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

AB-8769
File: 21-313046 Reg: 05060930

7-ELEVEN, INC., JOHN SHIN, and YUN SOOK SHIN, dba 7-Eleven 2175 17853
601 South Fremont Avenue, Alhambra, CA 91803,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

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

ISSUED MARCH 19, 2009

7-Eleven, Inc., John Shin, and Yun Sook Shin, doing business as 7-Eleven 2175 1753 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, all of which were conditionally stayed for one year, for appellants' 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., John Shin, and Yun Sook Shin, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

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[1]The decision of the Department, dated October 31, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 19, 1995. On October 24, 2005, the Department filed an accusation against appellants charging that, on August 31, 2005, appellants' clerk, Gabriela Cortes (the clerk), sold an alcoholic beverage to 19-year-old David Munson. Although not noted in the accusation, Munson was working as a minor decoy for the Alhambra Police Department and the Department at the time.

At the administrative hearing held on September 13, 2007, documentary evidence was received, and testimony concerning the sale was presented by Munson (the decoy) and by Joseph Flannagan, an Alhambra police detective.

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 have filed an appeal making the following contentions: (1) the Department lacked proper screening mechanisms ensuring the non-appearance of bias; (2) the Department engaged in improper ex parte communications; (3) the Department's failure to supply a complete administrative record to the Appeals Board constitutes reversible error; (4) the decoy's appearance violated Rules 141(a) and 141(b)(2); (5) the failure to timely prosecute this matter violated Rule 141(a); and (6) the Appeals Board should reserve judgment in this matter pending the decision of the California Supreme Court in an appeal now pending in that court. Appellant has also filed a motion seeking to have the record augmented by the addition of any ABC Form 104 or other report of hearing, and General Order No. 2007-09 and related documents. Issues 1 and 2 are interrelated and will be discussed together, as will issues 4 and 5.

DISCUSSION

I and II

The administrative hearing in this case took place on August 17, 2007, after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007. The Order sets forth changes in the Department's internal operating procedures which, it states, the Director of the Department has determined are "the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications," changes which consist of "a reassignment of functions and responsibilities with respect to the review of proposed decisions." The Order, directed to all offices and units of the Department, provides:

> **Background**:
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> In 2006 the California Supreme Court found that the Department's practice of attorneys preparing a report following an administrative hearing, and the Director and his advisors having access to or reviewing that report, violated the Administrative Procedures [*sic*] Act's prohibition against *ex parte* communications. Subsequent cases in the courts of appeal extended the reasoning of the Supreme Court in holding that such a statutory violation continues to exist even if the Department adopted the administrative law judge's proposed decision without change. In addition, the courts of appeal placed the burden on the Department to establish that no improper *ex parte* communication occurred in any given case.
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> **Procedures**:
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> Although the Supreme Court held that a physical separation of functions within the Department is not necessary, in light of subsequent appellate decisions the Director has determined that the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications, a reassignment of functions and responsibilities with respect to the review of proposed decisions is necessary and appropriate.
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> Effective immediately, the following protocols shall be followed with respect to litigated matters:

> 1. The Department's Legal Unit shall be responsible for litigating administrative cases and shall not be involved in the review of proposed decisions, nor shall the Chief Counsel or Staff Counsel within the Legal Unit advise the Director or any other person in the decision-making chain of command with regard to proposed decisions.
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> 2. The Administrative Hearing Office shall forward proposed decisions, together with any exhibits, pleadings and other documents or evidence considered by the administrative law judge, to the Hearing and Legal Unit which shall forward them to the Director's Office without legal review or comment.
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> 3. The proposed decision and included documents as identified above shall be maintained at all times in a file separate from any other documents or files maintained by the Department regarding the licensee or applicant. This file shall constitute the official administrative record.
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> 4. The administrative record shall be circulated to the Director via the Headquarters Deputy Division Chief, the Assistant Director for Administration and/or the Chief Deputy Director.
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> 5. The Director and his designees shall act in accordance with Government Code Section 11517, and shall so notify the Hearing and Legal Unit of all decisions made relating to the proposed decision. The Hearing and Legal Unit shall thereafter notify all parties.
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> 6. This General Order supersedes and hereby invalidates any and all policies and/or procedures inconsistent to [*sic*] the foregoing.

