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

AB-8882
File: 41-312926 Reg: 07067031

BJ's RESTAURANTS, INC., dba BJ's Chicago Pizzeria
280 South Coast Highway, Laguna Beach, CA 92651,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 7, 2009
Los Angeles, CA

ISSUED AUGUST 19, 2009

BJ's Restaurants, Inc., doing business as BJ's Chicago Pizzeria (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] suspending its license for 10 days for its server selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant BJ's Restaurants, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

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[1]The decision of the Department, dated April 24, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale beer and wine public eating place license was issued on March 27, 2001. On October 15, 2007, the Department filed an accusation charging that appellant's server sold an alcoholic beverage to 17-year-old Andrew Gordon on July 2, 2007. Gordon was working as a minor decoy for the Laguna Beach Police Department at the time.

Documentary evidence and testimony concerning the sale was presented at an administrative hearing held on March 14, 2008. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no affirmative defense was established.

Appellant filed an appeal contending that the Department (1) 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) engaged in prohibited ex parte communications; (3) provided an incomplete record on appeal; and (4) the administrative law judge (ALJ) abused his discretion when he excluded the testimony of one of appellant's witnesses. 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 in the Department's file of this case, with the Department's General Order 2007-09, and with any related documents.

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 January 16, 2008, 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, in relevant part:

> Effective immediately, the following protocols shall be followed with respect to litigated matters:
>
> 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.
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> 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.
>
> 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.[2] 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 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.

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

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.[3]

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 missing documents were all prepared in connection with appellant's motion to compel discovery: the motion; points and authorities in support of the

[3]On February 9, 2009, the California Supreme Court issued its decision in *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731 [199 P.3d 1142; 88 Cal.Rptr.3d 610], 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.

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 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.

In the first place, the motion-to-compel documents were eventually provided to appellant and this Board on or about January 22, 2009. Therefore, any initial deficiency was cured.

Secondly, we cannot see that appellant has suffered any prejudice by this error. 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.

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 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 contends the ALJ committed reversible error by excluding the testimony of appellant's witness Mel Landuyt. Appellant wanted Landuyt's testimony to provide a basis for mitigation of whatever penalty the Department might impose. Landuyt was to testify about the training employees received, the store's policies regarding alcoholic beverage sales, and the measures taken after this violation to prevent further violations.

The Department objected to Landuyt's testimony because appellant had just provided his name as a potential witness the day before the hearing. Appellant argued that the Department would not be surprised or prejudiced by Landuyt's testimony because, on the day before the hearing, appellant's counsel had telephoned the Department's counsel to let her know of Landuyt as a potential witness and the general

topic of his testimony. Appellant stated, and the Department's counsel did not disagree, that the Department's counsel did not indicate during the telephone conversation that she had any objection to Landuyt taking the stand.

The ALJ refused to allow Landuyt to testify, saying [RT 62-63]:

> Well, I don't think I've run into this situation before with you Ms. Sullivan, but I have with Mr. [Akopyan] within the last couple months, and I find that the practice of disclosing witnesses at the last minute to be something I don't wish to promote. So I'm going to exclude this witness's testimony on the basis that discovery was not responded to in a timely fashion.

Appellant asserts that the only discretionary basis for an ALJ to exclude evidence under the Administrative Procedure Act[4] (APA) is found in Government Code section 11513, subdivision (f):

> The presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time.

In the present case, appellant points out, the ALJ based his exclusion of Landuyt's testimony on the lateness of disclosure. Appellant argues that since Landuyt's testimony was necessary for it to "fully and completely defend this matter," the ALJ's improper exclusion of that testimony should result in the Department's decision being reversed.

The Department contends that the ALJ was within the bounds of his discretion when he excluded the testimony because, according to the Department, Government Code section 11507.6 provides that the parties are entitled to discovery within 30 days of service of the initial pleading. Under that provision, the Department asserts, appellant should have provided discovery by October 2007; instead, appellant waited until five months later, on the day before the hearing, to provide Landuyt's name as a

[4]Government Code sections 11340-11529.

witness. Therefore, the Department concludes, excluding the testimony was proper as a consequence of appellant's failure to comply with section 11507.6.[5] In any case, the Department notes, appellant has cited no case law supporting reversal as the remedy for improper exclusion of a witness.

This appears to be an issue that has not been raised before, although the Board has seen a number of cases in which ALJ's excluded evidence because it was not provided, or was provided late, in discovery. The questions to be answered are whether an ALJ may impose sanctions for providing discovery in an untimely manner, and if so, what sanctions may be imposed for violating administrative discovery provisions.

Prehearing discovery in administrative proceedings is governed by the California APA. Sections 11507.5 through 11507.7 describe the rights to and method of administrative discovery and the procedure for filing and consideration of a motion to compel discovery when one party does not provide the discovery requested. Contrary to the Department's assertion, a party is not entitled to an answer to its discovery request within 30 days of the filing of the initial pleading; it is the written request of a party for discovery that must be made within that 30-day period. The APA puts no time limits on discovery except that a party may file a motion to compel discovery 30 days after a discovery request is made if the other party has not replied by then.

