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

AB-8733
File: 20-388256 Reg: 06064568

7-ELEVEN, INC., HARBHAJAN KAUR HUNDAL, and RAJKARAN SINGH HUNDAL,
dba 7-Eleven 2131-20508
948 Grand Avenue, Spring Valley, CA 91977,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 4, 2008
Los Angeles, CA

ISSUED: DECEMBER 3, 2008

7-Eleven, Inc., Harbhajan Kaur Hundal, and Rajkaran Singh Hundal, doing business as 7-Eleven 2131-20508 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days for their 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 appellants 7-Eleven, Inc., Harbhajan Kaur Hundal, and Rajkaran Singh Hundal, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

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[1]The decision of the Department, dated August 16, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on June 18, 2002. Thereafter, the Department instituted an accusation against appellants charging that, on November 18, 2006, appellants' clerk, Jamal Mujahid (the clerk), sold an alcoholic beverage to 17-year-old Joseph Massey. Although not noted in the accusation, Massey was working as a minor decoy for a decoy operation being conducted jointly by the Department, the La Mesa Police Department and the San Diego County Sheriff's Department.

An administrative hearing was held on May 25, 2007, at which time documentary evidence was received, and testimony concerning the sale was presented by Massey (the decoy) and by Anthony Barabas, a Department investigator. Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal making the following contentions: (1) the Department engaged in ex parte communications; (2) the Department lacked effective screening measures to prevent ex parte communications; (3) the Department refused to provide required discovery; (4) the Board should withhold its decision pending the decision in the *Morongo* case; (5) the decision fails to provide a legal analysis for its credibility findings. Issues 1 and 2 are interrelated and will be discussed together.

DISCUSSION

I and II

Appellants contend the Department violated the APA and due process by

engaging in ex parte communication with the Department's decision maker, and by its failure to maintain effective screening procedures within the legal staff to prohibit its prosecutors from engaging in ex parte communications with the decision maker or the advisors to the decision maker. The Department denies that an ex parte communication was made. 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.

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. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 5 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*) [ex parte provision of report of hearing was "standard Department procedure"]; *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274, 1287 [60 Cal.Rptr.3d 295] (*Rondon*) ["widespread agency practice of allowing access to reports"]; *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116, 131 [57 Cal.Rptr.3d 6] (*Chevron*) [ex parte communication not unique to *Quintanar* case, "but rather a 'standard Department procedure'"].)

The Department insists 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. Declarations and affidavits are generally considered not to be competent

evidence.[2] Because they are hearsay statements, they cannot, by themselves, support a finding.

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.[3]

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

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[2]In *Windigo Mills v. Unemployment Ins. Appeals Bd*. (1979) 92 Cal.App.3d 586, 597 [155 Cal.Rptr. 63], the court stated:

> 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.

[3] We are acutely aware of the Department's adoption of General Order No. 2007-09 on August 10, 2007, shortly after the hearing and decision in this case.

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 it 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 Cal.App.2d 182, 187 [17 Cal.Rptr. 167]; 9 Witkin, Cal. Procedure (4th ed. 1997 & 2007 supp.) Appeal, §394.)

III

Appellants assert in their brief that the ALJ improperly denied their pre-hearing motion to compel discovery. Their motion was brought in response to the Department's failure to comply with those parts of its discovery request that sought copies of any findings or decisions which determined that the present decoy's appearance was not that which could be generally expected of a person under the age of 21 and all decisions certified by the Department over a four-year period which determined that any decoy failed to comply with rule 141(b)(2). For all of the decisions specified, appellants also requested all photographs of the decoys in those decisions.

ALJ Gruen, who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellant failed to show that the requested items were relevant or would lead to admissible evidence. Appellant argues that the items requested are expressly included as discoverable matters in the APA and the ALJ used erroneous standards in denying the motion.

This Board has discussed, and rejected, this argument numerous times before. Just as appellants' arguments are the same ones made before, our response is the same as before. We see no reason to once again go over our reasons for rejecting these arguments. Should appellant wish to review those reasons, it may find them fully set out in *7-Eleven, Inc./Virk* (2007) AB-8577, as well as many other Appeals Board opinions.

IV

Appellants ask the Appeals Board to 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). Appellants state that the case "implicates the same due process issues and appearance of bias issues as in the instant appeal," and 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.

The Appeals Board in a number of recent appeals has declined to accept this invitation, and we do not believe we should do so in this case. We see no need to

delay a decision to remand this case to the Department for further proceedings, especially when this matter can be resolved under existing law.

V

Appellants contend that the decision must be reversed because it does not contain an analysis of the basis for the administrative law judge's (ALJ's) determination that the clerk's testimony that the decoy had facial hair and a hood was not credible. They assert that the ALJ "utterly failed to identify any specific evidence of the observed demeanor, matter, or attitude of the witness that supports the determination." (App.Br., p.27.) The issue bears indirectly on a question raised indirectly, at best, by appellants, whether the decoy presented the appearance required by Rule 141(b)(2), i.e., that which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.

