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

AB-8865
File: 20-442534 Reg: 07066059

7-ELEVEN, INC., MANJEET DADA, and RAJWINDER KAUR,
dba 7-Eleven Store 2171 22494C
1395 West Kendall Drive, San Bernardino, CA 92407,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED JUNE 11, 2009

7-Eleven, Inc., Manjeet Dada, and Rajwinder Kaur, doing business as 7-Eleven Store 2171 22494C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their off-sale beer and wine license for 15 days for their clerk, Jose Granados, having sold a 24-ounce can of Bud Light beer to Jonathon Keil, an 18-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Manjeet Dada, and Rajwinder Kaur, appearing through their counsel, Ralph B. Saltsman, Stephen W.

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[1]The decision of the Department, dated March 17, 2008, is set forth in the appendix.

Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on September 18, 2006. On June 15, 2007, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to Jonathon Keil, a minor. Although not set forth in the accusation, Keil was working as a decoy for the San Bernardino Police Department.

An administrative hearing was held on January 23, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by David Baughman, a vice investigator for the San Bernardino Police Department, and Jonathon Keil, the minor decoy. Appellants presented no witnesses. The evidence established that Keil was not asked his age or for identification. The administrative law judge rejected appellants' claims that the identification of Granados was unduly suggestive and that Keil did not display the appearance required by Rule 141(b)(2).

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved. Appellants filed a timely notice of appeal in which they raise the following issues: (1) the Department lacked appropriate screening mechanisms to ensure the non-appearance of bias, and engaged in ex parte communications; and (2) the incomplete administrative record raises the specter of ex parte communication. Appellant also asks that the Board withhold any decision in this matter until the California Supreme Court issues its decision in *Morongo Band of*

Mission Indians v. State Water Resources Control Board (S155589),[2] and has filed a motion seeking to augment the record by the addition of any report of hearing forms and documents related to General Order No. 2007-09.

DISCUSSION

The administrative hearing in this matter took place on January 23, 2008, well after the adoption by the Department of General Order No. 2007-09. 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

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[2] There is no need for the Board to withhold its decision. The California Supreme Court issued its decision on February 9, 2009, reversing the decision of the appellate court, and holding that the separation of prosecutorial and advisory functions may be made on a case-by-case basis. *(Morongo Band of Mission Indians v. State Water Resources Control Board*) (2009) 45 Cal.4th 731.)

> 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.
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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.[3] 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 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 on any ex parte communication.

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

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, there is no need to augment the record as requested by appellants.

II

This issue concerns the discovery documents which were omitted from the administrative record initially certified by the Department, and added with another certification intended to serve as, but not so labeled, a supplemental certification. The effect of the supplemental certification was to provide the Board with a complete administrative record.

The documents encompassed by the supplemental certification consisted of pleadings and an order related to a motion to compel discovery. Since no issue has been raised before this Board concerning discovery, appellants cannot demonstrate any prejudice from the fact that the initial certification may have been less than complete. Their suggestion that the incomplete record raised a specter of ex parte communication is too speculative for this Board to accept.

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.