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

AB-8851
File: 20-441965 Reg: 07067125

LEE VUE, dba Quick N Save
1780 North Beale Road, Marysville, CA 95901,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: April 2, 2009
San Francisco, CA
Redeliberation: July 2, 2009

ISSUED AUGUST 27, 2009

Lee Vue, doing business as Quick N Save (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 15 days for his wife, Vang Thao, having sold a 24-ounce can of Bud Light beer to Shannon King, a 19-year-old Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Lee Vue, appearing through his counsel, Ralph B. Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated February 28, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 18, 2006. On or about September 26, 2007, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a 19-year-old minor by appellant's clerk. The minor was working as a decoy for the Department at the time.

An administrative hearing was held on January 22, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented. The decoy testified that she presented her valid California driver's license to the clerk when asked for identification. The clerk testified that she was shown a driver's license that showed the decoy was born in 1986, making the decoy at least 21 years old.

Subsequent to the hearing, the Department issued its decision which determined that the violation was proved and appellant had failed to establish a defense under Business and Professions Code section 25660 or Department rule 141 (4 Cal. Code Regs., § 141). Appellant filed a notice of appeal in which he contends: (1) The Department investigator submitted a "309 report" to the Director at the time the accusation was issued, making it a prohibited ex parte communication; and (2) the decision is not based on the record. Appellant also filed a Motion to Augment Record asking that the record be augmented with all forms and/or documents containing comments of Department counsel that were available for review by the decision maker, the 309 report in this case, and any communications relating to the 309 report sent to and from the Hearing and Legal Unit, the Department "prosecutor," and the Director and/or his advisors.

DISCUSSION

I

Appellant asserts that his right to due process was violated "when, after the issuance of the Accusation, Investigator [McCarty][2] sent a '309 report' to the Director regarding this matter." (App. Br. at p. 5.) For this reason, appellant asserts, the decision of the Department must be reversed and the accusation dismissed.

After a violation occurs, it seems that there is often a meeting between a Department representative and the licensee (a "309 hearing"). The purpose of the meeting, apparently, is for the Department to inform the licensee of the potential disciplinary action and to discuss settlement. Following the meeting, the Department representative prepares a 309 report.

The Department's 309 report[3] is a form with designated areas to fill in. Besides places on the form for basic information about the licensee and the license, the form asks for information about "Special Handling"; settlement offers; whether a POIC[4] is acceptable; Stipulation and Waiver forms[5]; and "Notes from meeting with licensee." At the top of the form the addressees are shown as "Division Office" and "Director Via Hearing And Legal." At the bottom are places for the signature of the District Administrator and approval by the Division Office. In the examples attached to

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[2]The briefs refer to the investigator as "McCarthy," but the reporter's transcript shows the investigator spelled his name "McCarty."

[3]This description is based on five examples attached to appellant's closing brief. All five 309 reports provided involve licensees other than appellant.

[4]Petition for Offer in Compromise – essentially a fine paid in lieu of serving a suspension. (Bus. & Prof. Code, § 23095.)

[5]Stipulation and Waiver – a Department form in which a licensee stipulates to the violation and the discipline proposed and waives rights to a hearing and appeal.

appellant's closing brief, the forms are filled in and bear at least one signature. Beyond the assertions in appellant's briefs, we know nothing about a 309 form in the present appeal, including whether it existed and, if so, what information was filled in.

The Administrative Procedure Act (APA)[6] prohibits ex parte communications beginning on "issuance of the agency's pleading." (Gov. Code, § 11430.10, subd. (c).) Appellant argues that the accusation in this case "was signed by Investigator [McCarty] on September 25, 2007 and therefore issued on that date" (App.Br., p. 2), thus beginning the period when ex parte communications are prohibited. On that same date, appellant asserts, after the accusation was signed and issued, McCarty sent a copy of the 309 report to the Department Director. According to appellant, sending the 309 report after the accusation was issued was "a clear violation of Government Code §11430.10 and requires dismissal of this matter." (*Ibid*.)

An ex parte communication is a "communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication," made "[w]hile the proceeding is pending." (Gov. Code, § 11430.10, subd. (a).) Sections 11430.20 and 11430.30 delineate situations in which communications which would otherwise be prohibited under Section 11430.10 are permissible. Section 11430.30 is specifically directed at agencies that are parties. Subdivision (a) allows communication from an agency representative "for the purpose of assistance and advice to the presiding officer," but only if the person communicating "has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage." Subdivision (b)

[6]Government Code sections 11340-11529. Unless otherwise indicated, all statutory references are to sections of the Government Code.

allows the communication when it is to "advis[e] the presiding officer concerning a settlement proposal advocated by the advisor."

Appellant's argument depends on the accusation being "issued" when it was signed and the 309 report being available for the decision maker's review. We conclude that the argument fails on both of these aspects.

