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

AB-8740
File: 21-384196 Reg: 07065021

RHS ENTERPRISES, INC., dba A-1 Food Store
10821 Studebaker Road, Downey, CA 90241,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 7, 2008
Los Angeles, CA

ISSUED DECEMBER 10, 2008

RHS Enterprises, Inc., doing business as A-1 Food Store (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 20 days 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 RHS Enterprises, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated August 22, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 10, 2003. On February 9, 2007, the Department filed an accusation against appellant charging that, on November 4, 2006, appellant's clerk, (the clerk), sold an alcoholic beverage to 19-year-old Diana Marmol. Although not noted in the accusation, Marmol was working as a minor decoy for the Downey Police Department at the time.

At the administrative hearing held on June 20, 2007, documentary evidence was received, and testimony concerning the sale was presented by Marmol (the decoy) and by Garth Boggs, a Downey Police officer. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense was established.

Appellant has filed an appeal contenting: (1) The Department violated the Administrative Procedure Act (APA)[2] and due process by failing to effectively screen its prosecutors from its advisors; (2) the administrative law judge (ALJ) abused his discretion by imposing an aggravated penalty without any basis; and (3) the ALJ erroneously denied appellant's motion to compel discovery. Appellant has also filed a motion to augment the record with any Report of Hearing and related documents, and with General Order No. 2007-09 and any related documents.

DISCUSSION

I

Appellant contends the Department violated the APA and due process by engaging in ex parte communication with the Department's decision maker and by its failure to maintain effective screening procedures within the legal staff to prohibit its prosecutors from engaging in ex parte communications with the decision maker or the

[2]Government Code sections 11340-11529.

advisors to the decision maker. The Department denies that an ex parte communication was made. A declaration by the staff attorney who represented the Department at the administrative hearing asserts that at no time did the attorney prepare a report of hearing or other document, or speak to any person, regarding this case.

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. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 5 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*) [ex parte provision of report of hearing was "standard Department procedure"]; *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274, 1287 [60 Cal.Rptr.3d 295] (*Rondon*) ["widespread agency practice of allowing access to reports"]; *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116, 131 [57 Cal.Rptr.3d 6] (*Chevron*) [ex parte communication not unique to *Quintanar* case, "but rather a 'standard Department procedure'"].)

The Department insists that it need only include a declaration denying the existence of an ex parte communication for the Appeals Board to rule in its favor. We disagree. Declarations and affidavits are generally considered not to be competent evidence.[3] They are hearsay statements which cannot, by themselves, support a finding.

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[3]In *Windigo Mills v. Unemployment Ins. Appeals Bd*. (1979) 92 Cal.App.3d 586, 597 [155 Cal.Rptr. 63], the court stated:

> 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.

The Department has not pointed out any reason the declaration should be considered an exception to the general rule just stated.

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.

As did the California Supreme Court in *Quintanar*, *supra*, we decline to address appellant's due process argument.

> Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

(*Quintanar*, *supra*, 40 Cal.4th at p. 17, fn. 13.)

There is another reason we need not consider this issue. The situation giving rise to appellant's due process claim existed at the time of the administrative hearing and should have been raised then. Since appellant did not, the Board is entitled to consider it waived. (*Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1141-1142 [67 Cal.Rptr.3d 2]*; Vikco Ins. Servs. v. Ohio Indem. Co*. (1999) 70 Cal.App.4th 55, 66-67 [82 Cal.Rptr.2d 442]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v.*

Alcoholic Beverage Control Appeals Board (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167]; 9 Witkin, Cal. Procedure (4th ed. 1997 & 2007 supp.) Appeal, §394.)

II

Appellant contends the ALJ abused his discretion by imposing an aggravated penalty even though appellant presented evidence of mitigating factors and no aggravating factors were found. At the hearing, the Department recommended a 25-day suspension, but the ALJ proposed, and the Department adopted, a 20-day suspension.

The evidence at the hearing showed that appellant filed a stipulation and waiver and paid a fine in lieu of serving a 15-day suspension, for a sale-to-minor violation that occurred on May 15, 2003 (the first violation). It also showed a stipulation and waiver to an accusation charging a sale-to-minor violation on August 10, 2006 (the second violation), less than a month before the violation that is the subject of the present appeal. The Department denied appellant's later request to withdraw the stipulation, and appellant appealed from the denial; the matter was still being considered by the Appeals Board and was not final at the time of the hearing.

Business and Professions Code section 25658.1, subdivisions (b) and (c), provide:

> (b) Notwithstanding Section 24200, the department may revoke a license for a third violation of Section 25658 that occurs within any 36-month period. This provision shall not be construed to limit the department's authority and discretion to revoke a license prior to a third violation when the circumstances warrant that penalty.
> (c) For purposes of this section, no violation may be considered for purposes of determination of the penalty until it has become final.

Since the first violation was more than 36 months prior to the violation at issue here, and the proceeding for the second violation was not final at the time of the hearing,

appellant argues that there is no basis for aggravating the penalty; rather, it should receive no more than the 15-day suspension ordinarily imposed for a "first strike."

