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

AB-8776
File: 20-398794 Reg: 07065342

7-ELEVEN, INC., and NAT STORES CORPORATION,
dba 7-Eleven Store # 2175-25483B
690 North Lake Avenue, Pasadena, CA 91104,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 5, 2009
Los Angeles, CA

ISSUED JUNE 2, 2009

7-Eleven, Inc., and Nat Stores Corporation, doing business as 7-Eleven Store # 2175-25483B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their 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 appellants 7-Eleven, Inc., and Nat Stores Corporation, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

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[1]The decision of the Department, dated November 8, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 27, 2003. The Department filed an accusation against appellants charging that their clerk sold an alcoholic beverage to 18-year-old Nathaly Yeremian on January 20, 2007. Yeremian was working as a minor decoy for the Pasadena Police Department at the time.

At the administrative hearing held on September 21, 2007,[2] documentary evidence was received and testimony concerning the sale was presented by Yeremian and by Matthew Widger, a Pasadena police officer.

The Department's decision determined the violation charged was proved and no defense was established. Appellants then filed an appeal contending: (1) the Department lacked screening procedures 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; (2) the Department engaged in prohibited ex parte communications; (3) the Department provided an incomplete record on appeal; and (4) the administrative law judge (ALJ) erred by continuing the originally scheduled administrative hearing. The first two issues are related and will be discussed together.

Appellants have also moved to augment the record with any report of hearing, General Order No. 2007-09, and related documents.

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[2]The administrative hearing was originally scheduled for July 11, 2007, but the minor decoy did not appear and the Department requested that the matter be continued. On that day, the record was opened, the Department's exhibits 1 and 2 were marked for identification, and exhibit 1 (jurisdictional documents) was received in evidence. Appellants moved to dismiss the accusation because the minor decoy did not appear. They argued that the subpoena was not valid because it was not personally served on the decoy and, therefore, her absence did not constitute good cause for a continuance. The ALJ found that the decoy was properly served and granted the continuance.

DISCUSSION

I and II

Appellants contend 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 September 21, 2007, after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007.[3] 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, in relevant part:

> 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:
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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.

[3]The Department requests the Appeals Board take official notice of the Order, and we do so.

> 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.[4] 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 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

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

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 not only from the attorney who litigated the administrative matter, but from the Department's entire Legal Unit as well.

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 assume 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.[5]

In light of the result we reach, we see no need to augment the record as requested by appellants.

III

Appellants assert that the Department's decision must be reversed because the certified record provided by the Department did not include certain documents related to appellants' motion to compel discovery: the motion; points and authorities in support of and in opposition to the motion; and the order denying the motion. They also assert that the record lacks the transcript and exhibits from the July 11 hearing date.[6] Appellants argue that omission of these documents from the certified record makes it unclear whether and when the documents were considered by the decision maker.[7]

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[5]Appellants asked the Appeals Board to refrain from deciding this issue until resolved by the California Supreme Court in *Morongo Band of Mission Indians v. State Water Resources Control Board*, S155589 (*Morongo*), but the Board had no reason to delay. As explained in the text, the Department's Order effectively prevents the issue from arising, so the Court's decision could have no effect on this Board's analysis. On February 9, 2009, the Court issued its decision in *Morongo*, rejecting the position espoused by appellants, holding that the separation of prosecutorial and advisory functions within an administrative agency may be made on a case-by-case basis.

[6]The Department states that the original exhibits from the June 11 hearing were lost. However, certified copies of the exhibits were attached to its reply brief, and appellants do not contest their accuracy. In addition, the Board and appellants received certified copies of the July 11 hearing transcript in November 2008.

[7]Contrary to appellants' assertion that the Department is legally obligated to review the record before making its decision, it has long been the rule under section 11517 of the Administrative Procedure Act (Gov. Code, §§ 11340-11529) "that where the hearing officer acts alone the agency may adopt his decision without reading or otherwise familiarizing itself with the record." (*Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 399 [184 P.2d 323].) This principle was most recently affirmed in *Ventimiglia v. Board of Behavioral Sciences* (2008) 168 Cal.App.4th 296, 309 [85 Cal.Rptr.3d 423].

There is no dispute that the documents noted were missing from the record originally certified by the Department; nor is there any dispute that the documents should have been included in the certified record. The only question is whether the Department's decision should be reversed because of this.

Appellants insist that reversal is required, but cite no authority to support this result. Nor do they present any meritorious argument in support of their contention. We conclude that the record on appeal presents no basis for reversing the Department's decision.

Appellants have not shown that the documents originally omitted from the record have any relevance to the issues on appeal or that they suffered any prejudice from the omission of these documents. No discovery issues concerning these documents have been raised by appellants. Mere speculation that the documents may or may not have been reviewed by the Department's decision maker is insufficient to demonstrate any prejudice from the absence of these documents from the certified record.

Cases cited by appellants involving the inclusion in the certified record of documents that were not exhibits at the hearing are inapposite. In those cases, the certified record included documents that were never offered or received in evidence, and which contained comments and information that could have influenced the decision maker in a way adverse to appellants.

A Motion to Augment is the appropriate way to deal with items that appellants believe should have been included in the record. Appellants filed a Motion to Augment along with their opening brief, but they did not ask to have the record augmented with these discovery documents. Having failed to pursue the proper avenue to have missing documents included in the record, appellants cannot not now expect to be rewarded with a reversal of the Department's decision.

IV

Appellants contend the ALJ should not have granted the Department a continuance when the decoy did not appear because the Department did not personally serve the decoy. They allege that using "substituted service" was invalid and "nullif[ied] the witness subpoena as good cause for continuance of a hearing where a minor decoy fails to appear to testify."

The Department served the decoy through the police department that conducted the decoy operation. The decoy did not appear at the administrative hearing because she had been subpoenaed to appear in court with regard to the criminal charges arising from the decoy operation at the same time as the administrative hearing. The ALJ found there was good cause for a continuance and granted the Department's request.

A continuance is granted or denied at the discretion of the ALJ, and the ALJ's determination of whether good cause existed for a continuance will not be disturbed on appeal unless shown to be an abuse of discretion. (*Cooper v. Board of Medical Examiners* (1975) 49 Cal.App.3d 931, 944 [123 Cal.Rptr. 563]; *Savoy Club v. Board of Supervisors* (1970) 12 Cal.App.3d 1034, 1038 [91 Cal.Rptr. 198]; *Givens v. Department of Alcoholic Beverage Control* (1959) 176 Cal.App.2d 529, 532 [1 Cal.Rptr. 446].)

We cannot say that the ALJ abused his discretion in this case. Regardless of whether the subpoena was served correctly or not, the minor would not have been able to appear at the administrative hearing because of the conflicting subpoena for the criminal case.

Even if we had concluded that it was error for the ALJ to grant the continuance, appellants would still not be entitled to reversal of the Department's decision. Error alone does not warrant reversal. "The burden is on the appellant, not alone to show

error, but to show injury from the error." (9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 325, p. 335, italics omitted.)

Appellants have not alleged, much less shown, how they were prejudiced by the granting of the continuance. It is not enough for appellants to say "The rules are the rules." (App. Br. at 17.)

As the court pointed out 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*, *supra*, 52 Cal.2d 238, 246), 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.)

Even if it had been error to grant the continuance, the constitutional provision noted above would dictate that the Department's decision should not be reversed.

ORDER

The decision of the Department is affirmed.[8]

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

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[8]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.