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

AB-8767
File: 21-439520 Reg: 07065476

GARFIELD BEACH CVS LLC, dba CVS Pharmacy #9572
5117 Lakewood Boulevard, Lakewood, CA 90712,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: November 6, 2006
Los Angeles, CA

ISSUED FEBRUARY 5, 2009

Garfield Beach CVS LLC, doing business as CVS Pharmacy #9572 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Garfield Beach CVS LLC, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Cottrell.

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

PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 6, 2006. On April 6, 2007, the Department filed an accusation against appellant charging that, on February 22, 2007, appellant's clerk, Danny Keobunta (the clerk), sold an alcoholic beverage to 18-year-old Miguel Camacho. Although not noted in the accusation, Camacho was working as a minor decoy for the Department at the time.

At the administrative hearing held on August 17, 2007, documentary evidence was received, and testimony concerning the sale was presented by Camacho (the decoy) and by Jeanine Peregrina, a Department investigator.

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

Appellant has filed an appeal making the following contentions: (1) the Department lacked proper screening procedures sufficient to ensure that no attorney acts as both prosecutor and advisor to the decision maker; (2) the Department engaged in improper ex parte communications; (3) the Department lacked appropriate screening mechanisms to ensure the non-occurrence of ex parte communications; and (4) the incomplete record raises the specter of ex parte communications. Appellant has also filed a motion to augment the record by the addition of the ABC Form 104, if any, in the file, together with related forms or documents; General Order 2007-09 and any related documents; and documents relating to operational or structural alterations to the ABC attorney staff.

These issues will be discussed together.

DISCUSSION

Appellant contends the Department did not adequately screen its prosecutors from its decision maker and engaged in ex parte communications.

The administrative hearing in this case took place on August 17, 2007, after the adoption by the Department of General Order 2007-09 (the Order) on August 10, 2007. The Order sets forth changes in the Department's internal operating procedures which, it states, the Director of the Department has determined are "the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications," changes which consist of "a reassignment of functions and responsibilities with respect to the review of proposed decisions." The Order, directed to all offices and units of the Department, provides:

> **Background**:
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> In 2006 the California Supreme Court found that the Department's practice of attorneys preparing a report following an administrative hearing, and the Director and his advisors having access to or reviewing that report, violated the Administrative Procedures [*sic*] Act's prohibition against *ex parte* communications. Subsequent cases in the courts of appeal extended the reasoning of the Supreme Court in holding that such a statutory violation continues to exist even if the Department adopted the administrative law judge's proposed decision without change. In addition, the courts of appeal placed the burden on the Department to establish that no improper *ex parte* communication occurred in any given case.
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> **Procedures**:
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> Although the Supreme Court held that a physical separation of functions within the Department is not necessary, in light of subsequent appellate decisions the Director has determined that the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications, a reassignment of functions and responsibilities with respect to the review of proposed decisions is necessary and appropriate.
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> Effective immediately, the following protocols shall be followed with respect to litigated matters:

> 1. The Department's Legal Unit shall be responsible for litigating administrative cases and shall not be involved in the review of proposed decisions, nor shall the Chief Counsel or Staff Counsel within the Legal Unit advise the Director or any other person in the decision-making chain of command with regard to proposed decisions.
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> 2. The Administrative Hearing Office shall forward proposed decisions, together with any exhibits, pleadings and other documents or evidence considered by the administrative law judge, to the Hearing and Legal Unit which shall forward them to the Director's Office without legal review or comment.
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> 3. The proposed decision and included documents as identified above shall be maintained at all times in a file separate from any other documents or files maintained by the Department regarding the licensee or applicant. This file shall constitute the official administrative record.
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> 4. The administrative record shall be circulated to the Director via the Headquarters Deputy Division Chief, the Assistant Director for Administration and/or the Chief Deputy Director.
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> 5. The Director and his designees shall act in accordance with Government Code Section 11517, and shall so notify the Hearing and Legal Unit of all decisions made relating to the proposed decision. The Hearing and Legal Unit shall thereafter notify all parties.
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> 6. This General Order supersedes and hereby invalidates any and all policies and/or procedures inconsistent to [*sic*] the foregoing.

The obvious purpose of the Order is to amend the internal operating procedures of the Department that have resulted in more than 100 cases having been remanded to the Department by the Appeals Board for an evidentiary hearing regarding claims of ex parte communications between litigating counsel and the Department's decision makers.[2] Although not identified in the Order, the "appellate decisions" to which it refers undoubtedly include in their numbers the decision by the California Supreme Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control*

[2]We understand that these cases were ultimately dismissed by the Department.

