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

AB-8789
File: 20-369136 Reg: 07065923

CHEVRON STATIONS, INC., dba Chevron
12345 Ramona Avenue, Chino, CA 91710,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED MARCH 20, 2009

Chevron Stations, Inc., doing business as Chevron (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days for appellant's 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 appellant Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 30, 2000. On May 30, 2007, the Department filed an accusation against appellant charging that, on

[1]The decision of the Department, dated November 29, 2007, is set forth in the appendix.

April 7, 2007, appellant's clerk, Jennifer Montemayor (the clerk), sold an alcoholic beverage to 16-year-old Bianca Ramos. Although not noted in the accusation, Ramos was working as a minor decoy for the Department at the time.

At the administrative hearing held on October 2, 2007, documentary evidence was received, and testimony concerning the sale was presented by Ramos (the decoy) and by Timothy Tottress, a Department investigator. Appellant presented no witnesses. Undisputed evidence established that the decoy was not asked for identification, nor was she asked any questions regarding her age.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellant has filed an appeal making the following contentions: (1) The Department lacked appropriate screening mechanisms for ensuring the non-appearance of bias in the administrative proceeding; (2) the Department engaged in improper ex parte communnications and lacked appropriate screening mechanisms for ensuring the non-occurrence of any illegal ex parte communications in violation of the Administrative Procedure Act; (3) the certified record is incomplete; (4) The Department failed to provide proper discovery; and (5) the Department failed to include in the record the Motion to Compel and related documents. Issues 1 and 2 are interrelated and will be discussed together. Similarly, issues 3, 4, and 5 are also interrelated and will be discussed together.

DISCUSSION

I and II

The administrative hearing in this case took place on October 2, 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:
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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.

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.

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.

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 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 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

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

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 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.

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

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[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. We also note the presumption created by Evidence Code section 664, which appellant has not rebutted. That section provides, in pertinent part: "It is presumed that official duty has been regularly performed."

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 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), as appellant has requested. Similarly, there is no need to augment the record as requested by appellant.

III, IV, and V

Appellant contends that the record is incomplete, that the motion to compel discovery and related documents were omitted from the record submitted to the Appeals Board, and that they were denied proper discovery.

Appellant makes the same arguments its attorneys have put forth in numerous cases before the Appeals Board, arguments which have uniformly been rejected by the Board.

The fact that documents relating to the motion to compel discovery were omitted from the certified record does not, by itself, demonstrate any prejudice to appellant.

The omission of the documents in question is a procedural error, at best, and does not warrant reversal unless there has been a miscarriage of justice. 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. Appellant has not articulated any prejudice that could conceivably be viewed as resulting in a miscarriage of justice.

Although appellant has moved to augment the record by the addition of certain documents, it has not sought to add, by way of the motion to augment, the documents it contends are so essential to the issues it raises. Nonetheless, this Board is well acquainted with the arguments offered in support of appellant's discovery motion, having seen them in a myriad of cases over the years.

Appellant asserts that the information in the documents sought by its motion to compel could have established a similarity in the offenses allegedly committed by the various licensees with respect to whom documents were sought, including information that might have been used to impugn the credibility of the decoy or the police officers. Appellant offers no specifics as to what credibility questions it might have been able to raise, and its general references suggest they are little more than speculation.

In sum, appellant contends that this Board should reverse a decision of the Department because documents relating to a discovery motion that lacked merit are not part of the certified record. We reject that argument.

ORDER

The decision of the Department is affirmed.[4]

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

[4] 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.