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

AB-8783
File: 20-218207 Reg: 07065868

7-ELEVEN, INC., BYUNG D. CHUN, and CHUNG HEE CHUN,
dba 7-Eleven Store # 2173-18893
1151 Redondo Beach Boulevard, Gardena, CA 90247,
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 JUNE 2, 2009

7-Eleven, Inc., Byung D. Chun, and Chung Hee Chun, doing business as 7-Eleven Store # 2173-18893 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for five days, all of which are stayed for a probationary period of one year, 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., Byung D. Chun, and Chung Hee Chun, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control,

[1]The decision of the Department, dated November 27, 2007, is set forth in the appendix.

appearing through its counsel, Jennifer Cottrell.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 5, 1988. On May 30, 2007, the Department filed an accusation against appellants charging that appellants' clerk sold an alcoholic beverage to 19-year-old Peter Chang on March 19, 2007. Although not noted in the accusation, Chang was working as a minor decoy for the Department at the time.

At the administrative hearing held on October 5, 2007, documentary evidence was received and testimony concerning the sale was presented by Chang (the decoy) and by Department investigator Jeanie Peregrina. Appellants presented no witnesses.

The testimony showed that the clerk sold the decoy a can of Coors Light beer after looking at the decoy's valid California identification card bearing his true date of birth. The decoy later identified the clerk as the person who sold the beer to him.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants filed an appeal contending: (1) The Department 's legal staff lacked screening procedures to prevent ex parte communications and the appearance of bias; (2) the Department engaged in improper ex parte communications; (3) the administrative law judge (ALJ) improperly denied appellants' motion to compel discovery; (4) rule 141(b)(5)[2] was violated; and (5) the administrative record is incomplete, "rais[ing] the specter of ex parte communication."[3]

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[2]References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

[3]This issue was not addressed at all in appellants' opening brief. Their closing brief discussed only this issue, but only in the most general terms; appellants have not

(continued...)

The first two issues are interrelated and will be discussed together. Appellants have also filed a motion to augment the record with various documents, including any report of hearing and General Order No. 2007-09.

DISCUSSION

I and II

Appellants contend that the Department did not adequately screen its prosecutors from its decision maker and engaged in ex parte communications.

This is an appeal in which the administrative hearing took place after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007. (The administrative hearing took place on October 5, 2007.) The Order sets forth changes in the Department's internal operating procedures which it 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, in relevant part:

> **Procedures**:
>
> 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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[3](...continued)
even informed us what documents were omitted from the record and what their significance is. Under the circumstances, we see no reason to consider this issue.

> Effective immediately, the following protocols shall be followed with respect to litigated matters:
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> 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 license 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.
>
> 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 investigative hearings regarding claims of ex parte communications between litigating counsel and the Department's decision maker.[4] 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 Appeals*

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

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 earlier appeals, i.e., whether the Department's long standing practice of having its staff attorneys submit, on an ex parte basis, 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 to the problem endemic within the Department, with one intended to isolate the Department decision maker from any potential advice or comment not only from the attorney who litigated the administrative matter, but the Department's entire Legal Unit as well.[5]

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

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[5]Appellants asked the Appeals Board to refrain from deciding this issue until it was resolved by the California Supreme Court in *Morongo Band of Mission Indians v. State Water Resources Control Board*, S155589 (*Morongo*), but the Board had no reason to delay. As explained in the text, the Department's Order effectively prevents the issue from arising, so the Court's decision could have no effect on this Board's analysis. On February 9, 2009, the Court issued its decision in *Morongo*, rejecting the position espoused by appellants by holding that the separation of prosecutorial and advisory functions within an administrative agency may be made on a case-by-case basis.

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.

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 augment the record as requested by appellants.

III

Appellants assert in their brief that the ALJ improperly denied their pre-hearing motion to compel discovery. They state that they sought discovery of copies of any findings or decisions which determined that a decoy's appearance did not comply with the requirement of rule 141(b)(2), i.e., that which could be generally expected of a person under the age of 21, and all photographs of the decoys in those decisions.

In their brief, appellants refer to documents associated with their discovery request and subsequent motion to compel discovery that are neither part of the administrative record nor attached to appellants' brief.[6] It is appellants, as initiators of

[6]These may be the documents appellants alleged to be missing from the record. (See p. 2, *ante*, & fn. 3.) We do not know, and we will not speculate.

this appeal, who bear the burden of convincing this Board that the Department erred. Because of this, they bear the ultimate responsibility of providing a complete record for this Board's review. "Error is never presumed but must be affirmatively shown, and the burden is on the appellant to present a record showing it." (*Beamon v. Dept. of Motor Vehicles* (1960) 180 Cal.App.2d 200, 210 [4 Cal.Rptr. 396]; *Hothem v. City* (1986) 186 Cal.App.3d 702, 705 [231 Cal.Rptr. 70].) Failure to do so "precludes adequate review and results in affirmance of the [Department's] determination." *(Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1 [84 Cal.Rptr.2d 73].)