The obvious purpose of the Order is to amend the internal operating procedures of the Department that have resulted in more than 100 cases having been remanded to the Department by the Appeals Board for an evidentiary hearing regarding claims of ex parte communications between litigating counsel and the Department's decision makers.[2] Although not identified in the Order, the "appellate decisions" to which it refers undoubtedly include in their numbers the decision by the California Supreme Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control*

[2]We understand that these cases were ultimately dismissed by the Department.

Appeals Board (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] *(Quintanar)*, and Court of Appeal decisions in *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th116 [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*), case authorities routinely cited in appellate briefs asserting that the Department engaged in improper ex parte communications.

The Order effectively answers the question raised in this and earlier appeals, i.e., whether the Department's long standing practice of having its staff attorneys submit ex parte recommendations in the form of reports of hearing, has been officially changed to comply with the requirements of *Quintanar* and the cases following it. It replaces an earlier, less formal procedure used by the Department to address the problems of ex parte communications, one which the Appeals Board found was not an effective cure for the problem endemic within the Department, with one intended to isolate the Department decision maker from any potential advice or comment from the attorney who litigated the administrative matter, as well as the Department's entire Legal Unit.

Appellants have not affirmatively shown that any ex parte communication took place in this case. Instead, they have relied on the authorities cited above *(Quintanar, supra; Chevron, supra; Rondon, supra*), for their argument that the burden is on the Department to disprove the existence on any ex parte communication.

We are now satisfied, by the Department's adoption of General Order No. 2007-09, that it has met its burden of demonstrating that it operated in accordance with law. Without evidence that the procedure outlined in the Order was disregarded, we believe

it would be unreasonable to assume that any ex parte communication occurred.[3]

While the Order does not specifically address the question whether there was an adequate screening procedure to prevent Department attorneys who acted as litigators from advising the Department decision maker in other matters, by its terms it appears to resolve that issue by effectively removing the litigating attorneys from the review process entirely.

In light of the result we reach, we see no need to withhold our decision in this matter until the California Supreme Court resolves *Morongo Band of Mission Indians v. State Water Resources Control Board* (rev. granted October 24, 2007, S155589). Similarly, there is no need to augment the record as requested by appellants.

III

Appellants assert that the Appeals Board must reverse this matter in its entirety because "the record lacks, at a minimum, *key documents and arguments made by both [p]arties regarding the proposed decision* subsequently adopted by the Department decision-makers." (App. Br., p.13, emphasis added.) The documents which are the subject of appellants' claim consist of the following: (1) Motion to Compel; (2) Points and Authorities in Support of Motion to Compel (Re Discover); (3) Department's Opposition to Motion to Compel Discovery; and (4) Order denying Motion to Compel Discovery.

There are several reasons why we are unable to agree with appellants that the

[3] Appellant suggests that the Department "has apparently taken the words of the Court of Appeal in *Morongo* [*Morongo Band of Mission Indians v. State Water Resources Control Board]* to heart by dividing its staff accordingly," and that the Appeals Board "should take the Department's actions as its word." (App. Mot. To Aug., p.5.) We welcome the suggestion.

deficiencies in the certified record they describe warrant reversal of the decision of the Department. First and foremost, the documents appellants claim are vital to this appeal - so-called "key documents and arguments made by both Parties regarding the proposed decision" - do not relate at all to arguments regarding the proposed decision. The documents are discovery documents, filed at the outset of the administrative proceeding, long before the proposed decision had even entered the drafting stage. Appellants have not claimed error with respect to the administrative law judge's (ALJ's) ruling on their motion to compel discovery, so why would these documents be relevant to any issue on appeal?

Appellants' attorneys, in the ordinary course of things, would have copies of these documents in their files, and if they thought they were essential to this appeal, they could have sought, by way of a motion to augment, to add these to the record before the Appeals Board. In fact, appellants have filed a motion to augment along with their brief on appeal, but there is no reference in it to the discovery documents.

The Department's clerical personnel and/or their supervisors are probably the persons to be faulted for the omission of documents from the certified record submitted to the Appeals Board, as well as for the inclusion in the record supplied to appellants of the memorandum of points and authorities re lay representation of licensees, a subject having no relevance to any issue in this case[4] That said, clerical mishaps seldom justify relief as drastic as appellants seek.

This case is unlike *Circle K Stores, Inc*. (2007) Ab-8597, cited by appellants. In that case, documents which might have influenced a decision maker were included in

[4] The record supplied to the Appeals Board does not contain this document.

the certified record even though not placed in evidence at the administrative hearing. In this case, the documents have no relationship to the decision, whether or not included in the record.

