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

AB-8801
File: 21-449573 Reg: 07066517

GARFIELD BEACH CVS, LLC, dba CVS Pharmacy
3361 Market Street, Riverside, CA 92501,
Appellant/Licensee

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 11, 2009

Garfield Beach CVS, LLC, doing business as CVS Pharmacy (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Kevin Eytcheson,[2] having sold a 24-ounce can of Bud Light beer, an alcoholic beverage, to Luis Figueroa, an 18-year-old police 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 and Stephen W. Solomon, and the Department

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[1]The decision of the Department, dated January 18, 2008, is set forth in the appendix.

[2] This rather unusual name may simply reflect a court reporter's misunderstanding of a name like Acheson. We simply do not know.

of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 17, 2007. The Department instituted an accusation against appellant on July 25, 2007, charging the sale of an alcoholic beverage to Luis Figueroa, a person under the age of 21. Although not noted in the accusation, Figueroa was acting as a decoy for the Riverside Police Department.

An administrative hearing was held on November 8, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented. Subsequent to the hearing, the Department issued its decision which determined that violation had been proved and no affirmative defense had been established.

Appellant filed a timely notice of appeal in which it raises the following issues: the certified record is incomplete; there was no compliance with Rule 141(b)(5), since there was no evidence that the decoy pointed to the seller; the Department failed to provide adequate screening against the possibility of bias, and engaged in ex parte communications; and appellant's motion to compel discovery was improperly denied. Appellant has also filed a motion to augment the record with the addition of any ABC Form 104 and related documents, General Order No. 2007-09 and related documents, and documents relating to any operational or structural modifications to the Department legal staff, and has urged the Appeals Board to withhold its decision until the California Supreme Court issues its decision in *Morongo Band of Mission Indians v. State Water*

Resources Control Board (S155589).[3]

DISCUSSION

I

This is another case in which a licensee finds fault, though not without some justification, with the certified record supplied to the Appeals Board, and argues that a reversal is warranted by reason of that alone. Appellant does not contend that documents were improperly included *in* the record, as was the case in *Circle K Stores, Inc.* (2007) AB-8597, but that absent from it are documents relating to appellant's unsuccessful motion to compel discovery. Appellant infers that, since these documents were not part of the record furnished to the Appeals Board, they must not have been included in the record reviewed by the Director prior to the Department's adoption of the proposed decision. Aside from the question whether such an inference can reasonably be drawn, there is the more basic question whether appellant might have been prejudiced by their omission.

The discovery motion in question sought the production of any findings and certified decisions by an administrative law judge (ALJ) or the Department that a decoy's appearance did not comply with Rule 141(b)(2), i.e., that the decoy "display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller at the time of the alleged offense."

The only issue raised in this case involving the decoy is appellant's claim that the

[3] The Court issued its decision in this case on February 9, 2009. It reversed the decision of the appellate court, and held that the separation of prosecutorial and advisory functions may be made on a case-by-case basis

Department did not prove compliance with a different part of Rule 141, i.e., 141(b)(5), which prescribes the procedure which must be followed when the decoy identifies the seller of the alcoholic beverages. We address, and reject, this contention in part II of this discussion. Consequently, we fail to see how appellant has been prejudiced.

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.

In August 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. Accompanying 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.

In November 2008 the Board, and appellant, received additional documents certified by the Department to be "a true, correct and complete record (not including the Hearing Reporter's transcript} [sic] of the proceedings" before the Department in this case. Included in these documents were the motion and points and authorities in support of the motion, etc., the documents that were missing from the first certification.

The Department's certifications are less than perfect, in that neither complies 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. Lacking are other notices and orders and pleadings and correspondence by a party required by Rule 188.

8. 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. We have discussed this issue in a number of other cases and expressed a number of reasons for rejecting dismissal as an appropriate remedy: This is really a procedural error, which is rarely sufficient by itself to justify reversal of a Department decision (*Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345]); appellant has not shown that it suffered any prejudice by this error; appellant has not shown that these documents are material to the issues raised in this appeal; and appellant should have included these documents in its Motion to Augment Record.

The most compelling reason for rejecting appellants' contention, however, is a simple one: contrary to their 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].

The record on appeal provides no basis for reversal.

II

Appellant contends that because the record does not contain evidence that the decoy pointed to the clerk when he identified him as the seller, there was no compliance with Rule 141(b)(5). Appellant invites the Appeals Board to make its own

assessment of the facts. The Board may not do so, and since the issue appellant raises is entirely factual, its contention must be rejected.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[4]

The Department concedes that the decoy did not point to the clerk, but argues that other evidence clearly supports the finding that a proper identification was made. Our review of the record satisfies us that there is ample evidentiary support in the record to sustain the ALJ's determinations.

The Department points to two instances where the decoy identified the clerk as the seller. The first was while the clerk was still at the counter; the second was after the decoy and clerk were taken to a rear office inside the store.

When the decoy told the officer "This is the person," the clerk immediately became defensive. According to the decoy's testimony, the clerk accused him of lying about his age. This does not at all sound like the response which would come from a

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[4]The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

person who was unaware he was being accused.

The clerk's awareness that he was being accused could only have been enlarged when he was taken to the rear office and again identified. The ALJ was entitled to conclude that the clerk should reasonably have been aware that he was being accused of having sold to a minor.

The clerk did not testify. What he may have understood, or not understood about the two times the decoy identified him is unknown. All we can say is that, given the circumstances described by the decoy, the ALJ cannot have abused the discretion he possessed as the trier of fact in finding that there was an effective identification that complied with Rule 141(b)(5).

III

Appellant asserts that its motion to compel discovery was improperly denied.

This issue has been brought to the Appeals Board over the years more times than can be counted, supported by arguments the Board has uniformly rejected. (See, e.g., *Andy Hong* (2007 AB-8492; *Chevron Stations, Inc*. (2007) AB-8488; *7-Eleven, Inc./Dars Corp.* (2007) AB-8488; *The Southland Corporation/Nat* (2000) AB-7391.) We see no need to reiterate what has been said so many times before. The contention lacks merit.

IV

Appellant contends that the Department failed to provide adequate screening to ensure against the possibility of bias, and that the Department engaged in improper ex parte communications.

The administrative hearing in this case took place on November 8, 2007, after the adoption by the Department of General Order No. 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**:
> 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:
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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 licensee or applicant. This file shall constitute the official administrative record.

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.

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.

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.[5] 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 Cal.Rptr.3d 295] (*Rondon*), case authorities routinely cited in appellate briefs asserting

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

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 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.

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.[6]

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

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[6] 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.