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

AB-8804
File: 20-389860 Reg: 07066639

7-ELEVEN, INC., and QUARTUS, INC., dba 7-Eleven Store # 2174-17841
2001 East La Habra Boulevard, La Habra, CA 90631,
Appellants/Licensees

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 17, 2009

7-Eleven, Inc., and Quartus, Inc., doing business as 7-Eleven Store # 2174-17841 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with 5 days stayed for a probationary period of one year, for their clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Quartus, Inc., appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated January 18, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 29, 2002. On August 13, 2007, the Department filed an accusation against appellants charging that their clerk sold an alcoholic beverage to 19-year-old Michael MacCubbin on April 21, 2007. Although not noted in the accusation, MacCubbin was working as a minor decoy for the Department at the time.

At the administrative hearing held on November 2, 2007, documentary evidence was received and testimony concerning the sale was presented by MacCubbin (the decoy) and by Department investigator William Armantrout. The testimony established that the decoy took an 18-pack of Bud Light beer to the counter at appellants' premises. The clerk asked for identification and the decoy gave her his valid California driver's license that stated in bold white letters on a red background, "AGE 21 IN 2009." The clerk swiped the card in a device, punched some keys on her register, and handed the driver's license back to the decoy. She told him the price, he paid for the beer, and exited the store. He later returned and identified the clerk as the seller of the beer.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants then filed an appeal contending: (1) the Department engaged in improper ex parte communications; (2) the Department did not have effective screening procedures in place 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; and (3) the Department provided an incomplete record on appeal. Issues 1 and 2 are interrelated and will be discussed together. Appellants have also moved to augment the record with any report of hearing, General Order No. 2007-09, and related documents.

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.

The administrative hearing in this case took place on November 2, 2007, after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007.[2] 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:

> 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

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

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.

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 evidentiary hearings regarding claims of ex parte communications between litigating counsel and the Department's decision makers.[3] The Order refers to "appellate decisions" without identifying them, 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*),

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

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

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 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.[4]

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

III

Appellants assert that the accusation must be dismissed because the certified record originally provided by the Department did not include certain documents required to be included: their motion to compel discovery and points and authorities in support of the motion. Appellants argue that omission of these documents from the certified record makes it impossible to know what documents were provided to the decision maker for consideration. They assert "the Department has a lawful obligation to review the record in formulating its decision and then, in turn, provide that record to Appellant [*sic*] and this Board."[5] (App. Opening Br. at p. 17.)

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

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[4]Appellants 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 appellants, holding that the separation of prosecutorial and advisory functions within an administrative agency may be made on a case-by-case basis.

[5]Contrary to appellants' 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].

should have been included in the certified record. The only question is whether the Department's decision should be reversed because of this.

Appellants insist that reversal is required, but cite no authority to support this result. Nor do they present any meritorious argument in support of their contention. We conclude that the record on appeal presents no basis for reversing the Department's decision.

Appellants have not shown that the documents omitted from the record have any relevance to the issues on appeal or that they suffered any prejudice from the omission of these documents from the record. No discovery issues concerning these documents have been raised by appellants. Mere speculation that the documents may or may not have been reviewed by the Department's decision maker is insufficient to demonstrate any prejudice from the absence of these documents from the certified record.[6]

Cases cited by appellants involving the inclusion in the certified record of documents that were not exhibits at the hearing are inapposite. In those cases, the certified record included documents that were never offered or received in evidence, and which contained comments and information that could have influenced the decision maker in a way adverse to appellants.

A Motion to Augment is the appropriate way to deal with items that appellants believe should have been included in the record. Appellants filed a Motion to Augment along with their opening brief, but they did not ask to have the record augmented with these documents. Having failed to pursue the proper avenue to have missing documents included in the record, appellants cannot not now expect to be rewarded

[6] We note that a supplemental Certification of the record was filed with the Appeals Board early in November 2008, transmitting copies of the documents claimed by appellants to be important to their appeal.

with a reversal of the Department's decision.

ORDER

The decision of the Department is affirmed.[7]

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

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[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.