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

AB-8619
File: 20-334079 Reg: 06062216

CHEVRON STATIONS, INC. dba Chevron
18060 San Ramon Valley Boulevard, San Ramon, CA 94583,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert Coffman

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

ISSUED JANUARY 2, 2008

Chevron Stations, Inc., doing business as Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, with 5 days thereof conditionally stayed, subject to one year of discipline-free operation, for its clerk, Monica Rich, having sold a 24-ounce can of Budweiser beer to Kathryn Doyen, an 18-year-old Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated September 21, 2006, is set forth in the appendix.

PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on February 25, 1998. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on February 10, 2006.

An administrative hearing was held on July 25, 2006, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and that no affirmative defense had been established.

Appellant has filed a timely notice of appeal, raising the following issues: (1) the Department communicated with its decision maker on an ex parte basis, in violation of the APA; (2) the Department failed to proceed according to law in its determination of penalty; and (3) the decision fails to analyze the reasons for finding that the face to face identification was not unduly suggestive.

DISCUSSION

I

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 Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.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

[2] Gov. Code §11430.10 et seq.

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.)

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. We conclude that this matter must be 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]

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[3] The Department has in other cases 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 will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not

(continued...)

II

Appellant contends that the Department erred in its assessment of penalty by failing to accord appropriate weight to the period of time appellant had operated its premises without having incurred discipline. It cites the aggravating and mitigating factors set forth in the Department's penalty guidelines (Title 4, Cal. Code Regs., §144), and argues that the administrative law judge (ALJ) improperly imposed a penalty more severe than the penalty recommended by Department counsel. The ALJ did this, appellant contends, by according weight to aggravating factors (the minor's youthful appearance and the clerk's awareness of the minor's 1987 birth date) which, if true, were known to Department counsel at the time he made his penalty recommendation. Alternatively, appellant contends the aggravating factors are not supported by record evidence.

The Appeals Board may not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. *(Martin v. Alcoholic Beverage Control Appeals Board & Haley* (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (*Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board* (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

The Board said in *Corona* (2000) AB-7329, cited by appellant, that an ALJ is

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[3](...continued)
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.

required to explain an upward departure from the penalty recommendation of Department counsel. In this case, Department counsel had recommended a 10-day, all conditionally stayed, suspension. The ALJ instead imposed a penalty of 15 days, 5 of which were conditionally stayed.

In *Busby* (1998) AB-6959, also cited by appellant, a Department penalty that was greater than the penalty recommended by Department counsel was reversed by the Appeals Board. The Board found that the ALJ proceeded on an erroneous premise as to the penalty Department counsel had recommended. It also found that the clerk's reliance on an expired driver's license should not have been considered an aggravating factor, since there was no evidence the clerk knew or should have known the purchaser of alcoholic beverages was a minor. In the present case, the ALJ was not mistaken as to the penalty sought by the Department, and there was evidence from which he could reasonably infer that the clerk knew or should have known the purchaser was a minor. In light of those differences, we do not find *Busby* particularly persuasive.

The ALJ in the present case explained his departure from the Department's recommendation at some length (Determination of Issues 7, paragraph 2):

> The complainant's recommended penalty in this matter, a 10-day suspension with all 10 days stayed, is not appropriate under the facts and circumstances of the violation and is not in accord with the Department's guidelines for section 25658(a) violations. The rationale for the complainant's recommendation, that the respondent has suffered no prior disciplinary action, is a legitimate mitigating factor. However, there are no other mitigating factors. Even without any aggravating factors, the fact of no prior discipline is insufficient to reduce a standard 15-day suspension to one where the entire suspension is stayed. Mitigating factors referred to in the Department's guidelines, positive actions by the licensee to correct problems related to the violation and documented training of the licensee and its employees, were absent in this case. If such mitigating factors were present in this case presumably the suggested penalty would have been further reduced to a 5 day stayed suspension, or to no discipline at all. If the entire period of suspension is stayed in this matter it would seem that a similar penalty would be the most appropriate one in most, if not all,

section 25658(a) violations where the licensee has no record of prior discipline.

In *Corona*, supra, the Board reversed a decision which imposed a penalty greater than Department counsel had recommended, without any explanation by the ALJ why he did so. The concern expressed by the Board was that the ALJ's upward departure from the Department's recommendation may have been "the product of oversight or misunderstanding."

The explanation offered by the ALJ in this case dispels the notion that it was the product of oversight or misunderstanding. To the contrary, it is clear that the ALJ deemed the Department's recommendation inconsonant with its own guidelines and a bad precedent for future cases. Thus, the result reached by the Board in *Corona* has no application in this case

The recommended penalty falls within the Department's penalty guidelines. We cannot say the Department abused its discretion in adopting it.

III

Appellant contends that the decision erroneously concludes as a matter of law that there is no defense that a face to face identification was unduly suggestive, and that the decision fails to explain its conclusion that the identification was not the result of undue suggestion.

As the Department decision observed, the Board has uniformly rejected the claim that a face to face identification conducted in a manner similar to that in this case was unduly suggestive. While it is true that a court of appeal has acknowledged the existence in the abstract of such a defense (see *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd./Keller* (2003) 109 Cal.App.4th 1687 [1

Cal.Rptr.3d 339]), it is apparent from the result in that case that the identification process used in decoy cases does not support such a defense. In *Keller*, the court rejected the claim of undue suggestion even though the clerk had been taken outside the store to be confronted by the decoy.

> We note that single-person show-ups are not inherently unfair. (*In re Carlos M*. (1990) 220 Cal.App.3d 372, 386 [269 Cal.Rptr. 447].) While an unduly suggestive one-person show-up is impermissible (*ibid*.), in the context of a decoy buy operations [sic], there is no greater danger of such suggestion in conducting the show-up off, rather than on, the premises where the sale occurred.

(*Id*. at 109 Cal.App.4th 1698.)

The movement of the clerk from behind to the front of a store counter is certainly no more suggestive that the removal of the clerk from the premises itself, which was the case in *Keller*. The interval between the time the decoy purchases an alcoholic beverage and the time he is asked to identify the seller is so brief that the likelihood of a misidentification is extremely unlikely, regardless of where the clerk may be standing.

We note further that there is no evidence in the record that there was another clerk in the premises at the time, so the possibility the decoy might have been misled or mistaken is simply fantasy.

Contrary to appellant's contention, we do not read the Department's decision in this case as rejecting the very existence of the defense of an unduly suggestive identification. Instead, the Department simply found one had not been established.

ORDER

The decision of the Department is affirmed as to issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in

accordance with the foregoing opinion.[4]

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

[4]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.