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

AB-8840
File: 20-214297 Reg: 07065906

7-ELEVEN, INC., NILOFAR R. KHAN, and RIAZ A. KHAN, dba 7-Eleven Store #2171-13957
8703 Indiana Avenue, Riverside, CA 92503,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 7, 2009
Los Angeles, CA

ISSUED AUGUST 20, 2009

7-Eleven, Inc., Nilofar R. Khan, and Riaz A. Khan, doing business as 7-Eleven Store #2171-13957 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 10 days, all conditionally stayed for one year, for their clerk, Deler Singh, having sold a 24-ounce can of Budweiser beer, an alcoholic beverage, to Paul Alonzo, an 18-year-old police/Department minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Nilofar R. Khan, and

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[1]The decision of the Department, dated February 20, 2008, is set forth in the appendix.

Riaz A. Khan, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 1, 1988. Thereafter, on May 30, 2007, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor. Although not stated in the accusation, the minor was participating in a decoy operation being conducted jointly by the Department and the Riverside Police Department.

Documentary evidence was received and testimony concerning the violation charged was presented at an administrative hearing held on December 21, 2007.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and that appellants had failed to establish an affirmative defense under Rule 141(a) and 141(b)(2) (4 Cal. Code Regs., §§141(a) and 141(b)(2)).

Appellants filed a timely notice of appeal in which they raise the following issues: (1) the Department lacked appropriate screening mechanisms to ensure against bias; (2) the Department engaged in ex parte communications; and (3) the decision must be reversed because an incomplete administrative record was furnished to the Appeals Board. Appellants have also filed a motion to augment the record by the addition of General Order No. 2007-9 and other documents.

DISCUSSION

I and II

The administrative hearing in this case took place on December 21, 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.

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 evidentiary hearings 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

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

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 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 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.

In view of our decision on this issue, we see no need to address the motion to augment the record.

III

Appellants contend that the decision must be reversed because the Department supplied an incomplete administrative record to the Appeals Board. They assert that the record lacks, at a minimum, key documents and arguments made by both parties regarding the proposed decision subsequently adopted by the Department. Appellants state that the administrative record submitted to the Appeals Board on December 8, 2008, did not include documents relating to an unsuccessful motion of appellants to compel discovery. The documents consisted of a motion, points and authorities in support of and in opposition to the motion, and the ruling on the motion. Appellants argue in their brief that they are unable to know which parts of the administrative record were before the ultimate decision maker and which were not.

This issue has been before the Board a number of times. In all but one of such cases, the administrative record submitted to the Board lacked these same four documents relating to discovery.[3] The Department has explained in earlier cases that

[3] The exception, *Circle K Stores, Inc.* (2007) AB-8597, was a case where documents which should not have been part of the administrative record were included in that record. The Appeals Board reversed the decision in that case, stating, "we can

(continued...)

their omission was the result of a misunderstanding on the part of the person preparing the administrative record for the Board as to whether such documents should have been included.

Once alerted to the problem, the person who prepared the record initially certified submitted subsequent certifications covering the previously excluded discovery documents. She did so in this case, on January 20, 2009, one and one-half months prior to the filing of appellants' brief.

Appellants' quarrel is with the fact that the subsequent certification, by its contents supplemental, recites that it is the "true, correct and complete" record. They do not say that the documents that accompanied this supplemental certification are not the documents which were excluded from the initial certification, nor do they say that there were documents in the record that should not have been.

It is plain that what we have is two certified records which, in combination, constitute the administrative record contemplated by Appeals Board Rule 188 (4 Cal. Code Regs., §188).

Appellants' arguments that they are unable to know what the decision maker considered, or that the discovery documents were "key documents and arguments regarding the proposed decision" appear to be nothing more than an attempt to capitalize on an overly-literal reading of the Department's certifications.

This appeal has raised no issue claiming prejudice as a result of the denial of discovery, nor has it raised any issue regarding the appearance of the decoy, which

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[3](...continued)
only conclude that the case has been so tainted by the ex parte communications that the only appropriate relief is a dismissal of the accusation."

was the motivating factor behind the discovery motion.

The contention lacks merit.

ORDER

The decision of the Department is affirmed.[4]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.