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

AB-8759
File: 48-427073 Reg: 06063979

JOSÉ ANGEL AGUILERA, dba Mr. V's Sports Bar & Grill
12249 Hesperia Road, Suite 1B &1C, Victorville, CA 92392,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED DECEMBER 10, 2008

José Angel Aguilera, doing business as Mr. V's Sports Bar & Grill (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 15 days for permitting a minor to enter and remain in the premises and to consume an alcoholic beverage in violation of Business and Professions Code[2] sections 25665 and 25658, subdivision (a), and for misrepresenting a brand of draught beer being offered for sale in violation of section 25614.

Appearances on appeal include appellant José Angel Aguilera, appearing through his counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan,

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[1]The decision of the Department, dated October 4, 2007, is set forth in the appendix.

[2]Unless otherwise indicated, statutory references in this opinion are to the Business and Professions Code.

and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on August 11, 2005. On September 28, 2006, the Department filed an accusation against appellant charging that, on June 16, 2006, appellant permitted 19-year-old Roslynd Phillips to enter and remain in the premises and to consume an alcoholic beverage; misrepresented a brand of draught beer being offered for sale; and resisted, delayed or obstructed a Department investigator while the investigator was conducting his investigation, in violation of Penal Code section 148.

At the administrative hearing held on June 13, 2007, documentary evidence was received and testimony concerning the violations charged was presented by Phillips (the minor); Department investigators Steven Geertman and Scott Stonebrook; appellant José Aguilera; and one of appellant's employees, Kevin Reynolds.

On June 16, 2006, Geertman and Stonebrook, in plain clothes, entered the premises to investigate a complaint the Department had received regarding gambling on the premises. They spoke to appellant, who explained to them how the game in question worked. Thereafter, the investigators identified themselves by showing appellant their badges and identification and asked appellant to step outside to talk because of the noise in the premises.

Outside, the investigators and appellant went around the corner of the building, away from the front door, to talk. They told appellant of the complaint and also expressed their concerns that the premises appeared to be overcrowded and that some of the patrons appeared to be underage.

When the investigators were re-entering the premises, Geertman noticed a young woman, later identified as Phillips, entering the premises. Although a doorman was at the entrance to check ID's, Phillips was not asked for her ID or her age. She went into the bar area, where Geertman observed her drinking from a beer bottle. He saw no one ask Phillips for her age or ID.

After re-entering the building, Stonebrook also noted Phillips sitting at the fixed bar. While Stonebrook watched Phillips, Geertman walked around in the premises with appellant. Appellant told his employee, Reynolds, to check and make sure that none of the patrons was underage.

Stonebrook observed Phillips drinking from a bottle of Coors beer. After a few minutes, he approached Phillips, identified himself, and asked Phillips how old she was. Phillips told him she was 21, but she said she had no identification, so Stonebrook asked her to step outside so he could verify her age.

Stonebrook picked up the bottle of Coors and began to walk outside with Phillips. As he went by Geertman and appellant, Stonebrook handed the partially filled bottle of Coors to Geertman. When Geertman started to go outside with the bottle to secure it as evidence, appellant attempted to detain him because he was not fully convinced that Geertman and Stonebrook were actually Department investigators. After a few seconds, appellant let Geertman leave with the bottle. The investigators confirmed that Phillips was only 19 years old.

While inspecting the premises later, the investigators found that the spigot for draught Budweiser beer was connected to a half-filled keg of Budweiser beer and that keg was connected to a half-filled keg of Bud Light beer.

Subsequent to the hearing, the Department issued its decision which determined that the two charges regarding the minor and the charge for misrepresenting the brand of beer were proved. The charge of obstruction of a peace officer was found not proved and that count was dismissed. The Department's penalty recommendation at the hearing was for a 35-day suspension with 10 days stayed for a one-year probationary period. However, the administrative law judge (ALJ) found a lack of aggravating factors and no reason to impose a penalty for the section 25614 violation, since, by itself, it probably would have warranted a warning letter rather than an accusation. Therefore, he recommended, and the Department adopted, a penalty of only a 15-day suspension.

