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

AB-8813
File: 21-439458 Reg: 07066672

GARFIELD BEACH CVS, LLC, dba CVS Pharmacy 9804
425 South Sunrise Way, Suite C, Palm Springs, CA 92264,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: February 5, 2009
Los Angeles, CA

ISSUED JUNE 12, 2009

Garfield Beach CVS, LLC, doing business as CVS Pharmacy 9804 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a law enforcement minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Garfield Beach CVS, LLC, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

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[1]The decision of the Department, dated January 23, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off sale general license was issued on July 7, 2006. The Department filed an accusation against appellant charging that, on June 28, 2007, appellant's clerk sold an alcoholic beverage to 17-year-old Javier Lopez. Although not noted in the accusation, Lopez was working as a minor decoy for the Department and the Palm Springs Police Department at the time.

At the administrative hearing held on December 14, 2007, documentary evidence was received and testimony concerning the sale was presented by Lopez and by Department investigator Michael Piltz.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant has filed an appeal contending: (1) 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; (2) the Department engaged in improper ex parte communications; (3) the Department provided an incomplete record on appeal; and (4) the administrative law judge (ALJ) erred in denying appellant's Motion to Compel Discovery. Issues 1 and 2 are interrelated and will be discussed together. Appellant has also moved to augment the record with various documents.

DISCUSSION

I and II

Appellant contends that the Department failed to provide adequate screening to ensure against the possibility of bias, and that the Department engaged in improper ex parte communications.

The administrative hearing in this case took place on December 14, 2007, after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007.[2] 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, in relevant part:

> 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 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

[2]A copy of the Order is attached to the Department's brief as an exhibit.

> 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 evidentiary hearings regarding claims of ex parte communications between litigating counsel and the Department's decision makers.[3] The Order refers to "appellate decisions" which are not identified but which 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 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

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

for 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 from the Department's entire Legal Unit as well.

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.

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.[4]

In light of the result we reach, we see no need to augment the record as requested by appellant.

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[4]Appellant asked the Appeals Board to refrain from deciding this issue until 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 appellant, holding that the separation of prosecutorial and advisory functions within an administrative agency may be made on a case-by-case basis.

III

Appellant asserts that the accusation must be dismissed because the certified record provided by the Department did not include certain documents required to be included. The four missing documents were all prepared in connection with a motion to compel discovery: the motion, points and authorities in support of the motion, the Department's opposition to the motion, and the order denying the motion. 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.

Rule 188 states what is to be included 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;
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> (2) the hearing reporter's transcript of all proceedings;
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> (3) exhibits admitted or rejected.

There is no dispute that the documents noted were missing from the record originally certified by the Department nor is there any dispute that the documents should have been included in the certified record. The only question is whether the Department's decision should be reversed because of this.

Appellant insists that reversal is required, but cites no authority to support this result. Nor does it present any meritorious argument in support of its contention. We conclude that the record on appeal presents no basis for reversing the Department's decision.

In the first place, the motion-to-compel documents were eventually provided to appellant and this Board in January 2009. Therefore, any initial deficiency was cured.

Secondly, we cannot see that appellant has suffered any prejudice by this error. Appellant was not prevented from raising or arguing any issues on appeal, since it obviously had copies of the omitted documents in its possession when it first filed this appeal: two of the documents were of its own counsel's creation and the other two would have been received by appellant's counsel before the administrative hearing. Under these circumstances, appellant's contention borders on the frivolous.

Additionally, appellant has not even suggested that these documents would aid the determination of this appeal. It is not enough to say the documents "should" be included in the record on appeal. Without a showing that they are material to the issues raised here, there can be no prejudice to appellant in omitting them from the record; they simply have no bearing on the "real" issues in this appeal.

Appellant attempts to create materiality by asserting that the ALJ erred in denying its motion to compel, repeating, almost word for word, arguments raised by its counsel and rejected, repeatedly, by this Board ten years ago. Interestingly, appellant does not mention omission of the motion-to-compel documents at any point in its lengthy argument railing against the ALJ's denial of its motion to compel. In arguing this issue, appellant treats the documents as if they had been included in the record (as indeed they were; see, *ante*, ¶ 5 of this section). Under the circumstances, we are entitled to consider appellant's argument concerning the "incomplete record" as waived.

A Motion to Augment is the appropriate way to deal with items that a party believes should have been included in the record. Appellant filed a Motion to Augment along with its opening brief, but did not ask to have the record augmented with the missing motion-to-compel documents. Having failed to pursue the proper avenue to

have missing documents included in the record, appellant cannot now expect to be rewarded with a reversal of the Department's decision.

IV

Appellant asserts that its motion to compel discovery was improperly denied.

This issue has been brought to the Appeals Board over the years more times than can be counted, supported by arguments the Board has uniformly rejected. (See, e.g., *Andy Hong* (2007) AB-8492; *Chevron Stations, Inc*. (2007) AB-8488; *7-Eleven, Inc./Dars Corp.* (2007) AB-8590; *The Southland Corporation/Nat* (2000) AB-7391. We see no need to reiterate what has been said so many times before. The contention lacks merit.

ORDER

The decision of the Department is affirmed.[5]

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

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[5]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.