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

AB-8736
File: 20-388958 Reg: 07064791

7-ELEVEN, INC., AJIT SINGH THIND, and RAJINDER KAUR THIND,
dba 7-Eleven Store # 2171 32941B
1511 North Mount Vernon Avenue, Colton, CA 92324,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 6, 2008
Los Angeles, CA

ISSUED FEBRUARY 19, 2009

7-Eleven, Inc., Ajit Singh Thind, and Rajinder Kaur Thind, doing business as 7-Eleven Store # 2171 32941B (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 police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Ajit Singh Thind, and Rajinder Kaur Thind, 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, 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 October 23, 2002. In 2007 the Department filed an accusation against appellants charging that, on December 15, 2006, appellants' clerk sold an alcoholic beverage to 18-year-old Brandon Montano. Although not noted in the accusation, Montano was working as a minor decoy for the Colton Police Department and the Department at the time.

At the administrative hearing held on May 24, 2007, documentary evidence was received and testimony concerning the sale was presented by Montano (the decoy) and by Department investigator Scott Stonebrook. The testimony established that the clerk asked for the decoy's identification, was given the decoy's valid California driver's license, and looked at it for five to ten seconds before handing it back. Then the clerk sold a six-pack of Budweiser beer to the decoy. The decoy's driver's license showed his correct birthdate of March 11, 1988. The decoy later identified the clerk as the seller of the beer.

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

Appellants then filed an appeal contending: (1) The Department engaged in improper ex parte communications; (2) the Department did not have effective screening procedures in place to prevent any of its attorneys from acting as both prosecutor and advisor to the decision maker or to prevent ex parte communication with the decision maker; and (3) the Department provided an incomplete record on appeal. Appellants have also moved to augment the record with any report of hearing and documents related to General Order No. 2007-09. Issues 1 and 2 are interrelated and will be discussed together.

I and II

Appellants contend the Department violated the Administrative Procedure Act (Gov. Code, §§ 11340-11529) 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 his advisors. 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.

In a number of appeals recently, this Board has addressed the same arguments made by the parties here. In those appeals, the Board noted that several recent court decisions had described the Department's practice of ex parte communication with its decision maker or the decision maker's advisors as "standard procedure" in that agency. The Board concluded that, "without evidence of an agency-wide change of policy and practice [by the Department], 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." Since a factual question still exists in this case, as it did in the earlier appeals just mentioned, we believe the only appropriate resolution is to remand the matter to the Department for an evidentiary hearing.

As did the California Supreme Court 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], we decline to address appellants' 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.

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

In light of our decision to remand this matter, augmenting the record is unnecessary.

III

Appellants assert that the accusation must be dismissed because the certified record provided by the Department did not include certain documents required to be included. The four missing documents were all prepared in connection with a motion to compel discovery: the motion; points and authorities in support of the motion; the Department's opposition to the motion; and the order denying the motion. Appellants argue that omission of these documents from the certified record violates rule 188 of the Appeals Board (4 Cal. Code Regs., § 188) and makes it unclear whether and when the documents were considered by the decision maker.

Rule 188 states what is to be included in the record on appeal:

> (1) The file transcript, which shall include all notices and orders issued by the administrative law judge and the department, including any proposed decision by an administrative law judge and the final decision issued by the department; pleadings and correspondence by a party; notices, orders, pleadings and correspondence pertaining to reconsideration;
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> (2) the hearing reporter's transcript of all proceedings;
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> (3) exhibits admitted or rejected.

On May 14, 2008, the Board received what the Department certified was "a true, correct and complete record (not including the Hearing Reporter's transcript} [sic] of the proceedings" before the Department in this case. Attached to the certification were the

proposed decision of the administrative law judge (ALJ), the Department's Certificate of Decision adopting the ALJ's proposed decision, and the exhibits from the administrative hearing.

The Department's certification is patently false; it does not comply with its own self-description of a "true, correct and complete record" of the proceedings before the Department or with the description of the "record on appeal" in the Appeals Board's rule 188. Clearly, the Department's proceedings did not commence with its decision, or even with the administrative hearing. Obviously lacking are "notices and orders issued by the administrative law judge and the department [and] pleadings and correspondence by a party" required by Rule 188. Among the documents missing from the record on appeal are those that appellants have made the subject of this issue.

In spite of these deficiencies in the record, however, we do not believe that this decision should be reversed on the basis of an incomplete record. In the first place, this is really a procedural error, which is rarely sufficient by itself to justify reversal of a Department decision. As the court explained in *Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345],

> since the appeals board exercises a "strictly 'limited' " power of review over the Department's " 'exclusive power' to issue, deny, suspend or revoke licenses" (*Martin v. Alcoholic Beverage etc. Appeals Board* [(1959)] 52 Cal.2d 238, 246 [340 P.2d 1]), the decisions of the Department should not be defeated by reason of "any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the [reviewing body] shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.)

Secondly, we cannot see that appellants have suffered any prejudice by this error. Appellants have not articulated any prejudice that could conceivably be viewed as resulting in a miscarriage of justice. Nor do we believe they could do so; two of the

documents were of their own counsel's creation and the other two were clearly received by their counsel from the Department before a decision was made in this case. Under these circumstances, appellants' contention borders on the frivolous.

Additionally, appellants have not even suggested that these documents would aid the determination of this appeal. It is not enough to say the documents "should" be included in the record on appeal. Without a showing that they are material to the issues raised here, there can be no prejudice to appellants in omitting them from the record.

We also note that appellants did not include these documents among those they asked for in their Motion to Augment Record. A Motion to Augment is the appropriate way to deal with items that should have been included in the record. Appellants' counsel files a Motion to Augment in almost every appeal, so they clearly know how to do that. There is no basis for reversal because of omissions from the record.

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.[2]

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

[2]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.