Appellant has filed an appeal making the following contentions: (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; (3) 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*); (4) the Department failed to provide a complete certified record on appeal; and (5) the evidence did not establish that appellant permitted the violations involving the minor or that appellant misrepresented the brand of draught beer offered for sale. Issues I and II are related and will be discussed together. 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 & II

Appellant contends 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.[3] 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.[4] This matter must be remanded to the Department for an evidentiary hearing.

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

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[3]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.

[4] 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.

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

III

Appellant asks 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 accept it 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.

IV

Appellant alleges that the accusation must be dismissed because the certified record provided by the Department did not include a certain pleading and written arguments of the parties. The missing documents are the Order Concerning Proposed Decision (the order), the Department's Comments/Arguments Concerning Proposed Decision, and Respondent's Comments Regarding Proposed Decision.

The order, from the Department's Hearing and Legal Unit, asked both parties to provide their opinions regarding the penalty recommended in the ALJ's proposed decision. The latter two documents noted above are the comments each party provided in response to the order.

Appellant argues 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 or the decision maker's advisors. The "lack of clarity" about the purpose and use of the documents is "alarming" to appellant. (App.Br. at p. 14.) He concludes: "Therefore, the factual and procedural scenario proposed by the creation of these documents and their subsequent omission from the record of this proceeding requires reversal of the underlying matter." (*Ibid*.)

Rule 188 states what the Department is to include 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;

(2) the hearing reporter's transcript of all proceedings;

(3) exhibits admitted or rejected.

On April 30, 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 Department's Certificate of Decision stating that the Department adopted the ALJ's proposed decision, the proposed decision of the ALJ, and the exhibits from the administrative hearing.

On August 27, 2008, the Board received certified copies of the documents in question. Appellant insists that all the Department accomplished by this belated provision of the documents was to create *two* incomplete records on appeal. The Department argues the record is now complete and appellant's contention has no merit.

On a technical basis, appellant is right. We have two packets of documents, each of which is certified as the true, correct and complete record of the proceedings before the Department. Clearly, neither of the packets, by itself, is a complete record, and neither certification is true or correct.

Beyond the specious certifications, we agree with appellants that there is a "lack of clarity" regarding the Department's purpose for and use of the documents; however, we do not find the situation sufficiently "alarming" to justify reversal of the Department's decision in this case. In the first place, this type of procedural error 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 appellant has suffered any prejudice by this error. He has not articulated any prejudice that could conceivably be viewed as resulting in a miscarriage of justice. Nor do we believe he could do so; one of the documents was of his own counsel's creation and the other two were clearly received by his counsel from the Department before a decision was made in this case. Under these circumstances, appellant's contention borders on the frivolous.

V

A. "PERMITTING"

Appellant contends there is no evidence to support the conclusion he "permitted" the violations pertaining to the minor because there is no evidence he knew about the minor being in the premises. On the contrary, he argues, the evidence shows that he was outside the premises talking to one of the investigators when the minor entered the premises.

Appellant argues he was in charge of checking ID's at the door when the investigators approached him, and if they had not taken him away from his post the minor would not have entered the premises. He asserts that it was during the time he was outside talking with the investigators that the minor entered the premises, and if he did not *know* she had entered, he could not have *permitted* her to enter.

Appellant relies on language in the case of *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]:

> We . . . hold that a licensee must have knowledge, either actual or constructive, before he or she can be found to have "permitted" unacceptable conduct on a licensed premises. It defies logic to charge someone with permitting conduct of which they are not aware. It also leads to impermissible strict liability of liquor licensees when they enjoy a constitutional standard of good cause before their license--and quite likely their livelihood--may be infringed by the state.

In *Laube*, the court annulled the Department's decision imposing discipline on a licensee for permitting surreptitious drug transactions of which neither the licensee nor the licensee's employees knew or had reason to suspect were occurring among patrons of the licensee's "upscale hotel, bar and restaurant."

The present case is very different from *Laube*. Appellant's premises is a sports bar, not an upscale hotel, bar and restaurant. Both the licensee and the licensee's employees "knew or had reason to suspect" that a minor would try to enter the premises and, if successful, would attempt to consume an alcoholic beverage. That was the very reason appellant had personnel stationed at the door to check ID's.

