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

AB-8747
File: 20-422112 Reg: 07065227

7-ELEVEN, INC., and SYED CORPORATION, dba 7-Eleven #2171-20764C
700 West Sixth Street, Corona, CA 92882,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: November 6, 2008
Los Angeles

ISSUED FEBRUARY 27, 2009

7-Eleven, Inc., and Syed Corporation, doing business as 7-Eleven #2171-20764C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk, Kanubhai Valand, selling a 24-ounce can of Bud Light beer, an alcoholic beverage, to David Glassick, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Syed Corporation, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing

[1]The decision of the Department, dated September 5, 2007, is set forth in the appendix.

through its counsel, Valoree Wortham.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on April 15, 2005. On March 8, 2007, the Department instituted an accusation against appellants charging that, on December 8, 2006, appellants' clerk, Kanubhai Valand (the clerk), sold an alcoholic beverage to 19-year-old David Glassick. Although not noted in the accusation, Glassick was working as a minor decoy for the Corona Police Department at the time.

An administrative hearing was held on July 10, 2007, at which time documentary evidence was received, and testimony concerning the sale was presented by Glassick (the decoy) and by Mario Hernandez, a Corona police officer.

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 a timely appeal making the following contentions: (1) the Board should withhold its decision in this matter until the decision in a pending California Supreme Court case *(Morongo Band of Mission Indians v. State Water Resources Control Board* (S155589) (August 22, 2007)) is issued; (2) the Department lacked screening procedures to protect against the appearance of bias on the part of Department attorneys implicated in the adjudication process; and (3) the Department engaged in ex parte communications in violation of the Administrative Procedure Act. Issues 2 and 3 are interrelated and will be discussed together. Appellants have also filed a motion to augment the record.

DISCUSSION

I

Appellants urge the Board to delay any decision in this matter until the California Supreme Court issues its decision in *Morongo Band of Mission Indians v. State Water Resources Control Board* (S155589) (August 22, 2007), now pending on review. Appellants suggest that *Morongo* involves issues similar to those in this appeal, and that a delay on the Board's part will contribute to judicial economy.

This issue has been raised in a number of appeals to the Board, all of which have involved issues arising from the California Supreme Court's decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585].

It is our view that the issues in this case can be resolved under existing law, so there is no need to delay our decision in this appeal.

II and III

Appellants contend the Department violated the APA 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. They rely 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 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*). They assert that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte

communication occurred.

Attached to the Department's opposing brief is a declaration signed by Department staff attorney Valoree Wortham, who represented the Department at the administrative hearing. In this declaration, Wortham states that at no time did she prepare a report of hearing or other document, or speak to any person, regarding this case. At oral argument, the Department argued that the Board should accept the declaration as conclusive evidence that the documents requested do not exist.

We agree with appellants that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar*, *supra*.

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. Appellants argue that the declaration is inadequate. We agree with appellants.

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,[2] 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]

For the foregoing reasons, we will do in this case as we have done in so many other cases, that is, remand this matter to the Department for an evidentiary hearing. In view of the position we take, the issues raised by the motion to augment can be resolved at the Department level.

ORDER

This matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing discussion.[4]

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

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[2] Department General Order No. 2007-09, which was issued August 10, 2007, directed such an agency-wide change of policy and practice. It does not apply to this case.

[3] "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. (Evid. Code, §§ 300, 1200; see Code Civ. Proc., § 2009; Witkin, Cal. Evidence (2d ed. 1966) § 628, p. 588.)"
(Windigo Mills v. Unemployment Ins. Appeals Bd. (1979) 92 Cal.App.3d 586, 597 [155 Cal.Rptr. 63].)

[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.