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

AB-8768
File: 21-439638 Reg: 07065102

GARFIELD BEACH CVS LLC, dba CVS Pharmacy 8825
12071 Mt. Vernon Avenue, Grand Terrace, CA 92313,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED FEBRUARY 23, 2009

Garfield Beach CVS LLC, doing business as CVS Pharmacy 8825 (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 Julia H. Sullivan, 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 31, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 10, 2006. On February 22, 2007, the Department filed an accusation against appellant charging that, on December 23, 2006, appellant's clerk sold an alcoholic beverage to 18-year-old Kyle Glozer. Although not noted in the accusation, Glozer was working as a minor decoy for the Department at the time.

At the administrative hearing held on September 7, 2007, documentary evidence was received, and testimony concerning the sale was presented by Glozer (the decoy) and by Department investigator Eric Burlingame. Appellant's store manager, Kimberly Beard, also testified.

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 making the following contentions: (1) The Department engaged in improper ex parte communications; (2) the Department did not have effective screening procedures in place to prevent any of its attorneys from acting as both prosecutor and advisor to the decision maker or to prevent ex parte communication with the decision maker; (3) the Department provided an incomplete record on appeal; and (4) the penalty is excessive. Issues 1 and 2 will be discussed together. Appellant requests the Board withhold its decision until a matter pending in the California Supreme Court is resolved; it also asks the Board to augment the record with any Report of Hearing, General Order No. 2007-09, and related documents.

DISCUSSION

I and II

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

This is an appeal in which the administrative hearing took place after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007. (The administrative hearing took place on September 7, 2007.) 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 changes in the Department's internal operating procedures which, it states, have been determined by the Director of the Department to be "the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications." The changes 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:

> Effective immediately, the following protocols shall be followed with respect to litigated matters:
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> 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.

> 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 license 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 to comply with the decisions in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] *(Quintanar)*, *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.[2]

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, on an ex parte basis, recommendations in the form of reports of hearing, has been

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[2]The Department's failure to prove compliance with the dictates of the court decisions resulted in more than 100 cases having been remanded to the Department by the Appeals Board for investigative hearings regarding claims of ex parte communications between litigating counsel and the Department's decision makers. We understand that these cases were ultimately dismissed by the Department.

officially changed to comply with the requirements of *Quintanar* and the cases following it. Unlike earlier informal attempts at compliance, the Order is an official statement of the Department 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 of any ex parte communication.

We are now satisfied, by the Department's adoption of General Order No. 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 believe that any ex parte communication occurred.

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.

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

III

Appellant asserts that the accusation must be dismissed because the certified record provided by the Department did not include certain documents required to be included. The four missing documents were all prepared in connection with a motion to compel discovery: the motion; points and authorities in support of the motion; the Department's opposition to the motion; and the order denying the motion. Appellant argues that omission of these documents from the certified record violates rule 188 of the Appeals Board (4 Cal. Code Regs., § 188) and makes it unclear whether and when the documents were considered by the decision maker.

Rule 188 states what is to be included in the record on appeal:

> (1) The file transcript, which shall include all notices and orders issued by the administrative law judge and the department, including any proposed decision by an administrative law judge and the final decision issued by the department; pleadings and correspondence by a party; notices, orders, pleadings and correspondence pertaining to reconsideration;
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> (2) the hearing reporter's transcript of all proceedings;
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> (3) exhibits admitted or rejected.

On June 3, 2008, the Board received what the Department certified was "a true, correct and complete record (not including the Hearing Reporter's transcript} [sic] of the proceedings" before the Department in this case. Attached to the certification were the Department's Certificate of Decision adopting the ALJ's proposed decision, the proposed decision of the ALJ, and the exhibits from the administrative hearing.

The Department's certification is patently false; it does not comply with its own self-description of a "true, correct and complete record" of the proceedings before the Department or with the description of the "record on appeal" in the Appeals Board's rule 188. Clearly, the Department's proceedings did not commence with its decision, or

even with the administrative hearing. Obviously lacking are "notices and orders issued by the administrative law judge and the department [and] pleadings and correspondence by a party" required by Rule 188. Among the documents missing from the record on appeal are those that appellant has made the subject of this issue.

In spite of these deficiencies in the record, however, 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.)

Secondly, 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. Nor do we believe it could do so; two of the documents were of its own counsel's creation and the other two were clearly received by its counsel from the Department before a decision was made in this case. Under these circumstances, appellant's contention borders on the frivolous.

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.

We also note that appellant did not include these documents among those it asked for in its Motion to Augment Record. A Motion to Augment is the appropriate way to deal with items that should have been included in the record. Appellant's counsel files a Motion to Augment in almost every appeal, so it clearly knows how to do that. There is no basis for reversal because of omissions from the record.

IV

Appellant contends that the penalty, a 15-day suspension, is excessive and the decision must be reversed because the ALJ abused his discretion in refusing to consider appellant's evidence of mitigation in accordance with the Department's penalty guidelines (Cal. Code Regs., § 144 [rule 144]). This contention is apparently based on appellant's belief that, had the factors been considered, it would have been entitled to something less than the standard 15-day suspension that was imposed.

The penalty guidelines show that a 15-day suspension is considered the "standard" penalty for a first sale-to-minor violation. The existence of mitigating factors does not automatically mean that a penalty will be less than the standard penalty.

In any case, this Board 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].) Imposition of the standard penalty was well within the Department's discretion.

ORDER

The decision of the Department is affirmed.[3]

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

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

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