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

AB-9383
File: 20-225860 Reg: 13078708

7-ELEVEN, INC. and IBRAHIM ISMAIL KHANMOHAMED
dba 7-Eleven #2174-26261
4003 East Ocean Boulevard, Long Beach, CA 90803,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: June 5, 2014
Los Angeles, CA

ISSUED JUNE 27, 2014

7-Eleven, Inc. and Ibrahim Ismail Khanmohamed, doing business as 7-Eleven #2174-26261 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, with all 10 days stayed, for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc. and Ibrahim Ismail Khanmohamed, appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly Belvedere.

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[1]The decision of the Department, dated October 3, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 16, 1988. On June 13, 2013, the Department filed an accusation against appellants charging that, on February 26, 2013, appellants' clerk sold an alcoholic beverage to 19-year-old Brett Manis. Although not noted in the accusation, Manis was working as a minor decoy for the Long Beach Police Department at the time.

At the administrative hearing held on September 17, 2013, documentary evidence was received and testimony concerning the sale was presented by Manis (the decoy) and by Officer Kevin Ong of the Long Beach Police Department. Appellants presented no witnesses.

Testimony presented by the decoy established that, on the date of the operation, he entered the licensed premises, proceeded to the coolers, and selected a six-pack of Bud Light beer in bottles. He then took the beer to the sales counter for purchase.

The decoy placed the beer on the counter, and the clerk asked him for identification. The decoy handed the clerk his California driver's license, which bore his correct date of birth, June 7, 1993, as well as a red stripe reading "AGE 21 in 2014." The clerk examined the identification for five or ten seconds, then handed it back. The clerk did not ask any age-related questions, nor did he ask any questions about the identification. The decoy paid, received his change, and left the premises.

The officers supervising the operation took the decoy back into the store, identified themselves to the clerk, and advised him of the violation. The decoy was asked who sold him the beer. The decoy pointed at the clerk, and indicated the clerk was the one who had sold the beer. At the moment of identification, the decoy and the clerk stood approximately two to three feet apart and were facing each other, and the

clerk was aware he was being identified. A photograph was taken of the clerk with the decoy holding the beer he purchased.

Testimony presented by Officer Ong was stricken from the record, and was not considered as part of the proposed decision.

The Department's decision determined that the violation charged was proved and no defense was established. A penalty of 10 days suspension was imposed, with all ten days stayed on the condition that no cause for discipline occur within the following year.

Appellants then filed this appeal contending that the record provided to the Department Director included an illegal ex parte communication in the form of the Decoy Information Sheet and the Long Beach Police Department Notice to Appear.

DISCUSSION

I

Appellants contend that the inclusion of Exhibits 5 and 6—the Decoy Information Sheet and Long Beach Police Notice to Appear—in the administrative record constitutes an impermissible ex parte communication. Appellants argue that the inclusion of these exhibits merits dismissal of the case.

An ex parte communication is broadly defined as "[a] generally prohibited communication between counsel and the court when opposing counsel is not present." (Black's Law Dictionary (7th ed. 1999) p. 597.) Section 11430.10 of the Government Code provides, in relevant part:

> (a) While the proceeding is pending there shall be no 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.

> (b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

Section 11430.70 extends the prohibition on ex parte communications to agency heads:

> (a) Subject to subdivision (b) and (c), the provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

The California Supreme Court, in *Quintanar*, read section 11430.70 to hold that ex parte communications are forbidden not only during the trial stage, but at any point in the course of adjudication, including the decisionmaking phase. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Quintanar)* (2006) 40 Cal.4th 1, 11-14 [50 Cal.Rptr.3d 585]; see also *Chevron Stations, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6] [ex parte hearing reports require reversal even where Department accepts the ALJ's decision].)

Section 11430.50 provides guidance where a presiding officer (or agency head, pursuant to section 11430.10(a)) receives an improper written communication:

> (a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:
>
> > (1) If the communication is written, the writing and any written response of the presiding officer to the communication.
> >
> > ¶ . . . ¶
>
> (b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.
>
> (c) If a party requests an opportunity to address the communication within 10 days after receipt of the notice of the communication:
>
> > (1) The party shall be allowed to comment on the communication.

