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

AB-8815
File: 20-344783 Reg: 07066002

7-ELEVEN, INC., MANUEL A. LOPEZ, and MIRNA L. LOPEZ,
dba 7-Eleven # 2174-27017
1190 Studebaker Road, Long Beach, CA 90815,
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 12, 2009

7-Eleven, Inc., Manuel A. Lopez, and Mirna L. Lopez, doing business as 7-Eleven # 2174-27017 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for two of their clerks selling alcoholic beverages to two 19-year-old individuals, violations of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Manuel A. Lopez, and Mirna L. Lopez, 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, David W. Sakamoto.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 31, 1998. On June 6, 2007, the Department filed an accusation against appellants charging that on April 13, 2007, appellants' clerk, Rafael Lopez, sold an alcoholic beverage to 19-year-old Travis Benson, and another clerk, Lucia Saldana, sold an alcoholic beverage to 19-year-old Steven Scrape.

At the administrative hearing held on November 14, 2007, documentary evidence was received and testimony concerning the sales was presented by the two underage purchasers, Benson and Scrape; by clerk Rafael Lopez;[2] by co-licensee Manuel Lopez; and by Department investigators Dawn Richardson and Esmerelda Reynoso-Torres.

The Department investigators were outside appellants' premises doing a random compliance check when they saw Benson and Scrape enter the premises. Reynoso-Torres thought that Benson and Scrape looked young, so she followed them into the store. Benson and Scrape went to the coolers; Benson removed two 40-ounce bottles of Mickey's Fine Malt Liquor and one 24-ounce can of Corona beer and Scrape chose two 24-ounce bottles of Corona beer. Each took his items to a different clerk.

Benson took his items to the counter where Lopez was the clerk. Lopez told Benson the price, Benson paid for the beer, and Benson left the store with the beer. Lopez did not ask Benson his age or for identification. Benson was stopped outside by the investigators who ascertained that he was 19 years old. The only identification he was carrying was a valid Texas driver's license showing his true age.

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[2]Rafael Lopez is the younger brother of co-licensee Manuel Lopez.

Scrape took his beer to the register where Saldana was the clerk. She rang up the purchase and Scrape paid for it and left the store with the beer. Saldana did not ask Scrape his age or for identification. Scrape was also stopped by the investigators outside the store. They eventually determined that he was only 19. He was carrying a college identification card, his own valid California driver's license showing his true age, and an expired California driver's license issued to another person who was over the age of 21.

The Department's decision determined that the violations charged were proved and no defense was established. Appellants filed an appeal contending: (1) the Department lacked screening procedures to prevent ex parte communications between its litigating attorneys and the decision maker; (2) the Department engaged in prohibited ex parte communications; and (3) the administrative law judge (ALJ) failed to address appellants' concerns over the credibility of the Department's witnesses. The first two issues are interrelated and will be discussed together. In addition, appellants have moved to augment the record with various documents.

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 November 14, 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

[3]A certified copy of the Order is attached to a declaration of the Department attorney.

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:

> 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.
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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 evidentiary hearings regarding claims of ex

parte communications between litigating counsel and the Department's decision makers.[4] The Order mentions "appellate decisions" that are not identified but which 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 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.

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

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 contend the decision must be reversed because the ALJ did not explain the basis for his credibility determinations. Citing Government Code section 11425.50, subdivision (b),[6] and *California Youth Authority v. State Personnel Bd.* (2002)

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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] Section 11425.50, subdivision (b), provides, in pertinent part:

> If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

104 Cal.App.4th 575, 596 [128 Cal.Rptr.2d 514], they argue that the ALJ "cannot merely believe certain witnesses and disbelieved other [*sic*], without identifying any 'observed demeanor, manner, or attitude' of the witnesses." (App. Br., p. 14.)

Additionally, appellants assert that the ALJ violated the precept of the California Supreme Court in *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 [113 Cal.Rptr. 836] (*Topanga*), that an agency decision must include findings that "bridge the analytic gap" between the evidence and the conclusions reached.

We begin by stating the general principle that it is the province of the ALJ, as the trier of fact, to make determinations as to witness credibility. *(Lorimore v. State Personnel Bd.* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of abuse of discretion.

The applicability of Government Code section 11425.50, subdivision (b), has been before the Board on a number of occasions, and arguments similar to those made by appellants have been rejected without exception. In *7-Eleven, Inc./Navdeep Singh* (2002) AB-7792, the appellants argued that because the decoy was the only witness to testify about what occurred in the premises during the sale of the alcoholic beverage, and his testimony suffered from striking credibility defects, the ALJ was required to explain why the decoy's testimony was sufficient to support the Department's accusation. The Board rejected this argument, stating:

> Section 11425.50 is silent as to the consequences which flow from an ALJ's failure to articulate the factors mentioned. However, we do not think that any failure to comply with the statute means the decision must be

> reversed. It is more reasonable to construe this provision as saying simply that a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all. [Fn. omitted.]

(See also *7-Eleven, Inc./Janizeh* (2005) AB-8306; *Chuenmeersi* (2002) AB-7856.)

Appellant's reliance on *California Youth Authority v. State Personnel Bd.*, *supra*, is also misplaced. In that case, the court determined that section 11425.50 did not "come into play" because the ALJ did not identify the witnesses' demeanor, manner, or attitude that supported his credibility determinations; therefore, the court said, it would not give special weight to those determinations when considering whether substantial evidence supported the administrative decision. Since neither party had argued that the decision was defective due to the ALJ's failure to identify the specified factors, the court declined to express a view on the matter. (*California Youth Authority*, *supra*, 104 Cal.App.4th at 596, n. 11.)

As for appellants' contention that *Topanga*, *supra*, requires the ALJ to address conflicts in the testimony and explain why he believed one witness and not another, the Appeals Board has rejected similar arguments numerous times before. For example, in *7-Eleven, Inc./Cheema* (2004) AB-8181 (fns. omitted), the Board explained:

> Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga*, *supra*, 11 Cal.3d 506, 515, italics added.) [¶] . . . [¶]
>
> Appellants' demand that the ALJ "explain how [the conflict in testimony] was resolved" (App. Br. at p. 2) is little more than a demand for the reasoning process of the ALJ. The California Supreme Court made clear in *Fairfield v. Superior Court of Solano County* (1975) 14 Cal.3d 768,

778-779 [122 Cal.Rptr. 543], that, as long as findings are made, a party is not entitled to attempt to delve into the reasoning process of the administrative adjudicator:

> As we stated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836, 522 P.2d 12]: "implicit in [Code of Civil Procedure] section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order."
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> In short, in a quasi-judicial proceeding in California, the administrative board should state findings. If it does, the rule of *United States v. Morgan* [(1941)] 313 U.S. 409, 422 [85 L.Ed. 1429, 1435 [61 S.Ct. 999]] precludes inquiry outside the administrative record to determine what evidence was considered, and reasoning employed, by the administrators.

The language quoted above makes it clear that if findings are made, no further inquiry may be made into how those findings were reached. The Department decision contains findings, and the inquiry ends there.

ORDER

The decision of the Department is affirmed.[7]

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

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[7]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.