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

AB-8750
File: 21-409440 Reg: 07064903

PUNJABI KING, INC., dba Liquor King
6629 Ming Avenue, Bakersfield, CA 93309,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

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

ISSUED: NOVEMBER 17, 2008

Punjabi King, Inc., doing business as Liquor King (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Santokh Gill, having sold Miller Light beer and other brands of beer to Jacob Cureton, a 19-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Punjabi King, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated September 4, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's license was issued on April 29, 2004. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on October 27, 2006.

An administrative hearing was held on May 15, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented by Department investigator Josh Porter and the minor, Jacob Cureton. Santokh Gill, appellant's clerk; Reshem Singh, appellant's owner; Brandy Terrell, a clerk, and Erika Cisneros, an acquaintance of the clerk, testified on behalf of appellant.

The evidence established that beer was sold to Cureton without his having been asked his age or for identification. Cureton testified that he had never displayed false identification in any of his visits to the store. All four of appellant's witnesses contradicted Cureton, asserting he had, on numerous occasions, displayed identification purporting to show that he was 21 years of age.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as alleged, and that appellant had failed to establish a defense under Business and Professions Code section 25660.

Appellant has filed an appeal making the following contentions: (1) The Appeals Board should reserve judgment in this appeal until the California Supreme Court has decided *Morongo Band of Mission Indians v. State Water Resources Control Board*, review granted October 24, 2007, S155589; (2) the Department engaged in improper ex parte communications; (3) the Department did not have effective screening procedures in place to prevent its attorneys from acting both as advisors to the decision maker and as prosecutors; and (4) the Department submitted an incomplete record to the Appeals

Board. Appellant has also filed a motion asking the Board to augment the record with any Report of Hearing and related documents in the Department's file for this case, and with General Order No. 2007-09 and any related documents.

DISCUSSION

I

Appellant asserts that "economy of resources" compels delaying the Board's decision in this appeal until the California Supreme Court issues a decision in a case that "implicat[es the] same due process and appearance of bias issues as the instant appeal." (App. Br. at p.12.) It urges that, if the Board does not wait for the Court's decision, appellant "will be compelled to pursue judicial review of any decision otherwise affirming the [Department's decision], thereby continuing this matter indefinitely and continuing to expend Department resources." (*Id*., at p. 13.)

Appellant's concern for unnecessary expenditure of Department resources is commendable, but beside the point.

Morongo, *supra*, is an interesting case that the Appeals Board will be watching with great interest. The website for the Supreme Court states the issue to be decided as follows:

> May a staff attorney for an administrative agency attorney [sic] serve as a prosecutor in one matter while simultaneously serving as an advisor to the agency as decision maker in an unrelated matter, without violating the due process rights of parties that appear before the agency?

The issue in *Morongo* is clearly related to the issues that were raised in the *Quintanar* cases. (See *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Quintanar* (2006) 40 Cal.4th 1 [50 Cal.Rptr. 585], and related cases. However, based on the currently available legal authority, we do not

believe it is necessary for the Board to wait for the Court's decision.

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*(*Quintanar*), *supra* 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.

In a declaration signed by Department staff attorney Matthew G. Ainley, who represented the Department at the administrative hearing, Ainley states that at no time did he prepare a report of hearing or other document, or speak to any person, regarding this case. 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.

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.[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.

III

Appellant asserts that the Department violated its right to due process because the Department did not have procedures in place to eliminate the "appearance of bias"

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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].)

arising from Department attorneys acting both as advisors to the decision maker and as prosecutors, nor did it have procedures to "screen" advisors from prosecutors.

This contention is related to the issue of ex parte communication addressed earlier. However, while the ex parte issue was properly raised for the first time on appeal (since the communication did not occur until after the hearing), the situation at the root of the present issue existed at the time of the administrative hearing and should have been raised then.

Since appellant did not raise this issue at the hearing, 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.)

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 in this case with regard to the requested 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 putting an end to 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 then sets out the procedures to be implemented by the Department to comply with the courts' directives.

Appellant wants to use this order to show that the Department's procedures before August 10, 2007, did *not* comply with the courts' directives. It's not the strongest argument, and it seems unnecessary since it is the Department that must show that it did comply. In any case, this too is more appropriately included in a record created during an evidentiary hearing.

IV

Appellant asserts that the Appeals Board must reverse this matter in its entirety because the record lacks "at a minimum, key documents and arguments made by both parties regarding the Proposed Decision." (App. Br., page 12.) It lists three documents it says should have been included in the record: a Department order inviting comments/arguments concerning the proposed decision and proposed penalty; the Department's comments/arguments in response to the order; and appellants

comments/arguments in response thereto. Appellant argues that without these documents in the certified record it cannot know which parts of the administrative record were before the ultimate decision maker, but that it "can assume and logic can dictate that these documents were reviewed." (*Id*. at pages 12-13.) Nevertheless, appellant concludes, "[d]eference to logical assumptions is not a guarantee that Appellant's due process rights have not somehow been violated by a problem that seems to be endemic to the Department."

The documents in question were submitted to the Appeals Board under the cover of a hand-printed "post-it" note dated April 17, 2008, which stated: "We need to start including this info to you as per John Pierce [sic]. Dianna." In brief, the documents show that the Department recommended that the proposed decision be adopted, and appellant urged it should not. Appellant also objected to the proposed penalty.

We do not know in what way appellant feels it has been prejudiced by the fact that the documents in question were not part of the certified record. It would seem that, having invited comments and arguments on whether the proposed decision should be adopted, it might be reasonable to assume they were considered by the Department's decision maker. On the other hand, if the documents were mistakenly omitted from the certified record, but, nonetheless, included within that record reviewed by the decision maker, appellant can not have been prejudiced by their absence from the certified record sent to the Appeals Board. Of course, we do not know if this was the case, nor are we willing to presume so.

In any event, as this case is to be remanded to the Department for other reasons, we see no reason why, in the evidentiary hearing we shall direct, the certified

record can not be augmented or corrected to include the documents in question. We decline to adopt appellant's suggestion that a reversal of the Department decision is necessary or appropriate.

It is somewhat troubling that, in recent months, the Department has often submitted an abbreviated certified record to this Board that does not conform to the requirements of Appeals Board Rule 188. This case is an example of how such a practice can unnecessarily add to the issues likely to be raised.

ORDER

This matter is remanded to the Department for the conduct of an investigative hearing to determine whether the Department has proceeded in a manner required by law (Bus. & Prof. Code §23084, subd. (b)), i.e., whether or not there was an ex parte communication to the Department decision maker, and such other proceedings as may be appropriate in light of our discussion above.

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