 P.2d 323].) This principle was most recently affirmed in *Ventimiglia v. Board of Behavioral Sciences* (2008) 168 Cal.App.4th 296, 309 [85 Cal.Rptr.3d 423].

brief, but did not ask to have the record augmented with the missing motion-to-compel documents. Having failed to pursue the proper avenue to have missing documents included in the record, appellant cannot now expect to be rewarded with a reversal of the Department's decision.

IV

Appellant asserts that its motion to compel discovery was improperly denied. This issue has been brought to the Appeals Board over the years more times than can be counted, supported by arguments the Board has uniformly rejected. (See, e.g., *Andy Hong* (2007 AB-8492; *Chevron Stations, Inc*. (2007) AB-8488; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *The Southland Corporation/Nat* (2000) AB-7391. We see no need to reiterate what has been said so many times before. The contention lacks merit.

V

Appellant contends the Department's decision must be reversed because the decision does not discuss the licensee's cooperation with law enforcement, which is listed as a factor in mitigation in the Department's penalty guidelines (4 Cal. Code Regs., § 144). Appellant "cooperated with law enforcement," in an unrelated investigation at some undisclosed time, when the Long Beach Police Department Internal Affairs division asked for, and appellant provided, a videotape of an undercover officer while he was in the premises. Appellant asserts that "the ALJ's rejection of this evidence is unjustified and reversible" because "[t]here is no factual or legal basis to reject this evidence." (App. Br. at p. 30.)

Mitigation evidence was discussed in Conclusions of Law, paragraphs 8 and 9:

> 8. Complainant requested a 15-day suspension, contending that the violation had been established and there had been full compliance with Rule 141. Respondent, beyond arguing the violation of Rules 141(a),

> 141(b)(2) and 141(b)(5), argued that a mitigated suspension is an appropriate sanction. Respondent argued that its operation without discipline since March 2004 (2 years, 9 months), coupled with the evidence of policies and training programs in place and corrective measures taken should result in a mitigated suspension. Respondent did not recommend any specific suspension length.
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> 9. Slight mitigation appears to have been shown. Requiring all employees to attend L.E.A.D. training and the corrective measures taken after the within sale do recommend a mitigated suspension. (Findings of Fact, ¶¶ 12-13.)

Although appellant treats this issue as if it had to do with findings, or lack of them, it is really a complaint about the penalty. The Board may examine the issue of excessive penalty if an appellant raises it (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order unless it is clearly an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal. 2d 589, 594 [43 Cal.Rptr. 633].)

Paragraph 9, quoted above, seems to conclusively show that appellant's "cooperation with law enforcement" was not considered a mitigating factor by the ALJ, since he specifically attributed the "[s]light mitigation" shown to the "L.E.A.D. training and the corrective measures taken after the . . . sale."

While the penalty guidelines do list "[c]ooperation by licensee in investigation" as a possible mitigating factor, we would not find it unreasonable for the ALJ consider it as such only when the cooperation is with regard to investigating the violation giving rise to

the penalty to be mitigated. In this case, the cooperation was totally unrelated to the violation; it was just a "good citizen" or "earning brownie points" type of cooperation. However, the Board does not need to decide what cooperation qualifies; the contention fails on more basic grounds.

Whether or not the decision includes a discussion of all possible mitigating factors presented is irrelevant. We are not aware of anything in the law that requires such a discussion, nor does appellant refer us to any such authority. This Board's review of a penalty looks only to see whether it can be considered reasonable, not what considerations or reasons led to it. If it is reasonable, our inquiry ends there.

We note that the ALJ did conclude that "[s]light mitigation" was shown. (Concl. of Law, ¶ 9.) The penalty imposed was mitigated from the standard 15-day penalty to a 15-day suspension with five days conditionally stayed for a year. The net result, assuming appellant does not commit another violation within that year, is only a 10-day suspension. Appellant's complaint is meritless.

VI

Appellant contends that the decoy did not display the appearance generally to be expected of a person under the age of 21, as required by rule 141(b)(2). It asserts that the photographs of the decoy in the record "make it abundantly clear" that she violated the standard of the rule. It also makes a rather confusing argument based on selective paraphrasing of the findings: the ALJ found the decoy "looked just as old" at the time of the decoy operation as she did at the hearing; at the hearing, she was 20 years old, wore make-up and jewelry, and had manicured nails; therefore, appellant concludes, "the decoy's appearance violated Rule 141 both at the time of the operation and at the time of the hearing." (App. Br. at p. 31.)

What the ALJ actually wrote about the decoy's appearance was that despite some differences, "decoy Cordova appeared substantially the same at the hearing as she did at Respondent's Licensed Premises on December 14, 2006." (FF, ¶ 5.) In paragraph 11 of the Findings of Fact, the ALJ stated, based on the decoy's overall appearance, that she "displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to the bartender. She looked to be her true age."

The Board has repeatedly said that it may not, and will not, second guess the determination of the ALJ as to the apparent age of a decoy. The ALJ has the benefit of seeing and hearing the decoy in person, while the Board has before it only the "cold record."

Appellant also contends that the ALJ unjustifiably ignored the decoy's "purchase rate," which, it asserts, "shows that her appearance did not comply with the mandate of Rule 141." (App. Br. at p. 32.) The ALJ found, erroneously, according to appellant, that "[i]t was not established by any credible evidence how many locations were visited . . . or how many licensed premises sold alcoholic beverages to her." (FF, ¶ 10.)

Appellant's complaint seems to be primarily directed at the ALJ's finding that the purchase rate was not established "by any credible evidence." Appellant contends the rate was established by the decoy's own testimony. However, appellant ignores the decoy's ultimate answers: "I don't remember how many [locations were visited] exactly," [RT 56] and, "I believe [I was able to purchase alcohol at] four [locations]." [RT 57.] The decoy's answers were uncertain enough to make the ALJ's finding not unreasonable.

Appellant tries to stretch out the ALJ's reference to "credible evidence" into an issue of deficient findings regarding credibility. In arguing that the ALJ must explain his credibility determinations, appellant relies on Government Code section 11425.50, subdivision (b), *Holohan v. Massanari* (2001) 246 F.3d 1195, and *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836]. This Board has discussed, and consistently rejected, the same or similar contentions many times. (See, e.g., *7-Eleven, Inc./Parstabar* (2008) AB-8614; *Hong* (2007) AB-8596; *Circle K Stores, Inc*. (2003) AB-7977; *7-Eleven, Inc./C Bar J Ranch, Inc.* (2002) AB-7800*; 7-Eleven, Inc./Huh* (2001) AB-7680.) We reject this contention again in this appeal.

Appellant also asserts, erroneously, that the ALJ cannot choose to believe some parts of a witnesses testimony and not believe other parts. The Board has rejected or distinguished these arguments and authorities innumerable times over the years. (See, e.g., *BP West Coast Products, LLC* (2005) AB-8366 [trier of fact entitled to accept or reject all or any part of testimony of any witness or to believe part of testimony of particular witness and disbelieve remainder].)

As for the significance of the decoy's purchase rate, the Board said in *7-Eleven & Jain* (2004) AB-8082:

> Although an 80 percent purchase rate during a decoy operation raises questions in reasonable minds as to the fairness of the decoy operation, that by itself is not enough to show that rule 141(a) or rule 141(b)(2) were violated.

In this case, appellant alleges that the decoy had a 50 percent purchase rate, well below the level that might raise questions in reasonable minds.

There is no question in our minds that the Department's decision should be affirmed.

ORDER

The decision of the Department is affirmed.[7]

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

[7]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.