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

AB-8718
File: 20-437029 Reg: 06063819

7-ELEVEN, INC., and LUISA MORALES, dba 7-Eleven Store
8000 El Camino Real, Atascadero, CA 93422,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John . McCarthy

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

ISSUED MARCH 18, 2009

7-Eleven, Inc., and Luisa Morales, doing business as 7-Eleven Store (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Rahsaan Dufftatum, having sold, in violation of Business and Professions Code section 25658, subdivision (a), a six-pack of Bud Light beer, an alcoholic beverage, to Bryan Findlay, a 19-year-old police minor decoy, in a decoy operation conducted by the Atascadero Police Department.

Appearances on appeal include appellants 7-Eleven, Inc., and Luisa Morales, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its

[1]The decision of the Department, dated July 26, 2007, is set forth in the appendix.

counsel, Kerry K. Winters.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 4, 2006. On September 14, 2006, the Department instituted an accusation against appellants charging that, on July 11, 2006, appellants' clerk, Rahsaan Dufftatum (the clerk), sold an alcoholic beverage (beer) to 19-year-old Bryan Findlay. Although not noted in the accusation, Findlay was working as a minor decoy for the Atascadero Police Department at the time.

An administrative hearing was held on April 10, 2007, at which time documentary evidence was received, and testimony concerning the sale was presented by Findlay (the decoy), Nick Sartuchi, a Department investigator, and Rene Vasquez, an Atascadero police detective. The evidence established that the clerk asked Findlay for his identification, and was handed Findlay's driver's license. The license (Exhibit 3) contained Findlay's true date of birth, and a red stripe with the words "AGE 21 IN 2008." The clerk examined the license, asked no further questions, and completed 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 Department lacked effective screening procedures; (2) the Department engaged in ex parte communications; and (3) the incomplete record raises the specter of ex parte communication. Appellants have also filed a motion to augment the record with any ABC Form 104 in the file together with related documents, and General Order No. 2007-09 and related documents. In light of the result we reach, we find it unnecessary to address the motion.

DISCUSSION

I and II

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 has submitted a declaration signed by Department staff attorney Kerry Winters, who represented the Department at the administrative hearing. In this declaration, Winters states that at no time did she prepare a report of hearing or other document, or speak to any person, regarding this case. The Department argues that the Board should accept the declaration as conclusive evidence that there was no ex parte communication, and that the ABC Form 104 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,[2] 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]

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[2] General Order No. 2007-09, adopted on August 10, 2007, after this case was heard by the Department, directs operational and structural changes in the organization of the Department's legal staff for the purpose of eliminating the possibility of ex parte communications.

[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

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.

III

Appellants contend that the matter must be reversed because the appellate record is incomplete. They contend that such action is required by the absence from the certified record supplied to the Appeals Board of a motion to compel discovery, the supporting and opposing authorities, and the order denying the motion.

We agree with all of the reasons set forth in the Department's brief why this contention lacks merit. Appellants have failed to show how they might have been prejudiced by the omission of these documents; they have not sought to have the record augmented by the addition of the missing documents; they have copies of these documents in their own files, and the documents have been submitted to the Appeals Board as a supplemental certified record, rendering appellants' contention moot.

In any event, it seems to us that It does not matter whether these documents were before the Department's decision maker. Since they do not bear on the merits - appellants have not claimed they do - whether they were considered or not is irrelevant. This case is totally unlike *Circle K Stores, Inc.* (2007) AB-8597, the case cited by appellants. In that case, documents were included as part of the certified record when they should not have been, and the Board's concern was that their content, if reviewed by the Department's decision maker, could have influenced his decision. That is not

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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].)

the case here.

ORDER

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