

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

AB-8847

File: 21-439562 Reg: 07065351

GARFIELD BEACH CVS, LLC, dba CVS Pharmacy 9689
950 West Foothill Boulevard, Monrovia, CA 91016,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED JUNE 12, 2009

Garfield Beach CVS, LLC, doing business as CVS Pharmacy 9689 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its 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 appellant Garfield Beach CVS, 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, Jennifer Casey.

¹The decision of the Department, dated February 28, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 7, 2006. On March 27, 2007, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 18-year-old Ashley Morehead on January 19, 2007. Although not noted in the accusation, Morehead was working as a minor decoy for the Department at the time.

At the administrative hearing held on July 17, 2007, documentary evidence was received, and testimony concerning the sale was presented. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant 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; and (3) the Department provided an incomplete record on appeal. The first two issues are related and will be discussed together. Appellant also has filed a motion to augment the record with any report of hearing, the Department's General Order No. 2007-09, and any related documents.

DISCUSSION

I and II

Appellant contends the Department violated the Administrative Procedure Act (Gov. Code, §§ 11340-11529) and due process by engaging in ex parte communication with the Department's decision maker, and by its failure to maintain effective screening procedures within the legal staff to prohibit its prosecutors from engaging in ex parte

communications with the decision maker or his advisors. The Department denies that an ex parte communication was made. A declaration by the staff attorney who represented the Department at the administrative hearing asserts that at no time did the attorney prepare a report of hearing or other document, or speak to any person, regarding this case.

In a number of appeals recently, this Board has addressed the same arguments made by the parties here. In those appeals, the Board noted that several recent court decisions had described the Department's practice of ex parte communication with its decision maker or the decision maker's advisors as "standard procedure" in that agency. The Board concluded that, "without evidence of an agency-wide change of policy and practice [by the Department], we would be exceedingly reluctant to affirm or reverse on the basis of a single declaration, especially where there has been no opportunity for cross-examination." Since a factual question still exists in this case, as it did in the earlier appeals just mentioned, we believe the only appropriate resolution is to remand the matter to the Department for an evidentiary hearing.

As did the California Supreme Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585], at page 17, footnote 13, we decline to address appellant's due process argument:

Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

In light of our decision to remand this matter, augmenting the record is not necessary.

III

Appellant asserts that the accusation must be dismissed because the certified record originally provided by the Department did not include certain documents related to appellant's motion to compel discovery: the motion; points and authorities in support of and in opposition to the motion; and the order denying the motion. Appellant argues that omission of these documents from the certified record makes it impossible to know what documents were provided to the decision maker for consideration.

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 that 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.

Appellant has not shown that the documents omitted from the record have any relevance to the issues on appeal or that it suffered any prejudice from the omission of these documents from the record. No discovery issues concerning these documents have been raised by appellant. 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.²

² We note that a certified supplement to the record, dated December 16, 2008, was filed with the Appeals Board, transmitting copies of the documents claimed by appellant to be important to its appeal.

Cases cited by appellant 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 those appellants.

A Motion to Augment is the appropriate way to deal with items that appellant believes should have been included in the record. Appellant filed a Motion to Augment along with its opening brief, but did not ask to have the record augmented with the missing discovery 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.

ORDER

The decision of the Department is affirmed with respect to the issue concerning the administrative record and the matter is remanded to the Department for further proceedings in accordance with the foregoing discussion.³

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

³This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.