

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

AB-8616

File: 20-290611 Reg: 06062579

7-ELEVEN, INC., and JAGTAR SINGH SAMRA dba 7-Eleven #2172-13779
13054 Chapman Avenue, Garden Grove, CA 92840,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 1, 2007
Los Angeles, CA

ISSUED JANUARY 16, 2008

7-Eleven, Inc., and Jagtar Singh Samra, doing business as 7-Eleven #2172-13779 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days, all of which were conditionally stayed subject to one year of discipline-free operation, for their clerk having sold a six-pack of Miller General Draft beer to Steven Dahl, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Jagtar Singh Samra, 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 Cottrell.

¹The decision of the Department, dated September 21, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on November 17, 1994. Thereafter, the Department instituted an accusation against appellants charging the unlawful sale of an alcoholic beverage to a minor on December 21, 2005.

An administrative hearing was held on July 18, 2006, at which time oral and documentary evidence was received. The evidence established that the clerk sold the beer to Dahl after viewing and scanning Dahl's California driver's license which showed his true date of birth and a red stripe with the words "AGE 21 in 2007."

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation was established, and which rejected appellants' claim the decoy did not display the appearance required by Rule 141(b)(2).

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) the Department violated the APA proscriptions against ex parte communications; (2) appellants were denied proper discovery; and (3) the Department failed to satisfy its burden of proof.

DISCUSSION

I

The contention that the Department violated the proscription against ex parte communications in the Administrative Procedure Act has been made many times before and has been adjudicated by the California Supreme Court in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*). This Board has followed *Quintanar* in numerous appeals, remanding the matters to the Department for evidentiary hearings to resolve the factual issues regarding ex parte communications raised in these cases.

(E.g., *Dakramanji* (2007) AB-8572; *BP West Coast Products, LLC* (2007) AB-8549; *Hong* (2007) AB-8492; *Chevron Stations, Inc.* (2007) AB-8488; *Circle K Stores, Inc.* (2006) AB-8404.) The ex parte communication contention in the present appeal is virtually identical to those made in the earlier appeals, and we decide this issue in the present appeal as we did the same issue in the earlier appeals just cited.

II

Appellants assert in their brief that the ALJ improperly denied their pre-hearing motion to compel discovery. Their motion was brought in response to the Department's failure to comply with those parts of their discovery request that sought copies of any findings or decisions which determined that the present decoy's appearance was not that which could be generally expected of a person under the age of 21 and all decisions certified by the Department over a four-year period which determined that any decoy failed to comply with rule 141(b)(2). For all of the decisions specified, appellants also requested all photographs of the decoys in those decisions.

ALJ Gruen, who heard the motion, denied it because he concluded it would cause the Department an undue burden and consumption of time and because appellants failed to show that the requested items were relevant or would lead to admissible evidence. Appellants argue that the items requested are expressly included as discoverable matters in the APA and the ALJ used erroneous standards in denying the motion.

This Board has discussed, and rejected, this argument numerous times before. Just as appellants' arguments are the same ones made before, our response is the same as before. We see no reason to once again go over our reasons for rejecting

these arguments. Should appellants wish to review those reasons, they may find them fully set out in *7-Eleven, Inc./Virk* (2007) AB-8577, as well as many other Appeals Board opinions.

III

Appellants contend that the Department failed to meet its burden of proof, by failing to prove that the employee named in the accusation was in fact the clerk who made the sale of the alcoholic beverage.

The only issue raised by appellants at the administrative hearing was whether the decoy displayed the appearance required by Rule 141(b)(2). There was no claim that the Department had failed to satisfy its burden of proof by failing to establish that the clerk who made the sale was the Gurdeep Singh whose name appears in the accusation.

An issue that might have been raised at the administrative hearing, but was not, may be considered waived. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal §394, p. 444.)

In our review of the record, we find no instance in which appellants' counsel raised any question regarding the identity of the clerk who made the sale. Further, we find several references to the clerk in the transcript of the administrative hearing, including a reference to a photograph of the clerk while standing behind the sales counter, as well as testimony that he was the person who made the sale.

Appellants never claimed that the clerk in the photograph (Exhibit 2) was not an employee of appellant. There is no reason to believe that the name of the clerk is a material part of the Department's burden of proof.

For all these reasons, appellants' contention lacks merit.

ORDER

The decision of the Department is affirmed as to issues raised other than that regarding the allegation of an ex parte communication in the form of a report of hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.²

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

²This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.