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

AB-9411
File: 20-325903 Reg: 13078971

7-ELEVEN, INC. and SUNG H. CHOE,
dba 7-Eleven Store #2233-29737
1760 Fremont Boulevard, Suite A1, Seaside, CA 93955,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: October 2, 2014
Sacramento, CA

ISSUED OCTOBER 13, 2014

7-Eleven, Inc. and Sung H. Choe, doing business as 7-Eleven Store #2233-29737 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, all 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 Sung H. Choe, appearing through their counsel, R. Bruce Evans and Jennifer L. Carr of Solomon Saltsman & Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, Heather Hoganson.

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[1]The decision of the Department, dated January 31, 2014, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on January 31, 1997. On July 29, 2013, the Department filed an accusation against appellants charging that, on June 22, 2013, appellants' clerk, Rosa Olmedo (the clerk), sold an alcoholic beverage to 19-year-old Andrew McIntire. Although not noted in the accusation, McIntire was working as a minor decoy for the California State University Monterey Bay Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on November 19, 2013, documentary evidence was received and testimony concerning the sale was presented by McIntire (the decoy) and by Daniel Andrada, a California State University (CSU) Monterey Bay Police Officer. Co-licensee Sung Choe testified for appellants.

The facts of this case are undisputed. Testimony established that on the date of the operation, appellants' clerk sold a six-pack of Bud Light beer to the decoy.

The Department's decision determined that the violation charged was proved and no defense was established. In light of mitigating evidence, appellants received a penalty of 10 days' suspension, all stayed on the condition that no cause for disciplinary action occur within one year of the effective date of the decision.

Appellants then filed this appeal contending that the administrative record provided to the Department Director in his decisionmaking capacity improperly included the CSU Monterey Bay police report and face sheet, in violation of the Department's internal policy as expressed in a General Order issued in 2007.

DISCUSSION

Appellants contend that the inclusion of Exhibit 2, a CSU Monterey Bay police report and face sheet, in the administrative record provided to the Department Director in his decisionmaking capacity constitutes a violation of a Department General Order. This, they contend, merits reversal. Appellants do not allege an ex parte communication, but instead argue that Exhibit 2 was not "considered" by the ALJ and therefore, under the language of the General Order, should not have been forwarded to the Director.

The facts of this case are entirely undisputed. All that remains are pure questions of law: did the inclusion of Exhibit 2 violate the Department's General Order, and if so, can the violation of the General Order alone lead to reversal?

The General Order in question is an internal directive issued in the wake of the *Quintanar* decision. (See *Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd. (Quintanar)* (2006) 40 Cal.4th 1, 11-14 [50 Cal.Rptr.3d 585] [holding that hearings reports produced by Department counsel and forwarded to the Director in his decisionmaking capacity constituted illegal ex parte communications].) It reads, in relevant part: "The Administrative Hearing Office shall forward the proposed decision, 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." (Department of Alcoholic Beverage Control, General Order 2007-09 (August 10, 2007).)

The General Order, however, is not law — it is merely an internal directive aimed at avoiding ex parte communications of the sort that gave rise to *Quintanar*. As we have observed elsewhere, "the General Order is *only* relevant for purposes of

determining whether an appellant received sufficient notice and the opportunity to respond." (*7-Eleven/Sirisut* (2014) AB-9398, at p. 11, emphasis in original.)

In this case, appellants do not allege an ex parte communication. The General Order, which is not law and cannot itself provide a defense, is therefore irrelevant.

The California Code of Regulations, on the other hand — which *is* law — defines what documents shall be included in the administrative record:

> Any person may request a copy of all or a portion of the record, subject to any protective order or provisions of law prohibiting disclosure. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by an ALJ, the final decision, a transcript of all proceedings, *all exhibits whether admitted or rejected*, the written evidence and any other papers in the Case, except as provided by law.

(Cal. Code Regs., tit. 1, § 1038(a), emphasis added.) Thus, where an ALJ has issued a ruling on an exhibit, whether admitting or excluding, the document must be included in the record. This is necessary because evidentiary rulings are appealable. Moreover, the decision to admit or exclude is made on the record at the administrative hearing after both parties have had the opportunity to respond. Assuming the two conflict, section 1038(a) undeniably trumps the General Order.

We are not convinced, however, that the inclusion of Exhibit 2 violated the General Order at all. Following appellants' objection to portions of Exhibit 2, both parties and the ALJ engaged in extensive discussion regarding the evidentiary value of the document. (See RT at pp. 15-17, 50-52.) Merely ruling to admit or exclude would be sufficient to establish that the ALJ "considered" the document within the meaning of the General Order and mandate its inclusion under § 1038(a). In this case, however, the record shows an unusually thorough consideration of the evidentiary arguments followed by a well-reasoned ruling excluding certain limited portions of the exhibit. To

claim, despite this, that the ALJ did not "consider" Exhibit 2 is absurd.

Finally, appellants rely on three cases in which at least one document was improperly forwarded to the Director in his decisionmaking capacity. (App.Br. at pp. 4-5, citing *Garfield Beach CVS, LLC* (2014) AB-9355; *Basra* (2008) AB-8645; *Circle K Stores, Inc.* (2007) AB-8597.) All of those decisions, however, turned on the existence of an ex parte communication — which appellants do not allege in this case — and only one of the three makes any mention at all of the General Order. (See *ibid.*) The cases are therefore wholly unsupportive.

Simply stated, appellants' case is, as a matter of law, entirely meritless.

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.