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

AB-9561
File: 20-517471 Reg: 15082652

7-ELEVEN, INC., BALWANT KAUR GREWAL, and JAGBIR SINGH GREWAL,
dba 7-Eleven Store #34923
7371 Florence Avenue, Downey, CA 90240-3606,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: October 6, 2016
Sacramento, CA

ISSUED NOVEMBER 15, 2016

Appearances: *Appellants*: Saranya Kalai, of Solomon Saltsman & Jamieson, as counsel for appellants 7-Eleven, Inc., Balwant Kaur Grewal, and Jagbir Singh Grewal.
Respondent: Sean Klein as counsel for the Department of Alcoholic Beverage Control.

OPINION

7-Eleven, Inc., Balwant Kaur Grewal, and Jagbir Singh Grewal, doing business as 7-Eleven Store #34923 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] suspending their license for fifteen days because their clerk sold an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 14, 2012. On June 23, 2015, the Department filed an accusation against appellants charging that, on

[1.] The decision of the Department, dated December 14, 2015, is set forth in the appendix.

January 30, 2015, appellants' clerk, Arwinder Ladi Singh (the clerk), sold an alcoholic beverage to 18-year-old Ismael Granados. Although not noted in the accusation, Granados was working as a minor decoy for the Downey Police Department at the time.

On July 7, 2015, appellants filed and served on the Department a Request for Discovery pursuant to Government Code section 11507.6 demanding, inter alia, the names and addresses of all witnesses. On July 17, 2015, appellants received a response providing the address of the Downey Police Department in lieu of the decoy's home address. On July 22, 2015, appellants sent a letter to the Department demanding that it furnish the decoy's contact information by July 27, 2015. On July 28, 2015, appellants received a response from the Department asserting that the contact information for the Downey Police Department was sufficient.

On July 31, 2015, appellants filed a Motion to Compel Discovery. On August 3, 2015, the Department responded and opposed the motion.

On August 28, 2015, the ALJ denied appellants' motion, arguing that the statute requires only an "address" and not necessarily a home address, and further, that this Board's decision in *Mauri Restaurant Group* (1999) AB-7276 was on point and mandated denial of the motion.

The administrative hearing proceeded on September 22, 2015. Documentary evidence was received and testimony concerning the sale was presented by Granados (the decoy) and by co-appellant Jagbir Singh Grewal.

Testimony established that on the date of the operation, the decoy entered the licensed premises, walked to the cooler, and selected a six-pack of Bud Light beer,

which he took to the counter. The decoy paid for the beer, and the clerk gave him some change. The decoy then exited the premises.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed this appeal contending (1) the ALJ abused his discretion by denying appellants' motion to compel release of the decoy's contact information; (2) the Department failed to comply with Government Code section 11507.6 when it provided the address of the Downey Police Department, rather than the decoy's home address; and (3) the Department improperly included two exhibits—a police investigative report and a photograph—in the administrative record, resulting in an ex parte communication.

DISCUSSION

I

Appellants contend the Department failed to comply with section 11507.6 of the Government Code when it provided the address of the Downey Police Department, rather than the decoy's home address, during pre-hearing discovery. (App.Br. at pp. 8-10.)

Appellants further contend the ALJ abused his discretion by denying their motion to compel disclosure of the minor decoy's home address. (App.Br. at pp. 6-8.) They accurately observe that this Board has held that the burden of proving an affirmative defense falls on the party raising it, and that "[p]re-hearing discovery is necessary to have a meaningful chance to meet that burden." (App.Br. at p. 8.) Appellants insist the Department's refusal to provide the decoy's address, coupled with the ALJ's denial of

their motion to compel, prejudiced them and deprived them of the ability to meaningfully defend themselves. (App.Br. at pp. 8, 10.)