Appellant's argument about not being able to prevent the minor from entering because the investigators made him go outside and around the corner of the building is misleading. It is true that appellant was not able to monitor the entrance while he was talking with the investigators; however, he was not monitoring the entrance before talking to the investigators either. (The ALJ made a specific finding (Finding of Fact 7) that appellant was *not* checking ID's at the door when the investigators approached him.)

The door was not unattended, however, while appellant was with the investigators; his employee, Eric Sheppler, was at the door to check ID's and to prevent

minors from entering. The minor, however, was able to enter without being asked for her ID or her age. And even though Phillips certainly looked young enough to have her right to be in the premises questioned, no one asked for her ID or her age while she was at the bar drinking from a beer bottle.

It is indisputable that appellant's employees allowed the minor to enter, to remain in the premises without challenge, and to drink beer. That it was appellant's employees and not appellant who allowed the violations to occur does not shield appellant from culpability.

Laube, *supra*, is not helpful to appellant. The language relied on by appellant states that knowledge may be either actual or constructive. "Constructive knowledge" includes knowledge imputed to a licensee through the knowledge of his or her employee. (*Laube*, *supra*, 2 Cal.App.4th at pp. 367, 376.)

It is settled law that the on-premises conduct and knowledge of an employee is imputed to the employer. (See *Harris* v. *Alcoholic Beverage Control Appeals Bd.* (1962) 197 Cal.App.2d 172, 180 (17 Cal.Rptr. 315); *Mack* v. *Department of Alcoholic Bev. Control* (1960) 178 Cal.App.2d 149, 152-154 [2 Cal.Rptr. 629].) In appellant's case, while he did not actually know of this particular violation, he clearly had constructive knowledge, imputed to him through his employees. Their knowledge and actions (or the lack of them) became appellant's and the responsibility for their acts became his responsibility, as far as his right to retain his alcoholic beverage license is concerned. Since the employees permitted the minor to enter and remain in the premises and to consume beer while there, the conclusion of the ALJ that appellant permitted the violations was amply supported by the evidence.

B. MISREPRESENTING THE BRAND OF BEER

Appellant contends that he cannot be found to have violated section 25614 because he did not misrepresent the brand of beer offered for sale to customers. Misrepresentation, which is what the accusation charged, requires some affirmative act, according to appellant. He argues that no evidence was produced that a patron ordered Budweiser and was served Bud Light or that appellant or any employee took any affirmative act to misrepresent the brand of beer.

Section 25614 provides:

> Any person who violates any of the provisions of Sections 25611 to 25613, inclusive, or substitutes another or different brand of draught beer from that indicated by any of the required notices, placards, or markers, or substitutes one brand of beer for another, or misrepresents the brand or kind of beer served to a consumer is guilty of a misdemeanor.

Both the ALJ in the decision and the Department in its brief treat this as a strict liability violation, that is, they assume that simply having the Budweiser spigot attached to a Bud Light keg is enough to constitute a violation of section 25614. While appellant's argument has some appeal, it is hard to get around the fact that if a spigot says Budweiser and only Bud Light comes out of it, the type of beer that will be served from it is misrepresented.

The decision treats this simply as an unintentional or accidental occurrence, a violation in name only, and no penalty was imposed for it. Even if we were to conclude that there was not a violation, it would make no difference in the penalty and there would be no reason or justification to remand this matter to the Department for reconsideration.

VI

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 was made that our conclusion regarding the ex parte communication issue makes augmenting the record unnecessary; that is, in an evidentiary hearing, the primary focus 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 putting an end to 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 then sets out the procedures to be implemented by the Department to comply with the courts' directives.

Appellant wants to use this order to show that the Department's procedures before August 10, 2007, did *not* comply with the courts' directives. It's not the strongest argument, and it seems unnecessary since it is the Department that must show it complied. In any case, this too is more appropriately included in a record created during an evidentiary hearing.

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. The motion to augment is denied.[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.