

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

**AB-8761**

File: 20-214335 Reg: 07065455

7-ELEVEN, INC., JESSE MAO FU, and MABEL MING SUN,  
dba 7-Eleven # 2136-18352  
18461 Roscoe Boulevard, Northridge, CA 91325,  
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: December 4, 2008  
Los Angeles, CA

**ISSUED JUNE 11, 2009**

7-Eleven, Inc., Jesse Mao Fu, and Mabel Ming Sun, doing business as 7-Eleven # 2136-18352 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended their license for 10 days, all of which were stayed for a probationary period of one year, for their 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 appellants 7-Eleven, Inc., Jesse Mao Fu, and Mabel Ming Sun, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Cottrell.

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<sup>1</sup>The decision of the Department, dated October 11, 2007, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

The Department filed an accusation<sup>2</sup> against appellants charging the sale of an alcoholic beverage by appellants' clerk to 19-year-old Mariana Olvera. Olvera was working as a minor decoy for the Los Angeles Police Department (LAPD) at the time.

At the administrative hearing held on July 31, 2007, documentary evidence was received and testimony concerning the sale was presented by Olvera and by two LAPD officers. Appellants presented no witnesses or other evidence. The evidence established that the clerk sold beer to Olvera after examining her valid California identification card which showed her to be 19 years of age.

The Department's decision determined that the violation charged was proved and no defense to the charge was established. Appellants filed an appeal contending the Department allowed its advocate at the administrative hearing to engage in prohibited ex parte communications with the decision maker. Appellants also filed a motion asking the Appeals Board to augment the record with various documents, including any reports of hearing and General Order No. 2007-09.

## DISCUSSION

This Board has been placed at a great disadvantage in reviewing this matter, since the brief filed by appellants does not contain a statement of the issues they raise on appeal, but appears to be continuing an argument begun somewhere else. It is more like a closing brief rather than an opening brief. We have attempted to decipher the contention being made, and have concluded it is probably that the Department did

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<sup>2</sup>We have no actual knowledge of the accusation or its contents, since the Department did not include a copy of the accusation in the administrative record provided to this Board.

not have an "official process or safe guards [sic]" (App. Br. at p. 2) in place at the time of the administrative hearing in this case to prevent ex parte communication between its prosecutors and the decision maker. Appellants do make clear the result they desire: remand for an evidentiary hearing.

The Department, in something of a "shotgun" approach, asserts that appellants have not established a due process violation, that an attorney may act both as a prosecutor and as an advisor in different cases without violating the Administrative Procedure Act (APA) or due process, that appellant bases its (nonexistent) argument on speculation rather than facts, and 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 arguments similar to those 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 endemic in that agency. The Board concluded that, "without evidence of an agency-wide change of policy and practice [by the Department],<sup>3</sup> 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.

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<sup>3</sup>The Department's General Order No. 2007-09 was not issued until after the administrative hearing in this case.

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.<sup>4</sup>

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

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<sup>4</sup>This 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.