In any event, the Department submitted an additional certified record to the Appeals Board on September 17, 2008, five days after appellants' brief was filed, containing the very documents appellants claim are essential to the appellate record.

IV and V

Appellants contend that Department Rule 141(a) and 141(b)(2) were violated by the use of a decoy who did not display the appearance required by the rule - "the appearance 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." A failure to comply with 141(a) - that the decoy operation be conducted in a manner which promotes fairness - or with 141(b)(2), gives rise to an affirmative defense under subdivision 141(c).

Appellants argue that it was unfair to use a decoy who was 6' 4" tall and weighed 185 pounds, who was employed by the Alhambra Police Department as a paid police cadet, and who had become a police recruit by the time of the hearing. They point to his experience as a cadet, claiming it would have affected the appearance he displayed. Appellants also argue that the period of time which elapsed between the date of the violation and the administrative hearing prevented a fair assessment of how he appeared at the hearing.

The Board has often expressed its reluctance to second guess the judgment of the ALJ as to the apparent age of the decoy. This is another such case.

The ALJ made the following findings with respect to the decoy's appearance

(Findings of Fact 5, 11, and 12):

> FF 5: Munson appeared at the hearing. He stood 6 feet, $3^{3}/_{4}$ inches tall and weighed 185 pounds. When he visited Respondents' store on August 31, 2005, he wore long black shorts, a white T-shirt with a "Billabong" logo and black skateboard shoes with white writing on the tongues. (*See* Exhibits 2 & 3.) He weighed then between 180 and 185 pounds and stood 6 feet, 2 or 3 inches tall. His hair was cut as is shown in photograph Exhibit 2A and worn with a little gel to make it stand up. At the hearing, Munson wore his hair styled in the same fashion but cut a little shorter. At both the hearing and at Respondents' store, Munson was clean shaven. (*Id*.) He wore no jewelry at Respondents' store. At the hearing, Munson spoke with a deep voice. By the time of the hearing, over 2 years after the investigation, Munson was 21 years, $1^{1}/_{2}$ months of age. His facial features had become more mature-appearing than is shown in the Exhibits 2A, 2B and 3 photographs.
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> FF 11: As of August 31, 2005, David Munson had been working at APD as an employed Police Cadet. His principal assignment was to the records group where he entered various data into the computer system, did records checks and also helped citizens at the front counter. He had received no particular course of training. On occasion, Munson accompanied sworn officers on "ride-a-longs" where he was able to witness arrests and the issuance of citations.
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> FF 12: Decoy Munson is a male adult who by the time of the hearing was a police recruit, 21 years of age. Based on his overall appearance, *i.e*., his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing in comparison with Exhibits 2A, 2B and 3, the slight changes in his physical description and the fact that he said nothing to clerk Cortes at the Licensed Premises on August 31, 2005, Munson displayed the appearance and dress that could generally be expected of a person less than 21 years of age under the actual circumstances presented to the clerk. While Munson was a tall person both at the hearing and in front of clerk Cortes, his size was not imposing. In addition, there were noticeable maturing changes in Munson's facial appearance between August 31, 2005 and September 13, 2007, in keeping with his passing his 20th and 21st birthdays.

Appellants also claim that the Department's delay in bring this matter to hearing had the effect of making the appearance of the decoy at the hearing no longer the equivalent of that presented to the clerk on the date of the operation. It will almost invariably be the case that a decoy appears older or more mature at a hearing that takes place many months after the decoy operation. Under such circumstances, it is

not unreasonable for an ALJ to rely, as did the ALJ in this case, on contemporaneous photographs depicting how the decoy looked at the time of the decoy operation, and weigh that into his or her overall consideration of the issue.

Appellants have not persuaded us that the ALJ's assessment of Munson's appearance is factually or legally deficient. He observed the decoy at the hearing and explained his findings. This Board has no desire or reason to override his findings.

VI

In view of the result we reach, there is no reason to delay the issuance of the Board's decision until some uncertain date in the future when the California Supreme Court issues its decision in *Morongo Band Of Mission Indians v. State Water Resources Control Board* (S155589) (October 22, 2007). Nor is there any reason to address the issues raised by appellants' motion to augment the record.

ORDER

The decision of the Department is affirmed.[5]

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

[5] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.