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

AB-8703
File: 20-420135 Reg: 06064367

7-ELEVEN, INC., and MTAN ENTERPRISES, INC., dba 7-Eleven #2174 33257B
1000 West Orangethorpe Avenue, Fullerton, CA 92835,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 6, 2008
Los Angeles, CA

ISSUED MARCH 18, 2009

7-Eleven, Inc., and MTAN Enterprises, Inc., doing business as 7-Eleven #2174 33257B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days 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 MTAN Enterprises, Inc., appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

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[1]The decision of the Department, dated April 30, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on February 7, 2005. On November 29, 2006, the Department instituted an accusation against appellants charging that, on September 14, 2006, appellants' clerk, Oscar Mendoza (the clerk), sold an alcoholic beverage to 19-year-old Jenna Rea. Although not noted in the accusation, Rea was working as a minor decoy for the Fullerton Police Department and the Department at the time.

An administrative hearing was held on March 6, 2007, at which time documentary evidence was received, and testimony concerning the sale was presented by Rea (the decoy), by Truc Vo, a Department investigator, and Gary Mancini, a Fullerton police officer.

The evidence established that the decoy selected a six-pack of Bud Light beer from the beer coolers and placed it on the counter. When asked for identification, she handed the clerk her California driver's license. The license contained the decoy's correct date of birth and a red stripe bearing the words "AGE 21 IN 2007." The clerk looked at the license briefly, then went forward with the sale.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal making the following contentions: (1) The Board should withhold its decision until the California Supreme Court issues its decision in *Morongo Band of Mission Indians v. State Water Resources Control Board*, S155589 (review granted October 24, 2007); (2) the Department communicated ex parte with its decision maker; and (3) the record should be augmented by the addition of documents relating to any report of hearing, and to the Department's issuance of General Order

No. 2007-09.

DISCUSSION

I

Appellants suggest that the Board withhold any decision it may reach in this case until the California Supreme Court has issued its decision in *Morongo Band of Mission Indians v. State Water Resources Control Board*, S155589 (review granted August 22, 2007), a case appellants say involves issues which could affect this case.

In light of the result we reach, there is no need to address this issue. For the same reason, there is no need to address the issues raised by appellants' motion to augment the record.

II

Appellants contend that the Department did not adequately screen its prosecutors from its decision maker, and communicated on an ex parte basis with its decision maker, in violation of the Administrative Procedure Act. The administrative hearing in this matter took place prior to the Department's issuance of General Order No. 2007-09

Appellants contend 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. They rely 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*). They assert 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 denies that any ex parte communication occurred, and includes with its brief a declaration of counsel to that effect. The Department argues that the Board should accept the declaration as conclusive evidence that the documents requested do not exist.

We agree with appellants 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 argues that it need only include a declaration denying the existence of an ex parte communication for the Appeals Board to rule in its favor. Appellants argue that the declaration is inadequate. We agree with appellants.

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 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.[2]

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.

ORDER

This matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing discussion.[3]

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

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[2]"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].)

[3] 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.