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

AB-8665
File: 21-399702 Reg: 05059967

EZ STOP DELI, dba EZ Stop Deli 2233
Shattuck Avenue, Berkeley, CA 94704,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Stewart A. Judson

Appeals Board Hearing: April 3, 2008
San Francisco, CA

ISSUED: JULY 8, 2008

EZ Stop Deli, doing business as EZ Stop Deli (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for appellant's 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 appellant EZ Stop Deli, appearing through its counsel, Richard D. Warren, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

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[1] The decision of the Department, dated November 16, 2006, is set forth in the appendix.

Appellant's off-sale general license was issued in 2003.[2] On June 22, 2005, the Department filed an accusation against appellant charging that, on March 2, 2005, appellant's clerk sold an alcoholic beverage to 19-year-old John Chavoor. Although not noted in the accusation, Chavoor was working as a minor decoy for the Berkeley Police Department at the time.

At the administrative hearing held on November 23, 2005 and August 23, 2006, documentary evidence was received, and testimony concerning the sale was presented by Chavoor (the decoy) and by Steve Rego, a Berkeley police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, no defense had been established, and the offense was appellant's third sale-to-minor violation in a span of 12 months.

There were two proposed decisions in this case. In the first, which concerned a second sale to a minor within one year, the ALJ's recommendation was that the license be revoked, but revocation to be stayed subject to a two-year probationary period, service of a 30-day suspension, the imposition of a condition on the license prohibiting sales of alcoholic beverages between the hours of 11:30 a.m. to 3:30 p.m., and a requirement that the licensee's employees attend a LEAD program annually. The Department, acting pursuant to Business and Professions Code section 11517, subdivision (c), declined to adopt the proposed decision, and ordered the case remanded for the taking of additional evidence. Upon remand, evidence was introduced establishing that an appeal of a decision finding a third sale-to-minor within that same year had become final, and the order of revocation from which this appeal

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[2] Appellant was first issued an off-sale general license in 1998. The current license was issued following appellant's incorporation.

has been taken was entered. The second proposed decision, adopted by the Department, was essentially identical to the first except with respect to its determination of penalty.

Appellant has filed an appeal making the following contentions: (1) The Department communicated ex parte with its decision maker in violation of the Administrative Procedure Act; and (2) the Department abused its discretion by failing to accord proper weight to acts in mitigation. Appellant has also filed a motion to augment the record by the addition of any documents relating to the alleged ex parte communication.

DISCUSSION

I

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 states that, with the exception of General Order No. 2007-09, 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, Mr. 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. In a separate reply and response to the motion to augment, Mr. Lueders states that he represented the Department in the first of two hearings, and that Thomas Allen, who has since retired, represented the Department in the second of the two hearings. For that reason, Mr. Lueders, states, the Department requests that the Board remand the matter to the Department so that an evidentiary hearing may be held , at which time a declaration from Mr. Allen can be received.

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*.

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, and since the parties are in apparent agreement that an order or remand is appropriate, 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.

II

Appellant contends that the Department abused its discretion by ordering an excessive penalty, i.e., revocation. It argues that the single factor in aggravation, three sale-to-minor violations within a 12-month period, characterized by the Department as a "major" aggravating factor, was far outweighed by the actions appellant took in mitigation. Appellant claims that the Department, by its action, has created an insurmountable barrier to any mitigation ever being enough to offset a third strike.

It is true that appellant took a number of significant steps in an effort to mitigate the effect of the three sale-to-minor violations. It instituted a policy of requiring proof of

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"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].)

legal age from every purchaser of alcoholic beverages, regardless of age or apparent age; it required such identification to be scanned by two clerks; it had voluntarily limited sale of alcoholic beverages during the lunch hour of a nearby school.

What is also true is that the policy of requiring identification from all customers regardless of age was not adopted until after the third violation.

The Appeals Board has said many times that, while it will review a penalty assessment, it will not disturb the Department's penalty assessment in the absence of an abuse of discretion, citing *Martin v. Alcoholic Beverage Control Appeals Board* (1959) 52 Cal.2d 287 [341 P.2d 296, 300].

We cannot say that the Department abused its discretion in this case. If it were willing to accept, as substantial and sincere mitigation, steps that were not taken until after a third sale to a minor, a message would go out to the trade suggesting that a licensee need not get serious about selling to minors until it had been caught three times. Moreover, the fact that the three sales were made in less than one year obviously suggests that this appellant did not take its responsibilities seriously. It is noteworthy that two of the three sales were made by the same clerk.

The Legislature has made it clear, through its adoption of Business and Professions Code section 25658.1, subdivision (b),[4] that it takes a dim view of three sale-to-minor violations in **three** years. Hence, it comes as little surprise that the Department might deal rather harshly in a matter where the three violations occurred in

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[4] Section 25658.1, subdivision (b) states: Notwithstanding Section 24200, the department may revoke a license for a third violation of Section 25658 that occurs within any 36-month period."

a 12-month span. We find no abuse of discretion.

ORDER

The decision is affirmed with respect to the issue concerning penalty, and this matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[5]

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

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[5] 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.