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

AB-8549
File: 20-386236 Reg: 05060246

BP WEST COAST PRODUCTS, LLC, dba Arco AM/PM # 543
1949 Arden Way, Sacramento, CA 95815,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: April 5, 2007
San Francisco, CA

ISSUED JUNE 11, 2007

BP West Coast Products, LLC, doing business as Arco AM/PM # 543 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's 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 appellant BP West Coast Products, LLC, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Botting.

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[1]The decision of the Department, dated March 30, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 26, 2002. On July 20, 2005, the Department filed an accusation against appellant charging that, on March 22, 2005, appellant's clerk, Earl A. Hamilton (the clerk), sold an alcoholic beverage to 19-year-old Kelsey Dodson. Although not noted in the accusation, Dodson was working as a minor decoy for the Sacramento County Sheriff's Department at the time.

At the administrative hearing held on January 18, 2006, documentary evidence was received, and testimony concerning the sale was presented by Dodson (the decoy) and by detective Juliette Sanchez, a Sacramento County Sheriff"s deputy.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant filed an appeal contending: (1) The administrative law judge (ALJ) improperly admitted into evidence a cash register receipt that the Department had not produced during discovery, and (2) the Department violated prohibitions against ex parte communications.[2]

DISCUSSION

I

During her testimony, detective Sanchez opened a sealed brown paper bag containing two plastic bags, a 24-ounce bottle of Corona beer, and a receipt for the purchase of the beer. She identified these items as the ones given to her by the decoy when she came out of the premises after purchasing the beer. The cash register receipt was marked as Exhibit 4.

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[2]Appellant also filed a motion asking the Board to augment the record with any Report of Hearing in the Department's file for this case. Our decision on the ex parte communication issue makes augmenting the record unnecessary, and the motion is denied.

Later during the hearing, the Department moved to have its exhibits, including Exhibit 4, entered into evidence. Appellant objected because the Department had not produced the cash register receipt during discovery. Government Code section 11507.6 requires each party to produce certain documents "in [its] possession or custody or under [its] control," including "[a]ll writings . . . which the party then proposes to offer in evidence."

Appellant indicated it had subpoenaed the Sacramento County Sheriff's Department for "all written reports pertaining to all sales to minor violations on March 22, 2005 and involving Kelsey Dodson," and assumed "that any records not produced are not going to be introduced as exhibits at the hearing by the Department." [RT 45.]

The Department argued appellant was not surprised at the hearing by the cash register receipt because the police report, which had been provided during discovery, included a "property receipt/report" listing the beer and the cash register receipt as evidence in the possession of the Sacramento County Sheriff's Department. In addition, the subpoena appellant served on the Sheriff's Department asked for reports, not receipts, and if appellant had wanted a copy of the cash register receipt, the Department asserts, it could have specifically requested it. The ALJ said the Department's point was "well-taken" and he overruled appellant's objection to Exhibit 4. [RT 46-47.]

On appeal, appellant asserts the ALJ overruled its objection for two reasons, both of which were wrong. First, according to appellant, the ALJ was wrong to rule against appellant because of appellant's failure to file a motion to compel specifically requesting the receipt. Appellant contends it couldn't know beforehand that the Department would offer the receipt in evidence; that it chose not to pursue discovery of

the receipt since it appeared the Department did not intend to offer it as evidence; and the Department's failure to produce the receipt in discovery "is either the result of negligence or trickery," which should not prevent appellant from receiving the discovery to which it is entitled.

Appellant's first contention is simply unsupported; clearly, the ALJ did not base his ruling on appellant's failure to file a motion to compel specifically requesting production of the cash register receipt. Although the ALJ did ask appellant why it had not filed a motion to compel, that was based on the ALJ's assumption that appellant had received nothing in response to the *subpoena* it served on the *Sheriff*. It had nothing to do with the *Department's* response to appellant's *request for discovery*. The ALJ agreed with the Department that appellant's discovery request asked only for "reports" and that appellant could have made a specific discovery request for the cash register receipt once appellant learned of its existence. However, neither the Department nor the ALJ said anything during this discussion about a motion to compel. It appears that appellant may have failed to differentiate between a request for discovery and a motion to compel, the latter of which addresses a failure to provide discovery that was requested.

Appellant also contends that the ALJ's ruling on the motion was based erroneously on the Department not having possession, custody, or control of the receipt. Appellant cites the decision in *People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060 [19 Cal.Rptr.3d 324], in which the court stated that, to the extent a state agency has a role in investigating a party as a part of the action, documents related to that investigation may be sought directly from "the People," i.e., the Attorney General, who is prosecuting the action on behalf of the citizens of California, rather than the particular agency that has actual possession of the documents requested. Appellant

asserts "[i]t would be a legal absurdity not to apply the same rule to an administrative proceeding." (App. Br. at p. 6.)

The actual holding in that case, however, was that the People, prosecuting an action through the Attorney General, "are not deemed to have possession, custody or control over documents of any state agency." State agencies, in the ordinary course of their duties, are considered third parties under the discovery statutes, and can be compelled to produce documents only by a subpoena.

Appellant's position is meritless. The language appellant relies on was dicta and has no application to this case. The investigating agency in this case was the Sacramento County Sheriff's Department, not another state agency, and the Department is not "the People." The Department did not have possession, custody, or control of the receipt; the Sheriff's Department did. That was made very clear when the receipt was produced from a sealed bag that had been, from the time of the decoy operation until the hearing, in the possession of the Sheriff's Department. The only way for appellant to obtain the receipt was by subpoena.

In fact, appellant did serve a subpoena duces tecum on the Sheriff's Department. We do not know what it received from the Sheriff's Department, but it would almost certainly have received a copy of the same police report it received from the Department, clearly indicating that the Sheriff's Department had the beer and the cash register receipt.

It is not enough to show error in the ALJ's ruling; appellant must also show that the error was prejudicial, and reversal is not appropriate unless the error has resulted in a miscarriage of justice. (9 Witkin Cal. Procedure (4th ed. 1997) Appeal, § 409.) Appellant cannot, and has not attempted to, demonstrate that it was prejudiced by having the cash register receipt entered into evidence. Appellant is simply attempting

to make a silk purse out of a sow's ear. Undisputed testimony established that the decoy actually purchased the beer, and there was no controversy about that fact. Even if we believed the cash register receipt to have been admitted erroneously, the error would be harmless, not warranting reversal. The cash register receipt was immaterial, cumulative of other evidence, and it could not have had any substantial influence on the result. (See, e.g., *Kalfus v. Fraze* (1955) 136 Cal.App.2d 415, 423, 427 [288 P.2d 967]; *Inouye v. McCall* (1939) 35 Cal.App.2d 634, 635 [96 P.2d 386].)

II

On November 13, 2006, the California Supreme Court held that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*).) In *Quintanar*, the Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access to the report of hearing, establishing, the court held, "that the reports of hearing were provided to the agency's decision maker." *(Id.* at pp. 15-16.)

In the present case, appellant contends a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar* has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing

before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.[3]

ORDER

The decision of the Department is affirmed as to all issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.[4]

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

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[3]The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

[4]This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.