

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

AB-8724

File: 21-439593 Reg: 07064890

GARFIELD BEACH CVS, LLC, dba CVS Pharmacy # 9738
11735 Whittier Boulevard, Whittier, CA 90601,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 6, 2008
Los Angeles, CA

ISSUED FEBRUARY 19, 2009

Garfield Beach CVS, LLC, doing business as CVS Pharmacy # 9738 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a police 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.

¹The decision of the Department, dated August 16, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 10, 2006. The Department filed an accusation against appellant charging that, on October 20, 2006, appellant's clerk, Tommy Martinez (the clerk), sold an alcoholic beverage to 18-year-old Eric Lopez. Although not noted in the accusation, Lopez was working as a minor decoy for the Whittier Police Department at the time.

At the administrative hearing held on May 16, 2007, documentary evidence was received, and testimony concerning the sale was presented. 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 making the following contentions: (1) The Department engaged in prohibited ex parte communication with the decision maker, and (2) 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. These two issues will be discussed together. Appellant requests that the Board withhold its decision until a matter pending in the California Supreme Court is resolved. It also filed a motion to augment the record with any Report of Hearing, any documents available for review in the decision consideration process, and various Department orders and memoranda regarding review of proposed decisions and the structure of its legal staff.

DISCUSSION

I and II

Appellant contends the Department violated the Administrative Procedure Act (Gov. Code, §§ 11340-11529) and due process by engaging in ex parte communication with the Department's decision maker, and by its failure to maintain effective screening

procedures within the legal staff to prohibit its prosecutors from engaging in ex parte communications with the decision maker or his advisors. The Department denies that an ex parte communication was made. A declaration by the staff attorney who represented the Department at the administrative hearing asserts that at no time did the attorney prepare a report of hearing or other document, or speak to any person, regarding this case.

In a number of appeals recently, this Board has addressed the same arguments made by the parties here. In those appeals, the Board noted that several recent court decisions had described the Department's practice of ex parte communication with its decision maker or the decision maker's advisors as "standard practice" in that agency. The Board concluded that, "without evidence of an agency-wide change of policy and practice [by the Department], we would be exceedingly reluctant to affirm or reverse on the basis of a single declaration, especially where there has been no opportunity for cross-examination." Since a factual question still exists in this case, as it did in the earlier appeals just mentioned, we believe the only appropriate resolution is to remand the matter to the Department for an evidentiary hearing.

As did 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] at page 17, footnote 13, we decline to address appellant's due process argument:

Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

In light of our decision to remand this matter, augmenting the record is not necessary.

ORDER

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.