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[5]The Department also quotes the last sentence of Government Code section 11512, subdivision (b):

> A ruling of the administrative law judge admitting or excluding evidence is subject to review in the same manner and to the same extent as the administrative law judge's proposed decision in the proceeding.

Unfortunately, the Department has not explained why it believes this provision is relevant to the determination of this issue.

Not only was there no violation of the APA by appellant's late disclosure, there is no provision in the APA for an "evidence sanction," i.e., excluding evidence or witnesses for misuse of the discovery process. Sanctions for violating provisions of the APA, including the failure or refusal to comply with a discovery request, are found in Government Code sections 11455.10 through 11455.30. Under these provisions, failing or refusing to comply with a discovery request may subject a person to the contempt sanction (Gov. Code, § 11455.10, subd. (e)) or, if done in bad faith or to cause delay, to monetary sanctions (Gov. Code, § 11455.30, subd. (a)). No other sanctions are provided in the APA.[6]

We agree with the Department that the ALJ is granted wide discretion in the conduct of the hearing. However, we do not believe that discretion is so broad that it may supersede the provisions of the APA and create new unauthorized sanctions.

The sanction imposed by the ALJ, except for being unauthorized by the statutes, is not an unreasonable one, and his aim of discouraging dilatory tactics was a legitimate motive. It can be unfair for a party to wait until the day before the hearing to provide the name of a person it wants to call to testify. [7]

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[6]Evidence sanctions are available under the Civil Discovery Act (Civ. Proc. Code, § 2016 et seq.), but "[e]xcept for disciplinary proceedings before the State Bar . . . , the Civil Discovery Act . . . does not apply to administrative adjudication." (*Romero v. Hern* (1969) 276 Cal.App.2d 787, 791 [81 Cal.Rptr. 281].) The California Occupational Health and Safety Appeals Board uses evidence sanctions, but the sanctions are specifically provieded for by regulation. (8 Cal. Code Regs., § 372.7.)

[7]It also appears that the ALJ had experience with one of the other attorneys in the same firm using last-minute disclosures. However, sanctioning appellant for conduct unrelated to appellant's case might be seen as punitive, which is not allowed. Sanctions are to be used only to protect the aggrieved party's interests and not to punish the offending party, particularly for past misdeeds. (*Karlsson v. Ford Motor Co*. (2006) 140 Cal.App.4th 1202, 1217 [45 Cal.Rptr.3d 265]; *Do It Urself Moving & Storage v. Brown, Leifer, Slatkin & Berns* (1992) 7 Cal.App.4th 27, 35 [9 Cal.Rptr.2d 396].)

On the other hand, the Department was not really surprised when appellant wanted to call Landuyt to testify. Appellant's counsel called the Department counsel the day before to alert her about Landuyt and the nature of his testimony. It appears that during that conversation the Department did not object to calling Landuyt. If that is so, it was appellant who was surprised at the hearing, not the Department.

In fact, the Department did not suggest it was prejudiced or surprised. It was simply the circumstance of not being notified earlier that the Department objected to. The Department might have had some real interest in preventing Landuyt from testifying if he had been a key witness on some substantive issue, but he was to testify only about mitigation. It is difficult to imagine that the Department could argue convincingly that it would be prejudiced by allowing Landuyt to testify.

In sum, we conclude that neither the facts nor the law support the exclusion of Landuyt's testimony, and it was an abuse of discretion for the ALJ to do so. We do not know if Landuyt's testimony would have made a difference in the penalty imposed; neither, however, does the Department, since it refused to hear it.

Appellant's position that the decision should be reversed, however, is not well taken:

> [T]he admission or rejection of evidence is not ground for reversal unless there has been a denial of justice. (*Kunimori Ohara v. Berkshire* (9th Cir. 1935) 76 F.2d 204, 207.) "A verdict or finding cannot be set aside on the basis of erroneous admission of evidence if the error did not result in a miscarriage of justice. (Evid. Code, § 353; see Cal. Const., art. VI,§ 13; *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].) *. . ."*

(McCoy v. Bd. of Ret. (1986) 183 Cal.App.3d 1044, 1054 [228 Cal.Rptr. 567].)

There has been no miscarriage of justice here; the testimony excluded could only affect the penalty, not the Department's decision, and the penalty imposed was

already mitigated from the standard penalty. However, since neither we, nor the Department, knows what the excluded testimony would be, we believe that the matter must be remanded to the Department for such further proceedings as are necessary for the Department to take into consideration the mitigation testimony of Landuyt.

ORDER

The decision of the Department is affirmed except as to the penalty, and the matter is remanded to the Department for such further proceedings as are necessary for the Department to take into consideration the mitigation testimony of appellant's witness Mel Landuyt.[8]

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

[8]This 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.