For appellant to prevail, the accusation must be considered issued when it was signed, because issuance of the accusation begins the period when ex parte communications are prohibited. If the accusation were issued some time after it was signed, sending the 309 report to the Director could not be considered a prohibited ex parte communication because the communication would not have been made while the proceeding was pending.

"Issuance" is not defined in the APA. Appellant says "issued" must mean something other than "filed" or "served," because the APA uses the latter terms "specifically . . . in relation to an accusation." According to appellant, "the only logical meaning of 'issuance' of an Accusation must be the time in which the Accusation is signed and then submitted for filing." Appellant cites no authority in support of his contention.

We disagree with appellant's conclusion that "signed" must mean "issued." When interpreting a statute to determine the Legislature's intent, we look first at the language itself, "being careful to give the statute's words their plain, commonsense meaning." (*Kavanaugh v. West Sonoma County Union High School Dist*. (2003) 29 Cal.4th 911, 919 [129 Cal.Rptr.2d 811, 62 P.3d 54].)

Courts often begin their determination of a word's "plain meaning" with dictionary definitions. (See, e.g., *In re Establishment of Eureka Reporter* (2008) 165 Cal.App.4th

891, 896, 897 [81 Cal.Rptr.3d 497].) Following is a representative sampling of the dictionary definitions of "issue" that this Board found[7]:

> to put out; deliver for use, sale, etc.; put into circulation. . . . to be sent, put forth, or distributed authoritatively or publicly, as a legal writ or money.
> (Dictionary.com Unabridged (v 1.1. 2009) Random House, Inc.)

> v. tr. 1. To cause to flow out; emit.
> 2. To circulate or distribute in an official capacity: issued uniforms to the players.
> 3. To publish: issued periodic statements.
> (American Heritage Dict. (4th ed. 2004) Houghton Mifflin Co.)

> v. t. 1. To send out; to put into circulation; as, to issue notes from a bank.
> 2. To deliver for use; as, to issue provisions.
> 3. To send out officially; to deliver by authority; as, to issue an order; to issue a writ.
> (Webster's Rev. Unabridged Dict. (1998) MICRA, Inc.)

Notably, none of these definitions have to do with simply signing a document; all reflect the Latin root of "issue" – exīre, meaning "to go out." (American Heritage Dict., *supra*.) The plain meaning of "issue" based on dictionary definitions is to send out or circulate or distribute, clearly something more than just signing the document.

We also disagree with appellant's conclusion that "issuance" cannot mean "filed" or "served" since those terms are "specifically use[d] . . . in relation to an accusation." Appellant does not explain this statement, and we have no idea what it means.

Our conclusion is, in fact, the opposite; we believe that "issuance" in section 11430.10, subdivision (c), means the same as "filing" in section 11503. Section 11430.10 says that "a proceeding is pending from the issuance of the agency's pleading." The pleading in this case is the accusation. Section 11503 says that "[a]

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[7]The definitions shown here were found on the Web site of Dictionary.com. <http://dictionary.reference.com/browse/issue> [as of 06/18/2009].

hearing to determine whether a . . . license . . . should be . . . revoked [or] suspended . . . shall be initiated by filing an accusation." These are simply two ways of describing the beginning of an "adjudicative proceeding," defined in section 11405.20 as "an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision." No discernible purpose is served by appellant's interpretation of issuance except to provide him with a colorable basis for appeal.

Appellant's factual contentions fare no better than his legal ones; he provides *only* contentions, asking this Board to dismiss the accusation ipse dixit. Appellant makes assertions about documents being signed and sent on particular dates, yet the Appeals Board has not seen evidence that would lend credence to those assertions.

Appellant provided nothing with his opening appeal brief in support of his factual allegations. In his closing appeal brief, however, he attaches five 309 reports from other cases, each bearing printed routing directions that list the Director as one of the recipients. This, appellant asserts, is "undeniable evidence" that the Department engaged in "illegal practices" in this matter. It is the Department's burden, appellant insists, "to refute the statements of its own documents, which it did not and cannot do." (App. Cl. Br. at p. 2.) The Department has presented no evidence to satisfy its burden of proof, says appellant, such as a declaration from either the investigator or the Director denying the allegations.

In this diatribe, appellant overlooks the fact that he presented nothing more than unsupported allegations in his opening brief, which the Department denied in its reply brief. The Department was not required to present any evidence refuting appellant's claims until appellant presented some actual evidence establishing a prima facie case.

(See *People v. Zavala* (1983) 147 Cal.App.3d 429, 440 [195 Cal.Rptr. 527]*; Vaughn v. Coccimiglio* (1966) 241 Cal.App.2d 676, 678-679 [50 Cal.Rptr. 876].)