This Board has recently addressed a number of cases raising this purely legal issue. In *7-Eleven, Inc./Joe* (2016) AB-9544, we held that the decoy's personal address is protected under section 832.7 of the Penal Code. (*Id.* at pp. 6-10.) We follow our *Joe* decision here and refer the parties to that case for a full discussion of the legal issues.

In *7-Eleven, Inc./Nagra* (2016) AB-9551, we emphasized that the decoy must *actually be reachable* at the address provided. (*Id.* at p. 5, citing *7-Eleven, Inc./Joe*, *supra*, at p. 11.) We noted that "the Department is accountable for the validity of the addresses it provides." (*Id.* at p. 7.) "It is not enough to provide a Department District Office address if the District Office is unable or unwilling to forward communications to the decoy." (*Id.* at p. 6.) That responsibility does not evaporate where, as here, the Department provides the contact information of an independent law enforcement agency. It is incumbent upon the Department to ensure that the decoy is actually reachable through that law enforcement agency.

This Board will offer relief in the form of reversal if "we are presented with a well-established record showing that a decoy was legitimately unreachable at the address the Department provided during discovery, and the Department took no steps to provide an address at which the decoy could actually be reached." (*Id.* at p. 8.) Appellants, however, have presented no evidence that they attempted to reach the decoy through the Downey Police Department, let alone that their attempts failed. We therefore follow our decision in *Joe* and find appellants' contentions meritless.

II

Appellants contend that the Department improperly included an investigative report and a photograph in the administrative record provided to the Department Director in his decision-making capacity, resulting in an ex parte communication meriting reversal. (App.Br. at p. 10; Exhs. 4, 7.) Both exhibits were introduced by the Department and marked for identification, but counsel for the Department never referred to them during the course of the hearing, and ultimately moved to withdraw them. (App.Br. at pp. 14-15.)

According to appellants, however, when the Department moved to withdraw the exhibits, the ALJ responded by "express[ing] severe impatience with the Department's actions and his distaste for the Appeals Board's decision on *ex parte* communications." (App.Br. at p. 14.) The ALJ then gave appellants the opportunity to comment on the exhibits. (App.Br. at p. 15.) Appellants contend they withheld comment "because to comment would disclose the content of the exhibits[,] which would then become part of the record and therefore prejudice Appellants." (App.Br. at p. 15.)

Appellants rely on the Department's General Order 2007-09 as support for their assertion that they did not "reasonably expect" the exhibits would be included in the administrative record provided to the Department Director. (App.Br. at p. 15.) They interpret reasonable expectation as synonymous with notice, and therefore argue they did not receive notice that the exhibits would be provided to the Director. (App.Br. at p. 16.)

An ex parte communication is broadly defined as "'[a] generally prohibited communication between counsel and the court when opposing counsel is not present." (Black's Law Dict. (7th ed. 1999) p. 597.) Section 11430.10 of the Government Code provides, in relevant part:

> (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.
>
> (b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

As this Board has repeatedly noted, "the hallmark of an ex parte communication is the inability of the opposing party to respond." (*7-Eleven, Inc./Samra* (2014) AB-9387, at p. 4; see also *7-Eleven, Inc./Khanmohamed* (2014) AB-9383, at p. 9.) This aligns with the Quintanar holding:

> The APA bars only advocate-decision maker ex parte contacts, not all contacts. Thus, for example, nothing in the APA precludes the ultimate decision maker from considering posthearing briefs submitted by, and served on, each side. The Department if it so chooses may continue to use the report of hearing procedure so long as it provides licensees a copy of the report and the opportunity to respond. (Cf. § 11430.50 [contact with presiding officer or decision maker must be public, and all parties must be afforded opportunity to respond].)

(*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Bd.* (*Quintanar*) (2006) 40 Cal.4th 1, 17 [50 Cal.Rptr.3d 585], emphasis added.)

While this Board has cited the Department's General Order 2007-09 as *support* for the conclusion that, in specific cases, an exhibit was improperly included in the record and therefore constituted an ex parte communication, it has not held that the

language of the General Order—a document which is, in fact, an internal guideline and not even a properly adopted regulation—somehow defines the doctrine of ex parte communication.

