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

AB-8712
File: 47/58/77-354152 Reg: 06063421

CREST MANAGEMENT LLC, dba Bar of America
10040-42 Donner Pass Road, Truckee, CA 96161,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: April 3, 2008
San Francisco, CA

ISSUED: JULY 24, 2008

Crest Management LLC, doing business as Bar of America (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license and permits for 10 days for its clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Crest Management LLC, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

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[1]The decision of the Department, dated August 6, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant was issued an on-sale general license and club caterers' and event permits[2] on January 23, 1999. On July 13, 2006, the Department filed an accusation against appellant charging that on May 19, 2006, appellant's clerk, Brian Dinneen (the clerk), sold an alcoholic beverage to 18-year-old Evan Black. Although not noted in the accusation, Black was working as a minor decoy for the Department at the time.

At the administrative hearing held on December 1, 2006, documentary evidence was received and testimony concerning the sale was presented. Subsequent to the hearing, the administrative law judge (ALJ) submitted a proposed decision to the Department dismissing the accusation. The Department did not adopt the ALJ's proposed decision, but issued its own decision pursuant to Government Code section 11517, subdivision (c), on August 6, 2007,[3] which determined that the violation charged was proved and no defense was established.

Appellant has filed an appeal contending: (1) The Department did not include the Department's certified decision in the certified record sent to the Appeals Board and to appellant; (2) the Appeals Board should reserve judgment in this appeal until the California Supreme Court has decided *Morongo Band of Mission Indians v. State Water Resources Control Board*, review granted October 24, 2007, S155589 (*Morongo*); (3) the Department engaged in improper ex parte communications; and (4) the Department

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[2]We shall refer to the license and permits, collectively, as appellant's license.

[3]The Department's decision uses a date in August 200***6***, but since the administrative hearing before the ALJ was not held until December 1, 2006, we are assuming that the correct year of the Department's decision is 200***7***. The decision and the text of the certification refer to the date of the decision as August ***8***; however, the certification is dated August ***6***. The errors regarding the date of the decision are disturbing, but appellant does not specifically challenge the decision's date, so we will assume that the typist was having a bad day and that one of these dates is correct.

did not have effective screening procedures in place to prevent its attorneys from acting as both prosecutors and advisors to the decision maker. Appellant has also filed a motion asking the Board to augment the record with any Report of Hearing and related documents in the Department's file for this case, and with General Order No. 2007-09 and any related documents.

DISCUSSION

I

Appellant alleges that the accusation must be dismissed because the certified record sent to the Appeals Board and to appellant from the Department did not include a copy of the Department's certified decision. Dismissal is required, appellant argues, because the Board cannot adequately review this appeal without a certified decision.

It is true that the Department failed to include the Department's decision when it initially sent the certified record to the Appeals Board on October 23, 2007; the record included only the ALJ's proposed decision and the Department's notice that it did not adopt the proposed decision and would decide the case itself pursuant to Government Code section 11517, subdivision (c). When the Appeals Board discovered this omission and notified the Department, the Department sent the original certified decision to the Appeals Board on February 5, 2008.

The only proof of service attached to the document sent to the Board indicates that the Department sent appellant a copy of the Department's decision on August 9, 2007, but did not send appellant a copy of the decision to correct the certified record when it sent one to the Appeals Board. It appears then, that the Department has not sent appellant a complete certified record. However, this is not a basis for reversal.

Appellant's allegation that the Board did not receive the decision with the certified record is correct. However, the Board did receive it eventually, with sufficient time for review before oral argument. Therefore, there is no merit to appellant's argument that the Board has been prevented from reviewing the entire record.

Appellant has also suffered no detriment. It did not receive the complete record, but it had already received a copy of the Department's certified decision since it was the party involved in the hearing. Although the Department did not comply fully with its obligation to provide a complete certified record, appellant has not shown that this created a basis for reversing the Department's decision.

II

Appellant asserts that "economy of resources" compels delaying the Board's decision in this appeal until the California Supreme Court issues a decision in a case that "implicat[es the] same due process and appearance of bias issues as the instant appeal." (App. Br. at p.12.) It urges that, if the Board does not wait for the Court's decision, appellant "will be compelled to pursue judicial review of any decision otherwise affirming the [Department's decision], thereby continuing this matter indefinitely and continuing to expend Department resources." (*Id*., at p. 13.)

The Court's website states the issue in *Morongo*, *supra*, as follows:

> May a staff attorney for an administrative agency attorney [*sic*] serve as a prosecutor in one matter while simultaneously serving as an advisor to the agency as decision maker in an unrelated matter, without violating the due process rights of parties that appear before the agency?

While the issue in *Morongo* may be related to some of the issues that are raised in this appeal we do not believe it is necessary to wait for the Court's decision; a satisfactory (at least from the Board's point of view) decision can be reached based on the currently available legal authority.