Appellant's "undeniable evidence," not revealed until his closing brief, consists of form documents from cases other than this one.[8] His factual argument hinges on pre-printed routing information on the forms showing the "Director Via Hearing And Legal" as a recipient. Even if we were to accept appellant's contention that the 309 report in this case is the same as the examples, we conclude that, regardless of the routing, the director is prevented from receiving the 309 reports by General Order No. 2007-09.

General Order No. 2007-09 (the Order) was promulgated by the Department in response to several appellate court cases, principally *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] *(Quintanar)*. In *Quintanar,* the California Supreme Court found that the Department had a practice of communicating ex parte with the decision maker following adjudicatory administrative hearings, which violated provisions in the APA. *Quintanar* also said that in cases alleging ex parte communications the Department bears the burden of showing that it has *not* engaged in the prohibited communications.

The Appeals Board has heard many appeals over the last few years in which ex parte communications were alleged and the Department failed to sustain its burden of

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[8]Since appellant presented 309 reports from five other cases, the question is raised, why did appellant not present the 309 report from the present case? Appellant was so specific in his brief about the dates that documents were signed and sent, it is reasonable to assume that he has the document, yet he has chosen not to provide it to this Board. If he has the document but has not provided it, this Board would be justified in inferring that the document does not support his position. If appellant does not have the document, but made a guess and asserted it as a fact, we would likewise draw an inference adverse to his position.

proof as required by *Quintanar*. The Department issued the Order in August 2007, modifying Department internal procedures to comply with *Quintanar*. In appeals where the administrative hearing was held after the Order was issued, the Appeals Board concluded that the Order satisfied the Department's initial burden and shifted the burden of producing evidence of ex parte communications to the appellant. Appellant asserts that the Order does not address the illegal transmission of the 309 report in this case because it occurred before the time period covered by the Order.

While the Order is directed at the post-hearing communications that gave rise to *Quintanar*, we believe that the effect of language (italicized below) in paragraph 3 of the "Procedures" section is to prevent documents such as the 309 report from becoming ex parte communications:

> 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.

The documents included in the "official administrative record" are specified in paragraph 2, and they do not include a 309 report, unless it should happen to be included for some reason as a hearing exhibit. Since it is only the "official administrative record" that goes to the director, the 309 report, even if it did find its way to the Hearing and Legal Unit, would be sequestered in a separate file.

For the reasons indicated in the preceding discussion, we conclude that the Department did not engage in ex parte communication as alleged by appellant. We decline to order the record augmented with the documents listed in appellant's motion, since we have determined that they are documents that were not made available to any Department decision maker prior to the Department issuing its decision. As such, they are not properly included in the administrative record on appeal.

II

Appellant faults the decision as not being based on the record because Finding of Fact 8 does not reflect the testimony regarding what the clerk told the Department investigator immediately after the sale. Finding of Fact 8 states:

> Vang Thao did not make any statements about a fake identification when she was confronted by Department Investigators after the sale, but she testified at the hearing that she believed the identification King had given her before the sale is different from that shown on Exhibit 2, which is a photocopy of King's Drivers License.

In fact, both the clerk and the Department investigator testified that the clerk said that the identification she saw showed the decoy to be 21. (RT 13, 34.)

It seems clear that the administrative law judge (ALJ) was incorrect about what the clerk said after the sale. Appellant argues this was "prejudicial error" (App. Br. at 9) that caused the ALJ to disregard the clerk's testimony at the hearing that the identification she was shown was different from the decoy's driver's license.

Appellant begins by stating the decision must be reversed because it is not based on the record. However, his argument is that the ALJ found the clerk's testimony less credible than that of the Department's witnesses because of the ALJ'S mistaken belief that the clerk did not assert until the hearing that a fake identification was used.

It is well settled that resolution of the issue of credibility is within the province of the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

Appellant has not shown an abuse of discretion. The ALJ affirmatively found "a preponderance of the evidence established that the clerk was provided the decoy's

actual drivers license, and that only that identification was carried by the decoy on August 25, 2007." (Conc. of Law 5.) This conclusion was based on Findings of Fact 6 through 11 (*ibid*.), not just on Finding of Fact 8. Regardless of the ALJ'S mistake about the testimony, all three of the Department's witnesses testified that the decoy had not used a fake identification and this testimony constituted substantial evidence supporting the determination.

Appellant also objects to a statement in the last paragraph of Conclusion of Law 6: "Other than the clerk's self serving and tardy defense, there is no basis for believing the decoy used a false identification." Use of the word "tardy," appellant says, shows that the ALJ based his credibility determination on his erroneous Finding of Fact 8. However, eliminating the word tardy, the statement still says that all the evidence except for the clerk's testimony, which the ALJ found to be self-serving, supported the conclusion that the decoy did not use a false identification to purchase the alcoholic beverage. Again, the ALJ believed the Department's witnesses, and their testimony provided substantial evidence for the ALJ'S conclusion.

ORDER

The decision of the Department is affirmed.[9]

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

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[9]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.