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

AB-8652
File: 20-345437 Reg: 06062149

CHEVRON STATIONS, INC. dba Chevron Stations, Inc.
27513 Ward Drive, Kettleman City, CA 93239,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 10, 2008
San Francisco, CA

ISSUED MARCH 26, 2008

Chevron Stations, Inc., doing business as Chevron Stations, Inc. (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for its clerk having sold a six-pack of Budweiser Select beer to David Medina, a 17-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.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 1, 1999.

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[1]The decision of the Department, dated November 2, 2006, is set forth in the appendix.

The Department instituted an accusation against appellant in March 2006, charging the sale of an alcoholic beverage to a minor on February 11, 2006.

An administrative hearing was held on September 19, 2006, at which time oral and documentary evidence was received. At that hearing, the evidence established that appellant's clerk sold beer to a minor decoy without having asked him his age or for identification. The sale transaction was not disputed.

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 under Rule 141(b)(2).[2]

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department communicated ex parte with its decision maker; and (2) there was no compliance with Rule 141(b)(2).

DISCUSSION

I

Appellant makes in this appeal essentially the same arguments as it made at the administrative hearing concerning the decoy's appearance, and we find them no more persuasive than did the administrative law judge (ALJ). Appellant describes the decoy as a "fit young man" with a chiseled physique, possessing a physical appearance far different from that of an average, unfit, and overweight modern day teenager. Appellant also stresses the decoy's Police Explorer and high school ROTC experience, the

[2] Rule 141(b)(2) (4 Cal. Code Regs., §141(b)(2)) provides: "The decoy shall display the appearance which could generally be expected of a person under twenty-one years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense."

number of decoy operations in which he participated, and his "mature poise and demeanor."

The administrative judge (ALJ) addressed the decoy's appearance in Finding of Fact III and Determination of Issues II:

> FF III. While in high school, the decoy played football and baseball, and was in the Navy ROTC program. He also was a police explorer for approximately three and a half years. Prior to February 11, 2006, the decoy had participated in three decoy operations, during which he visited approximately fifteen to twenty licensed premises. The decoy joined the Navy on January 20, 2006, and began training as a Navy SEAL "right before" February 11.
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> DI II. Respondent argued that there was a violation of the Department's Rule 141(b)(2) in that the decoy's many activities made him a confident person, thereby also making him older. The argument is rejected.
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> Playing football and baseball in high school, participating in a high school ROTC program, joining the Navy, and being a decoy are things that teenagers do. While these activities may well have made the decoy become more confident, there is no evidence that they made him appear older. More importantly, there is no evidence that they made the seventeen-year old decoy appear twenty-one years old.

This is the typical case where appellant's counsel asks this Board to substitute its judgment about the appearance of a decoy it hasn't seen for that of an experienced ALJ who saw and heard the decoy as he testified.

There has been no reason shown in this case for the Board to withhold the deference it accords to administrative law judges when dealing with a challenge under Rule 141(b)(2). Appellant's contention is rejected.

II

Appellant contends the Department violated the APA by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision. It relies on the California Supreme Court's holding in *Department of Alcoholic*

Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*) and appellate court decisions following *Quintanar*, *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [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*). It asserts that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred.

The Department makes no argument in its brief, but states that none of the documents requested in the motion to augment exist. Attached to this statement is a declaration signed by Department staff attorney Dean Leuders who represented the Department at the administrative hearing. In this declaration, Leuders states that at no time did he prepare a report of hearing or other document, or speak to any person, regarding this case. In its brief, the Department makes no statements or assertions concerning these denials or what it believes should be the effect of them on this appeal. At oral argument, the Department argued that the Board should accept the declaration as conclusive evidence that the documents requested do not exist.

We agree with appellant that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar*, *supra*.

The Department apparently believes that it need only include a declaration denying the existence of an ex parte communication for the Appeals Board to rule in its favor. The appellant argues that the declaration is inadequate. We agree with appellant.

Three courts have now issued published decisions in which the Department's practice of ex parte communication with its decision maker or the decision maker's advisors is determined to be endemic in that agency. (*Quintanar*, *supra*, 40 Cal.4th 1, 5 [ex parte provision of report of hearing was "standard Department procedure"]; *Rondon*, *supra*, 151 Cal.App.4th 1274, 1287 ["widespread agency practice of allowing access to reports"]; *Chevron*, *supra*, 149 Cal.App.4th 116, 131 [ex parte communication not unique to *Quintanar* case, "but rather a 'standard Department procedure'"].) The Department has presented no evidence in this case, or any of the numerous other cases this Board has seen on this issue, that the "standard Department procedure" has changed. The Department has not provided, for example, a written policy, with a date certain, from which we could conclude that the Department has instituted an effective policy screening prosecutors from the decision makers and their advisors. The Department bears the burden of proving that it has adequate screening procedures (*Rondon*, *supra*), and without evidence of an agency-wide change of policy and practice, we would be exceedingly reluctant to affirm or reverse on the basis of a single declaration, especially where there has been no opportunity for cross-examination.[3]

For the foregoing reasons, we will do in this case as we have done in so many other cases, that is, remand this matter to the Department for an evidentiary hearing.

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[3]"The general rule in civil actions is that absent statutory authorization, stipulation of the parties, or a waiver by failure to object, an affidavit (Code Civ. Proc., § 2003) or a declaration under penalty of perjury (Code Civ. Proc., § 2015.5) is not competent evidence; it is hearsay because it is prepared without the opportunity to cross-examine the affiant. (Evid. Code, §§ 300, 1200; see Code Civ. Proc., § 2009; Witkin, Cal. Evidence (2d ed. 1966) § 628, p. 588.)"
(Windigo Mills v. Unemployment Ins. Appeals Bd.(1979) 92 Cal.App.3d 586, 597 [155 Cal.Rptr. 63].)

ORDER

The decision is affirmed with respect to the claim concerning Rule 141(b)(2), and this matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[4]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. 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.