III

Appellant contends the Department violated the Administrative Procedure Act (APA)[4] by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision. It relies on the California Supreme Court's holding in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*) and two appellate court decisions following *Quintanar*: *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [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*). Appellant asserts that this matter can only be resolved properly by reversing the decision of the Department.

The Department argues that appellant has not produced any evidence of an ex parte communication. A declaration by the staff attorney who represented the Department at the administrative hearing asserts that at no time did the attorney prepare a report of hearing or other document, or speak to any person, regarding this case. The Department contends this Board has no basis either to reverse the Department's decision or to require "further inquiry into the matter," since it has no evidence of an ex parte communication.

The Department apparently believes that it need only include a declaration denying the existence of an ex parte communication for the Appeals Board to rule in its favor. We disagree.

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[4]Government Code sections 11340-11529.

Three courts have now issued published decisions in which the Department's practice of ex parte communication with its decision maker or the decision maker's advisors is determined to be endemic in that agency. (*Quintanar*, *supra*, 40 Cal.4th 1, 5 [ex parte provision of report of hearing was "standard Department procedure"]; *Rondon*, *supra*, 151 Cal.App.4th 1274, 1287 ["widespread agency practice of allowing access to reports"]; *Chevron*, *supra*, 149 Cal.App.4th 116, 131 [ex parte communication not unique to *Quintanar* case, "but rather a 'standard Department procedure'"].) The Department has presented no evidence in this case, or any of the numerous other cases this Board has seen on this issue, that the "standard Department procedure" has changed. The Department has not provided, for example, a written policy, with a date certain, from which we could conclude that the Department has instituted an effective policy screening prosecutors from the decision makers and their advisors. The Department bears the burden of proving that it has adequate screening procedures (*Rondon*, *supra*), and without evidence of an agency-wide change of policy and practice, we would be exceedingly reluctant to affirm or reverse on the basis of a single declaration, especially where there has been no opportunity for cross-examination.[5]

For the foregoing reasons, we will do in this case as we have done in so many others, that is, remand this matter to the Department for an evidentiary hearing.

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[5]In *Windigo Mills v. Unemployment Ins. Appeals Bd*. (1979) 92 Cal.App.3d 586, 597 [155 Cal.Rptr. 63], the court stated that affidavits generally are not regarded as competent evidence:

> The general rule in civil actions is that absent statutory authorization, stipulation of the parties, or a waiver by failure to object, an affidavit (Code Civ. Proc., § 2003) or a declaration under penalty of perjury (Code Civ. Proc., § 2015.5) is not competent evidence; it is hearsay because it is prepared without the opportunity to cross-examine the affiant.

The Department has not pointed out any reason the declaration should be considered an exception to the general rule just stated.

IV

Appellant asserts that the Department violated its right to due process because it did not have procedures in place to eliminate the "appearance of bias" arising from Department attorneys acting both as advisors to the decision maker and as prosecutors, nor did it have procedures to "screen" advisors from prosecutors.

As did the California Supreme Court in *Quintanar*, *supra*, we decline to address appellant's due process argument.

> Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

(*Quintanar*, *supra*, 40 Cal.4th at p. 17, fn. 13.)

There is another reason we need not consider this issue. The situation giving rise to appellant's due process claim existed at the time of the administrative hearing and should have been raised then. Since appellant did not, the Board is entitled to consider the issue waived. (*Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1141-1142 [67 Cal.Rptr.3d 2]*; Vikco Ins. Servs. v. Ohio Indem. Co*. (1999) 70 Cal.App.4th 55, 66-67 [82 Cal.Rptr.2d 442]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167]; 9 Witkin, Cal. Procedure (4th ed. 1997 & 2007 supp.) Appeal, §394.) We decline to consider this contention.

V

Appellant filed a motion to have the record augmented with any report of hearing in the Department's file regarding this case and with General Order No. 2007-09 and any documents related to it.

We have said in other appeals where this motion has been made that our conclusion regarding the ex parte communication issue makes augmenting the record unnecessary; that is, if an evidentiary hearing is held, the primary focus of it will be whether or not a report of hearing was prepared and, if so, it will become part of the record. The same conclusion applies in this case with regard to the requested report of hearing.

Appellant also requests that General Order No. 2007-09 (the order) be made part of the record. A copy of a document purporting to be this order is attached to appellant's motion to augment as Exhibit 3. The order is a document issued by the Department over the signature of the director, Stephen M. Hardy, dated August 10, 2007, which is also designated as the order's effective date.

The order notes the court cases prohibiting the Department's practice of ex parte communications with the decision maker and placing the burden on the Department to show that no ex parte communication occurred in a particular case. It also sets out procedures to be implemented by the Department to comply with the courts' directives. A properly authenticated copy of the order is more appropriately included in the record created during an evidentiary hearing. The motion to augment is denied.

ORDER

The decision of the Department is affirmed as to all issues 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.[6]

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

[6]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.