

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

AB-8598

File: 20-337146 Reg: 05061200

CHEVRON STATIONS, INC. dba Chevron 1585
1600 Sisk Road, Modesto, CA 95350,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: October 4, 2007
San Francisco, Ca

ISSUED DECEMBER 27, 2007

Chevron Stations, Inc., doing business as Chevron 1585 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk having sold a six-pack of Bud Light beer to Alejandrina Maganar, an 18-year-old 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 and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 24, 1997.

¹The decision of the Department, dated August 10, 2006, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellant on November 29, 2005, charging the sale of an alcoholic beverage to a minor on September 17, 2005.

An administrative hearing was held on June 5, 2006, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Alejandrina Maganar, the decoy, and Modesto police officer Michael Hicks. The evidence established that, in response to the clerk's request, the decoy produced her California driver's license. The license showed the decoy's true age and bore a red stripe with the words "21 IN 2008." The clerk looked at the license, then went forward with the sale. The decoy left the store with her purchase, and then returned to the store and identified the clerk as the seller.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged in the accusation and that no affirmative defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that the Department submitted ex parte communications to its decision maker.

DISCUSSION

Appellant relies upon the decision of the California Supreme Court in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] ("*Quintana*"). In that case, the court held that the provision of a report of hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. (Gov. Code §11430.10 et seq.

Appellant has moved to augment the record by the addition of any report of hearing submitted to the Department decision maker in this case.

Appellant also asserts that additional documents other than a report of hearing were submitted to the Department's decision maker. These documents include a copy of the Modesto police report of the incident, and a copy of the citation issued to the clerk who made the sale, neither of which was referred to in the hearing or received in evidence. The police report contains the officer's narrative report of the incident and his interview with the clerk. The citation to the clerk contains the usual information associated with a citation issued to a seller of an alcoholic beverage to a minor.

The certified record supplied to the Appeals Board by the Department does in fact include copies of these documents. The Department does not dispute this, nor is the Board informed how and why the two documents became part of the certified record. Together, these two documents lend support to the decision of the Department, without an opportunity for appellant to respond.

Appeals Board Rule 188 provides that the record shall consist of the file transcript, all notices and orders issued by the administrative law judge and the Department, including any proposed decision and the final decision of the Department, along with pleadings and correspondence by a party, the hearing reporter's transcript, and exhibits admitted or rejected.

Neither the police report nor the citation were mentioned during the hearing, and neither was offered or received in evidence. Thus, neither belongs in the record. Assuming as we must that they were part of the case file reviewed by the Department's decision maker, we can only conclude that they were submitted to the Director or his advisors on an ex parte basis.

Unlike the issue involving the assertion that a report of hearing was submitted to the Department's decision maker, where the Department ordinarily raises the factual issue whether there was an ex parte communication, its brief in this case essentially concedes the issue as to the documents other than the report of hearing, making no attempt to explain, excuse or defend the presence of the police report and citation in the certified record. The brief contains only a summary of the undisputed facts concerning the sale, followed by a single sentence in the section of the brief where the argument ordinarily appears: "The Department submits the above-entitled matter to the Appeals Board."

We can only read this as a concession by the Department that documents with the potential of affecting the decision of the Department's decision maker were submitted to its decision maker on an ex parte basis. Thus, we have no alternative but to reverse the decision and remand the case to the Department so that it may dismiss the accusation in this matter.

ORDER

The decision is reversed and the case is remanded to the Department for such further proceedings as are appropriate in light of our comments above.²

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

² 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.