Appeals Board (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] *(Quintanar)*, and Court of Appeal decisions in *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th116 [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*), case authorities routinely cited in appellate briefs asserting that the Department engaged in improper ex parte communications.

The Order effectively answers the question raised in earlier appeals, i.e., whether the Department's long standing practice of having its staff attorneys submit ex parte recommendations in the form of reports of hearing, has been officially changed to comply with the requirements of *Quintanar* and the cases following it. It replaces an earlier, less formal procedure used by the Department to address the problems of ex parte communications, one which the Appeals Board found was not an effective cure for the problem endemic within the Department, with one intended to isolate the Department decision maker from any potential advice or comment from the attorney who litigated the administrative matter, as well as the Department's entire Legal Unit.

Appellants have not affirmatively shown that any ex parte communication took place in this case. Instead, they have relied on the authorities cited above *(Quintanar, supra; Chevron, supra; Rondon, supra*), for their argument that the burden is on the Department to disprove the existence on any ex parte communication.

We are now satisfied, by the Department's adoption of General Order 2007-09, that it has met its burden of demonstrating that it operated in accordance with law. Without evidence that the procedure outlined in the Order was disregarded, we believe

it would be unreasonable to assume that any ex parte communication occurred.[3]

While the Order does not specifically address the question whether there was an adequate screening procedure to prevent Department attorneys who acted as litigators from advising the Department decision maker in other matters, by its terms it appears to resolve that issue by effectively removing the litigating attorneys from the review process entirely.

Appellant complains that the record is incomplete, lacking the pleadings and order relating to appellant's motion at the administrative hearing for the production of records relating to decoys over a period of time. (App. Br., p.11-12.) Appellant asserts that it cannot know which parts of the administrative record were before the ultimate decision maker and those that were not. Thus, says appellant, it can only assume that these documents were before the decision maker.

Appellant's argument, that the omission of pleadings unrelated to the merits from the certified record of the administrative proceeding is a violation of one of the provisions of the General Order, is only technically correct, The analogy appellant draws between this case and *Circle K Stores* (2007) AB-8597 is inapposite. In *Circle K Stores*, the problem was that certain documents were included in the certified record that were neither pleadings nor documents placed in evidence, and were of a type

[3] Appellant suggests that the Department "has apparently taken the words of the Court of Appeal in *Morongo* [*Morongo Band of Mission Indians v. State Water Resources Control Board]* to heart by dividing its staff accordingly," and that the Appeals Board "should take the Department's actions as its word." (App. Mot. To Aug., p.5.) We welcome the suggestion, and note that Evidence Code section 664 creates a presumption that the duty required by the General Order was performed. Appellant has not rebutted that presumption.

which could well have offered additional support to the proposed decision. In this case, pleadings unrelated to the merits were omitted from the certified record. The assumption that they may have been unavailable to the decision maker is speculative, and even if true, does not demonstrate that appellant has been prejudiced.

The subject matter of the discovery pleadings dealt with the broader issue of whether the decoy displayed the appearance required by Rule 141(b)(2). Appellant has not raised any issue concerning the decoy's appearance, nor has appellant raised any issue relating to any improper denial of discovery.

We do not believe that this decision should be reversed on the basis of an incomplete record. In the first place, this is really a procedural error, which is rarely sufficient by itself to justify reversal of a Department decision. As the court explained in *Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345],

> since the appeals board exercises a "strictly 'limited' " power of review over the Department's " 'exclusive power' to issue, deny, suspend or revoke licenses" (*Martin v. Alcoholic Beverage etc. Appeals Board* [(1959)] 52 Cal.2d 238, 246 [[340 P.2d 1]]), the decisions of the Department should not be defeated by reason of "any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the [reviewing body] shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

We cannot see that appellant has suffered any prejudice by this error. Appellant has not articulated any prejudice that could conceivably be viewed as resulting in a miscarriage of justice. Additionally, appellant has not even suggested that these documents would aid the determination of this appeal. It is not enough to say the documents "should" be included in the record on appeal. Without a showing that they are material to the issues raised here, there can be no prejudice to appellant in omitting them from the record.

Finally, in light of the result we reach, we see no need to withhold our decision in this matter until the California Supreme Court resolves *Morongo Band of Mission Indians v. State Water Resources Control Board* (rev. granted October 24, 2007, S155589). Similarly, there is no need to augment the record as requested by appellants.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.