The penalty is discussed in Conclusions of Law, paragraphs 7, 8, and 9:

> 7. Complainant requested an aggravated second-strike 25-day suspension. She first pointed out that no evidence was presented by Respondent that subsequent to this November 2006 unlawful sale it took any precautions to avoid further such unlawful sales. She argued that the minor sale violation shown in Exhibit 3 is no longer a pending case. The licensee signed a Stipulation and Waiver form in which it gave up its right to a hearing, reconsideration and/or an appeal, along with all other rights that may be granted by the ABC Act or by the Administrative Procedure Act. (Exhibit 3.) Two months later Respondent sought to withdraw the Stipulation and Waiver and the Department denied the request. It is that denial from which the appeal that is the subject of Official Notice has been taken. Since there is the potential that the Appeals Board may order the Department to accept Respondent's request to withdraw its Stipulation and Waiver, it cannot be said that the Exhibit 3 Decision is final.
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> 8. Respondent points to three decoy operations after November 2006 in which its store successfully made no unlawful sale. It says it is not required to establish exactly what it did to turn things around. Respondent contends there is mitigation but nothing in aggravation.
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> 9. Not counting the Exhibit 3 matter, the within violation is the second violation since Respondent has been licensed. Since it was licensed first in March 2003 (Findings of Fact, ¶ 3), violated first in May 2003 (Findings of Fact, ¶ 4) and now again in November 2006, mitigation without aggravation does not exist. Giving consideration to three successful failures to sell alcoholic beverages to decoys results in a mixed aggravation/mitigation situation. The recommendation that follows should serve to keep Respondent on its toes.

The Appeals Board may examine the issue of excessive penalty if it is raised by an appellant (*Joseph's of California. v. Alcoholic Beverage Control Appeals Bd.* (1971) 19 Cal.App.3d 785, 789 [97 Cal.Rptr. 183]), but will not disturb the Department's penalty order in the absence of an abuse of discretion. *(Martin v. Alcoholic Beverage Control Appeals Bd. & Haley* (1959) 52 Cal.2d 287, 291 [341 P.2d 296].) If the penalty imposed is reasonable, the Board must uphold it, even if another penalty would be equally, or

even more, reasonable. "If reasonable minds might differ as to the propriety of the penalty imposed, this fact serves to fortify the conclusion that the Department acted within the area of its discretion." (*Harris v. Alcoholic Beverage Control Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633].)

Appellant appears to believe that prior sale-to-minor violations may only be used to enhance a penalty if they occurred within 36 months of the violation at issue. This is incorrect. The Board addressed this same contention in *Circle K Stores, Inc*. (2000) AB-7421, saying:

> Appellant contends the Department abused its discretion by imposing an enhanced penalty on the premise that a prior discipline constituted a factor in aggravation, because there was no evidence establishing that the date of the prior violation was within three years of the current violation. Appellant cites Business and Professions Code §25658.1, suggesting that it sets an outside limit of three years on the Department's use of a prior violation as an aggravating factor.
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> We think appellant reads more into §25658.1 than is there. The statute provides, in pertinent part:
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> > "... no licensee may petition the department for an offer in compromise... for a second or any subsequent violation of Section 25658 that occurs within 36 months of the initial violation."
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> There is nothing in the language of §25658.1 that prohibits the Department from enhancing a penalty because of a prior violation that occurred more than three years from the date of the initial violation. We do hold the view that the prior violation must not be so distant as to be considered remote, and must not be so dissimilar as to render its use unfair or abusive.

The first violation was also a sale-to-minor violation and it occurred approximately three and one-half years before the present violation. Clearly, the first violation was neither dissimilar nor remote. In addition, the ALJ found sufficient mitigation to reduce the Department's recommendation of a 25-day suspension to only 20 days. There was no abuse of discretion in imposing the penalty.

III

Appellant asserts in its brief that the ALJ improperly denied its pre-hearing motion to compel discovery. Its motion was brought in response to the Department's failure to comply with those parts of its discovery request that sought copies of any findings or decisions which determined that the present decoy's appearance was not that which could be generally expected of a person under the age of 21 and all decisions certified by the Department over a four-year period which determined that any decoy failed to comply with rule 141(b)(2). For all of the decisions specified, appellant also requested all photographs of the decoys in those decisions.

ALJ Gruen, who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellant failed to show that the requested items were relevant or would lead to admissible evidence. Appellant argues that the items requested are expressly included as discoverable matters in the APA and the ALJ used erroneous standards in denying the motion.

This Board has discussed, and rejected, this argument numerous times before. Just as appellant's arguments are the same ones made before, our response is the same as before. We see no reason to once again go over our reasons for rejecting these arguments. Should appellant wish to review those reasons, it may find them fully set out in *7-Eleven, Inc./Virk* (2007) AB-8577, as well as many other Appeals Board opinions.

IV

Appellant filed a motion to have the record augmented with any report of hearing in the Department's file regarding this case and with General Order No. 2007-09 and any documents related to it.

We have said in other appeals where this motion has been made that our conclusion regarding the ex parte communication issue makes augmenting the record

unnecessary; that is, if an evidentiary hearing is held, the primary focus of it will be whether or not a report of hearing was prepared and, if so, it will become part of the record. The same conclusion applies here with regard to the report of hearing.

Appellant also requests that General Order No. 2007-09 (the order) be made part of the record. A copy of a document purporting to be this order is attached to appellant's motion to augment as Exhibit 3. The order is a document issued by the Department over the signature of the director, Stephen M. Hardy, dated August 10, 2007, which is also designated as the order's effective date.

The order notes the court cases prohibiting the Department's practice of ex parte communications with the decision maker and placing the burden on the Department to show that no ex parte communication occurred in a particular case. It also sets out procedures to be implemented by the Department to comply with the courts' directives.

A properly certified copy of the order is more appropriately included in the record created in an evidentiary hearing. The motion to augment will be denied.

ORDER

The decision of the Department is affirmed as to all 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. The motion to augment is denied.[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.