> (2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

Thus, the proper remedy, when a decision maker receives an unsolicited ex parte communication, is to immediately lift the veil of secrecy and give the opposing party an opportunity to respond.

In *Quintanar*, the court reversed the Department's orders largely because of the secretive nature of the hearing reports:

> The Department implies no remedy is necessary because any submission was harmless; according to the Department, the decision maker could have inferred the contents of the reports of hearing (to wit, a summary of the hearing and requested penalty) from the record. We are not persuaded. First, because the Department has refused to make copies of the reports of hearing part of the record, despite a Board order that it do so, whether their contents are as innocuous as the Department portrays them to be is impossible to determine. Second, although both sides no doubt would have liked to submit a secret unrebutted review of the hearing to the ultimate decision maker or decision maker's advisors, only one side had that chance. The APA's administrative adjudication bill of rights was designed to eliminate such one-sided occurrences.

(*Quintanar*, *supra*, 50 Cal.Rptr. 3d at p. 17.)

Notably, *Quintanar* closed with an observation that the Department's post-hearing reports were, in fact, permissible, provided the Department complied with the requirements of section 11430.50:

> The APA bars only advocate-decision maker ex parte contacts, not all contacts. Thus, for example, nothing in the APA precludes the ultimate decision maker from considering posthearing briefs submitted by, and served on, each side. The Department if it so chooses may continue to use the report of hearing procedure *so long as it provides licensees a copy of the report and the opportunity to respond.* (Cf. § 11430.50 [contact with presiding officer or decision maker must be public, and all parties must be afforded opportunity to respond].)

(*Ibid.*, emphasis added.)

In *City of Pleasanton*, the court of appeals interpreted this passage from

Quintanar to mean that "under the APA the agency decision maker cannot properly solicit or receive *private, ex parte* advice from the personnel who serve as adversaries in the case." (*City of Pleasanton v. Bd. of Admin. of the Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 533 [149 Cal.Rptr.3d 729], emphasis in original.) Thus, as a matter of law, the decisionmaking body in *City of Pleasanton* was not precluded from receiving a written prosecutorial analysis and recommended disposition as part of a public agenda packet that *also* included the opposing party's analysis and recommendations. (*Ibid.*) The court of appeals laid out guidelines for when such communications are permissible:

> [D]ue process . . . does not in general preclude the advocate for the agency staff's position from communicating with and making recommendations to the agency decision maker or the decision maker's advisors about the substance of the matter as long as (1) no part of the communication is made ex parte, (2) the administrative appellant is simultaneously afforded at least the same opportunity to communicate with the decision maker as the staff advocate, and (3) the decision maker is not subject to the advocate's authority or direction.

(*Id.* at p. 536.)

In the wake of *Quintanar*, the Department issued a general order outlining the documents to be included in the record provided to the Director: "The Administrative Hearing Office shall forward proposed decisions, together with any exhibits, pleading 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." (Dept. of Alcoholic Bev. Control, General Order 2007-09 (August 10, 2007), emphasis added.) By its plain language, the Department's order excludes documents *not* considered by the ALJ.

This Board recently decided a case in which a document neither admitted nor

rejected, but merely marked, was nevertheless included in the administrative record provided to the Department Director in his decisionmaking capacity. (See *Garfield Beach CVS* (2014) AB-9355.) The Department argued that the inclusion was merely inadvertent. This Board reversed, noting that lack of intent was no defense to an ex parte communication in light of the potential for abuse.

In another recent case, a police report was submitted by the Department and marked into evidence. (*Lee* (2014) AB-9359, at pp. 4-7.) The licensee objected to admission of the report. The Department responded by withdrawing it. Despite the withdrawal, the report appeared in the administrative record forwarded to the Department Director. On appeal, this Board observed that in light of the withdrawal, the appellant had no reason to believe the exhibit would become part of the record sent to the Director. It noted further that, under the Department's post-*Quintanar* policy, the Director should not have received the withdrawn exhibit. This Board declined to reverse the decision below only because the withdrawn document pertained solely to counts that had already been dismissed in the decision below. With regard to the sustained counts, the report had no relevance or persuasive value whatsoever.