In fact, we have explicitly rejected that position. In *Samra*, counsel for the appellant introduced an exhibit, ensured it was marked for identification, and then withdrew it and appealed on the grounds that the licensee did not "reasonably expect" the exhibit would be provided to the Department Director under the terms of the Department's General Order. (*7-Eleven, Inc./Samra* (2014) AB-9387, at pp. 3-6.) We found that "[n]otice and an opportunity to be heard are implicit in the act of introducing the document at hearing." (*Id.* at p. 5; see also *7-Eleven, Inc./Arman Corp.* (2014) AB-9393 ["Notice to appellants and an opportunity for them to be heard, the *sine qua non* of due process, is implicitly met by appellants' act of introducing the document at hearing."].) We also noted that we were "deeply troubled by a statement made by appellants' counsel at oral argument, to the effect that appellants pursued an ex parte communication defense based on their own exhibit in order to test the Department's compliance with its General Order," and indicated that we "will not tolerate such manipulation." (*Samra*, *supra*, at pp. 5-6.)

In sum, the ALJ was incorrect when he lamented that "it's only because of this interpretation by the Appeals Board of the Department's own general order that we've got this problem." (RT at p. 41.) In fact, it was the Department's recurrent failure to provide licensees with notice and an opportunity to be heard on exhibits it introduced before its own ALJs and then forwarded to its own Department Director that resulted in

the series of decisions the ALJ describes as "a mess." (RT at p. 39.) We encourage the ALJ to reread those decisions closely.

In this case, for all his frustration with both parties and his dissatisfaction with this Board's interpretation of the law, the ALJ did ensure that appellants had notice of the exhibits and the opportunity to respond:

> THE COURT: That leaves [exhibits] 4 and 7. The Appeals Board is generally concerned with the ability of parties to address issues—documents which go to the director. I don't think I can hand back exhibits that parties have entered.
>
> So this is your opportunity. Do you have anything you'd like [to] tell me about Exhibits 4 and 7? Do you have any witnesses you would like to call to address Exhibits 4 and 7, which by the way you don't to do [*sic*].
>
> [¶ . . . ¶]
>
> So I'm giving you the opportunity to comment on these two exhibits in any manner in which you choose. Recognize that by doing so, you are probably waving [*sic*] the opportunity to raise this as an issue later under the Appeals Board decisions relating to unadmitted exhibits.
>
> [COUNSEL FOR APPELLANTS]: I have no comment, Your Honor.
>
> THE COURT: You understand you've been given the opportunity to address them in any way, shape, or form you feel fit?
>
> [COUNSEL FOR APPELLANTS]: I understand, Your Honor.
>
> THE COURT: All right. I'm not giving [exhibits] 4 and 7 back. They're going to be part of the record. And everybody is on notice, they are going to go to the director. The director will see these exhibits.

(RT at pp. 42-43.) That appellants' counsel only responded with "no comment" rather than an evidentiary objection or argument is irrelevant; it is the *opportunity* to be heard that matters, not the content, if any, of the response itself.

In this case, appellants were clearly given notice of exhibits 4 and 7 as well as the opportunity to respond, if they desired. There is no ex parte communication here.[2]

ORDER

The decision of the Department is affirmed.[3]

FRED HIESTAND, ACTING CHAIRMAN
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[2.] We recommend the Department implement some consistent method of ensuring that licensees receive both notice and the opportunity to be heard on *any* exhibit forwarded to the Director. Alternatively, the Department may withhold the exhibit (or seal it, as suggested by Department counsel) from the administrative record forwarded to the Director. (See RT at p. 44 [rejecting counsel's request that exhibits 4 and 7 be "sealed in some way"].) The ALJ's frustration appears to arise not from the law itself, but from the practical inconveniences of complying with it.

[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.