It is true that the Department necessarily bears the responsibility of compiling the administrative record, since the Department arranges the recording and transcription of the hearing, has custody and control of the exhibits and other evidence, and has a duty to maintain an adequate record. However, an appellant cannot just sit back and expect this Board to find in his or her favor.

> [T]he burden is always upon an appellant to use reasonable diligence to perfect and prosecute his appeal. Where some step is required by the rules to be taken by an officer of the court and such officer delays unreasonably the appellant cannot sit by indefinitely and do nothing. He must exercise a reasonable amount of diligence to investigate any unwarranted delays and if necessary take steps to see that the legal duty is performed.

(Flint v. Board of Medical Examiners (1946) 72 Cal.App.2d 844, 846 [165 P.2d 694]; accord, *Compton v. Bd of Trustees* (1975) 49 Cal.App.3d 150, 159 [122 Cal.Rptr. 493].)

In the present case, appellants did not include the missing documents among those asked for in their Motion to Augment Record. A Motion to Augment is the appropriate way to deal with items that appellants think should have been included in the record. Appellants apparently did not even make the effort to send an informal message or make a telephone call to the Department to attempt to have the record

completed. Nor did they provide the documents themselves to the Appeals Board, which they easily could have done, since they produced the Discovery Request and Motion to Compel and of necessity received the ALJ's order denying their motion.

If appellants made a discovery request and a motion to compel discovery, and the ALJ entered an order denying the motion, the Department should have included those documents in the record. However, this is not a case where appellants had to depend on the Department for these documents. Appellants affirmatively chose to "sit on their hands" and do nothing to provide the documents the Board must have to review the issue they raised. Therefore, we will not review the issue.[7]

IV

Rule 141(b)(5) requires, "[f]ollowing any completed sale, but not later than the time a citation, if any, is issued," that the decoy make a "face to face identification" of the seller. The Appeals Board has said that a face-to-face identification complies with the rule when "the decoy and the seller, in some reasonable proximity to each other, acknowledge each other's presence, by the decoy's identification, and the seller's presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller." (*Chun* (1999) AB-7287.) Rule 141(a) requires that minor decoy operations be conducted "in a fashion that promotes fairness." Failure to comply with rule 141 provides a licensee with a complete defense to a sale-to-minor charge. (4 Cal. Code Regs., § 141, subd. (c).)

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[7]Were we to consider this issue, we would almost certainly reject it. 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. Should appellants wish to review those reasons, they may find them fully set out in *7-Eleven, Inc./Virk* (2007) AB-8577, as well as many other Appeals Board decisions.

Appellants contend the identification of the clerk was not done in a manner that promotes fairness because the clerk was not reasonably aware he was being identified by the decoy as the seller of the alcoholic beverage.

Appellants base this contention on the testimony of investigator Peregrina that she had a Spanish-speaking officer explain the violation to the clerk before the decoy identified him. Following the sale to the decoy, Peregrina went in to inform the clerk of the violation. After talking to the clerk, Peregrina asked investigator Rergara to explain to the clerk in Spanish in order to "make [the clerk] a little bit at ease and better understand what was going on." [RT 53.]

When the decoy came to identify the seller, Peregrina asked the decoy, in English, who sold him the beer. The decoy pointed to the clerk and said, "He sold me the beer." At the time, the decoy and the clerk were facing each other, about three feet apart. Appellants assert the clerk was not "reasonably aware" he was being identified because the identification was unfairly conducted in English, even though the investigators knew the clerk did not understand English.

The ALJ discussed this contention at some length in Conclusion of Law 4:

> Respondents argued there was a failure to comply with section 141(b)(5) of Chapter 1, title 4, California Code of Regulations [Rule 141]. Therefore, Rule 141(c) applies and the Accusation should be dismissed. Respondents argued that under the Rule, the Department must conduct a face-to-face identification and ensure the clerk is "reasonably aware" identification is occurring. Respondents argued that the evidence showed there is no way clerk Navarrete-Vazquez knew he was being identified because he did not speak English. When the decoy identified clerk Navarrete-Vazquez, no one translated for him. The evidence is unclear whether translation was happening during the identification or not. Neither party explored that specific. There is no doubt that a face-to-face identification actually took place. (Findings of Fact, ¶ 10.) It was not established that clerk Navarrete-Vazquez was unaware he was being identified. In addition, the evidence showed that clerk Navarrete-Vazquez had some familiarity with English. (Finding of Fact, ¶¶ 7-9.) He conducted

> his business with the decoy and with Investigator Peregrina concerning the lottery listing in English so he had some English ability. (*Id*.) Since failure to comply with Rule 141(b)(5) is an affirmative defense, and no failure in the identification was proved by a preponderance of the evidence, the claim that a Rule 141(b)(5) defense applies in this case is rejected.

The ALJ concluded that appellants did not establish the affirmative defense of rule 141 by their speculation about what the clerk did or did not understand. The ALJ explained things well; we need not add to what he said. There clearly was substantial evidence supporting the ALJ's conclusion, and that is all this Board looks for.

ORDER

The decision of the Department is affirmed.[8]

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

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

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