In the present case, the two documents at issue — the Decoy Information Sheet and a Long Beach Police Department Notice to Appear — were marked into evidence as Exhibits 5 and 6, respectively. At the closing of the hearing, there was considerable discussion regarding the credibility of the Department's witness, Officer Ong. (See RT at pp. 79-83.) Counsel for appellants lodged a firm objection to the admission of Ong's testimony, pointing to a supplemental report Ong mentioned that was never forwarded to appellants in discovery, and arguing "I don't think this officer has a clue as to what he did, what he saw, what he recalls, what he doesn't, what the report said, what the report

should have said. And I don't think he has a clue as to whether or not he even prepared a supplemental report." (RT at p. 81.) The Department conceded that it also didn't know whether the supplemental report existed, as it never received it from the Long Beach Police Department, (RT at pp. 80-81), but argued that the same information appeared in the decoy information sheet. (Exhibit 5.) Based on the absence of the alleged supplemental report, counsel for appellants moved to exclude all testimony and documentary evidence. (RT at p. 82.)

Ultimately, the ALJ considered each exhibit individually. Counsel for appellants characterized Exhibit 5 as hearsay, because it was prepared by Agent Duong, not Officer Ong. (RT at p. 81.) The Department conceded that it would need Duong to testify in order to lay a full evidentiary foundation. (*Ibid.*) However, the Department pointed out that Officer Ong was questioned regarding several portions of Exhibit 5, and asked that those portions alone be admitted in order to explain his testimony. (RT at p. 86.)

Ultimately, the ALJ excluded the entirety of Officer Ong's testimony as unreliable. (RT at p. 88.) He specifically noted that Ong's testimony would not be considered in any manner in rendering the decision. (*Ibid.*) He also excluded Exhibits 5 and 6, though both were the basis of questioning during Ong's testimony, because they lacked foundation. (RT at pp. 87-88.) The decision, when it issued, included the following language:

> It should be noted that the testimony of Long Beach Police Officer Kevin Ong was stricken from the record and not considered in any manner as part of this proposed decision. In totality his testimony and exhibits presented (Exhibits 5 and 6) could not be relied upon in rendering this decision.

(Conclusions of Law ¶ 7.)

It is true that this Board's recent decisions involving allegations of ex parte communications have relied on the language in the Department's Order limiting the record to "evidence considered by the administrative law judge." (General Order 2007-09, *supra*.) In those cases we noted that, because the documents were *not* considered by the ALJ, the appellants could not reasonably expect for them to end up on the Department Director's desk.

Those cases, however, bore the very hallmark of an ex parte communication: the inability of opposing party to respond. In *Garfield Beach CVS*, in which this Board reversed the decision below, the document was merely marked, and no further mention was made of it whatsoever in the course of the hearing. (See AB-9355.) In *Lee*, the appellant objected and the Department immediately withdrew the document — a move that would lead an appellant to forego further response in the belief that the issue is moot. (See AB-9359.) Where a party responds to the document in detail, however, and that response is included in the record, concerns about unfairness evaporate.

Moreover, because the ALJ weighed arguments for and against Exhibits 5 and 6 before ultimately rejecting them, a strong argument could be made that he “considered” them, even if they in no way influenced his decision. Thus, their inclusion in the record provided to the Director was proper under the Department’s General Order.

In the present case, there was prolonged discussion about the Officer Ong's credibility, and the exhibits in question formed the basis of questioning which ultimately led to the total exclusion of his testimony. To say that appellants had no opportunity to respond to Exhibits 5 and 6 is to ignore the record. Because appellants were aware of both documents and responded to them in detail, there is no ex parte communication. Moreover, the ALJ “considered” them, within the meaning of the Department’s General

Order, before ultimately rejecting them. The documents, like Officer Ong's heavily disputed testimony, were properly included in the record supplied to the Director.

ORDER

The decision of the Department is affirmed.[2]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2]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.