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

AB-8814
File: 20-214650 Reg: 07066438

7-ELEVEN, INC., RIPUDAMAN N. GILL, and TARLOK S. GILL,
dba 7-Eleven No. 2173-19399
1665 South Robertson Boulevard, Los Angeles, CA 90035,
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., Ripudaman N. Gill, and Tarlok S. Gill, doing business as 7-Eleven No. 2173-19399 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, all of which were stayed for a one-year probationary period, for their clerk, Ariana Coronel, having sold a 24-ounce can of Bud Light beer, an alcoholic beverage, to Opal Garibai, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Ripudaman N. Gill,

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[1]The decision of the Department, dated January 23, 2008, is set forth in the appendix.

and Tarlok S. Gill, appearing through their counsel, Ralph Barat Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. The Department instituted an accusation against appellants on July 23, 2007, charging that their employee sold an alcoholic beverage to a minor on May 3, 2007.

An administrative hearing was held on November 29, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented by Opal Garibai, the minor decoy, and by Anthony Antonio, a Los Angeles police officer.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven, and no affirmative defense had been established under Rule 141(b)(2) (4 Cal. Code Regs., §141) or Rule 141(b)(5) (*Ibid*.)

Appellants filed a timely notice of appeal in which they raise the following issues: (1) the Department lacked appropriate screening mechanisms ensuring the non-appearance of bias in the administrative proceeding; (2) the Department engaged in improper ex parte communications; and (3) the decision should be reversed because the Department submitted an incomplete record to the Appeals Board. Appellants also ask the Appeals Board to withhold its decision in this matter until the California Supreme Court issues its decision in *Morongo Band of Mission Indians v. State Water*

Resources Control Board (S155589)[2] and have moved to augment the record with the addition of General Order No. 2007-09 and other related documents. DISCUSSION

I and II

The administrative hearing in this case took place on November 29, 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

[2] The California Supreme Court issued its decision in *Morongo Band of Mission Indians v. State Water Resources Control Board* (S155589) on February 9, 2009, reversing the decision of the appellate court, and holding that the separation of prosecutorial and advisory functions may be made on a case-by-case basis.

necessary and appropriate.

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.

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.[3] Although not identified in the Order, the "appellate decisions" to which it

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

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 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.

There is no need to augment the record as requested by appellants.

III

Appellants contend that the decision must be reversed in its entirety because of the Department's failure to supply a complete record to the Appeals Board.

Appellants have not shown that the documents omitted from the record have any relevance to the issues on appeal. The documents in question include a motion to compel discovery, points and authorities in support of and in opposition to the motion, and an order denying the motion. 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.[4]

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

[4] We note that a supplemental Certification of the record was filed with the Appeals Board on September 23, 2008, transmitting copies of the discovery documents claimed by appellants to be important to their appeal.

maker in a way adverse to appellants.

ORDER

The decision of the Department is affirmed.[5]

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

[5] 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.