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

AB-8597
File: 20-213075 Reg: 05061286

CIRCLE K STORES, INC. dba Circle K Store 5017
2549 Blossom Street, Dos Palos, CA 93620,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 4, 2007
San Francisco, CA

ISSUED DECEMBER 20, 2007

Circle K Stores, Inc., doing business as Circle K Store 5017 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, all of which were stayed on the condition appellant operate violation-free for one year, for its clerk having sold a 12-pack of Bud Light beer in cans to Jesse Arreola, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

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[1]The decision of the Department, dated August 10, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1993. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on November 10, 2005.

An administrative hearing was held on June 9, 2006, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Jesse Arreola, the decoy, and Mark Gedney, a Department investigator. No one testified on behalf of appellant.

The decoy testified that the clerk complimented him on how very young he looked and said that she had to see his ID. He showed her his California driver's license (Exhibit 2). The license contained his date of birth and a red stripe containing the words "21 IN 2007." The clerk looked at it, handed it back to him, and sold him the beer. The decoy met Investigator Gedney outside the store, showed him the beer, and then reentered the store with Gedney and another investigator. He identified the clerk who sold him the beer, and told her he was only 19 years old.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved, and rejected appellant's contention there had been a violation of Department Rule 141(b)(2).

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the Department communicated ex parte with its decision maker. In addition to contending that a report of hearing was made available to the Department decision maker, appellant asserts that a number of other documents were made

available to the Department decision maker without appellant's knowledge.

DISCUSSION

On November 13, 2006, the California Supreme Court held that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA.[2] (*Dept. of Alcoholic Beverage Contyrol v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] (*"Quintanar"*)). In *Quintanar*, the Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access to the report of hearing, establishing, the court held, "that the reports of hearing were provided to the agency's decision maker." *(Id.* at pp. 15-16.)

In the present case, appellant contends a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar* has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

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[2] Gov. Code §11430.10 et seq.

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any report of hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. In earlier cases where this issue has arisen, the Board has ordered the case remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.[3]

However, this case presents, in addition to the *Quintanar* issue, the unanswered contention that five documents, none of which were offered in evidence were included in the file which was submitted to the Department's decision maker or its advisors, without notice to appellant,[4] and which appellant claims resulted in prejudice. The contention is based on the inclusion of these documents in the certified record

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[3] The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand would necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

[4] Appellant was aware of the existence of such documents, having been provided copies through discovery. However, there is nothing to indicate to appellant that they would become part of the certified record.

furnished to the Appeals Board pursuant to Appeals Board Rule 188.[5]

The documents consist of the following:

(1) ABC Form 309. This document is a brief factual summary of the transaction, the standard and recommended penalties for the offense, and a short summary of the telephonic conference in which appellant's counsel was advised of the Department's intent to file an accusation.

(2) ABC Form 304, captioned "Decoy Information Sheet," identifies the decoy in question, sets forth his height, weight, eyes and hair color, and provides information to the effect that the requirements of Rule 141 were satisfied.

(3) ABC Form 333 is the investigator's four-page narrative summary of the details of the incident in question, including statements attributed to the clerk, and lists a number of attachments, including Forms 309, 304, and other documents.

(4) ABC Form 338, captioned "Decoy Operation Results," lists all of the premises visited during the decoy operation. Appellant's premises is the only one listed as having committed a violation.

(5) This document is a copy of the cash register receipt from the transaction in question.

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[5] Rule 188 provides:

The record on appeal filed with the board shall consist of:

(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;

(2) the hearing reporter's transcript of all proceedings;

(3) exhibits admitted or rejected.

Needless to say, these documents as a whole contain a great deal of information about the transaction that either duplicates or expands upon the evidence adduced at the hearing. We doubt that it could seriously be contended that a decision maker presented with these documents would not be influenced by the support they lend to the decision under review.

Their inclusion in the certified record, implying that they were in the file presented to the Department's decision maker, without notice to appellant, resulted in an impermissible ex parte communication pursuant to the terms of Government Code section 11430.10 and the sections which follow.

Unlike the *Quintanar* issue, where the Department ordinarily raises the factual issue whether there was an ex parte communication, its brief in this case essentially concedes the issue as to these documents, making no attempt to explain, excuse or defend their inclusion in the certified record. The brief contains only a summary of the undisputed facts concerning the sale, followed by a single sentence in the section of the brief where the argument ordinarily appears: "The Department submits the above-entitled matter to the Appeals Board."

Given these circumstances, we can only conclude that the case has been so tainted by the ex parte communications that the only appropriate relief is a dismissal of the accusation.

ORDER

The decision of the Department is reversed and the case is remanded to the

Department for such further proceedings as may be appropriate in light of the Board's comments herein.[6]

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

[6] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.