The ALJ made several factual findings that bear on the clerk's testimony and the ALJ's assessment of it:

> FF II-A: On November 18, 2006 at approximately 6:30 p.m., a seventeen year old decoy, Joseph Richard Massey (hereinafter "the decoy"), went to the Respondents' premises as part of a joint decoy operation conducted by the Department, the La Mesa Police Department and the San Diego County Sheriff's Department. After entering the premises alone, the decoy walked straight to the beer coolers, removed a six-pack of Budweiser beer bottles and walked to the sales counter. When it was his turn to be served, the decoy placed the beer on the counter. There was a conflict in the evidence as to what exactly occurred and what was said at the sales counter during the sale, as to whether the decoy had facial hair and as to whether the decoy had his hood up at the time of the sale. After evaluating the credibility of the witnesses pursuant to the factors set forth in Evidence Code Section 780 including the demeanor and manner of the witnesses and the existence of bias or other motive, greater weight was given to the testimony of the decoy and Investigator Barabas than to that of the Respondents' clerk. Although there were some minor inconsistencies in the

testimony of the decoy and the testimony of Investigator Barabas, both the decoy and Investigator Barabas were found to be credible witnesses.

FF II-E: The overall appearance of the decoy including his demeanor, his poise, his size, his mannerisms and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he had some facial hair at the time of the hearing.

FF II-E.1: The decoy is a tall and youthful looking male who is six feet one inch in height and who weighs approximately one hundred ninety-five pounds. On the day of the sale, his clothing consisted of the same red, hooded sweatshirt and camouflage cargo shorts that he was wearing at the hearing and he was clean-shaven. The decoy explained that he had some facial hair when he arrived at the police station and that the officers had him shave at the station before going out on the decoy operation.[1] The decoy also credibly testified that his hood was not up while he was in the premises.

[1] Although the clerk testified that the decoy had some facial hair when he came to the premises, Exhibit 2 is the photograph that was taken at the premises and the decoy does not have any facial hair in this photograph.

FF II-F: The clerk testified at the hearing that he had worked at the premises for approximately fifteen months, that he was the head operator on the night of the sale, that he thought that the decoy was at least twenty-five years old, that he did not ask the decoy for identification or for his age, that he did not recall the decoy saying anything to him, that he believes that the decoy paid with cash and that he could not remember how much money the decoy gave him.

FF II-F.1: The clerk was not a good historian or a credible witness. His testimony that the decoy had facial hair and that he had his hood up at the time of the sale was found not to be credible.

We note first that the ALJ's description of the decoy's appearance reflects a determination that the decoy's appearance complied with Rule 141(b)(2). As the Board has said in many cases, it will not second guess the ALJ 's factual finding that a decoy's appearance met the standard of Rule 141(b)(2).

Although appellants have not asked the Board to do precisely that, they have conjured up an alleged failure on the part of the ALJ to explain why he thought the clerk's testimony not worthy of belief. In so doing, they fail completely to defend the

clerk's testimony that the decoy had facial hair at the time of the decoy operation, in the face of a photograph taken that same evening which does not support that claim.[4] Even though relegated to a footnote, the ALJ's explanation that the clerk's testimony about facial hair was in conflict with contemporary photographic evidence (Exhibit 2) weighs strongly against appellants' theory.

Appellants also contend the ALJ failed to justify his credibility determinations as required by the case of *Holohan v. Massanari* (2001) 246 F.3d 1195 (9th Cir.). The Board considered and rejected this contention in *7-Eleven, Inc. and Huh* (2001) AB-7680, saying:

> We have reviewed the decision in [*Holohan*], and the court decisions cited in support of that portion of the court's holding, and are satisfied that the view expressed by the court is peculiarly related to federal Social Security disability

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[4] The clerk testified on cross-examination as follows [RT 100-101]:

Q. I believe you also indicated that Mr. Massey [the decoy] had facial hair when he came into the store?

A. Yes.

Q. Did he have a mustache?

A. Yes. He had all this - - this here was shaved with the hood up.

Q. So he had - - you're saying he had a beard or did he have a shadow, which is it?

A. It wasn't full beard like Mr. Hundal would have, but it was grown in. A little heavier than now. A little heavier than now.

Q. Are you saying you saw some hair on his face?

A. I saw hair from one ear to the other ear and mustache to this ear.

Q. And he also had a goatee?

A. Not a goatee but a beard.

> claims, and does not reflect the law of the State of California. While it may be true that a statement of the factors behind a credibility determination may be of considerable assistance to a reviewing court, and is welcomed by this Board, we are not prepared to say that a decision which does not set forth such considerations is fatally flawed.

There is no reason for us to decide the issue any differently in the context of the present appeal. It is well settled that the credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]*; Brice v. Dept. of Alcoholic Bev. Contro*l (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

ORDER

The decision of the Department is affirmed with respect to all issues other than that involving the claim of ex parte communication, and this matter is remanded to the Department for an evidentiary hearing on that issue.[5]

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5]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.