

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

AB-8806

File: 47-408649 Reg: 07065967

REA 2003 1 LLC, dba Saddle Ranch Universal
666 Universal Terrace Parkway, Universal City, CA 91608,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

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

ISSUED JUNE 17, 2009

REA 2003 1 LLC, doing business as Saddle Ranch Universal (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its bartender, Larry E. Yadan, having sold and furnished distilled spirits to Isaac Quintanilla, a 20-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant REA 2003 1 LLC, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Cottrell.

¹The decision of the Department, dated January 18, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on May 26, 2004. Thereafter, the Department instituted an accusation against appellant charging the sale of alcoholic beverages to a minor on March 23, 2007.

An administrative hearing was held on November 7, 2007. Documentary evidence was received and testimony concerning the violation charged was presented by Lissette Baron, a criminologist; Christy Beach, a former Department investigator; Isaac Quintanilla, the minor; and Matthew Pugh, appellant's chief operating officer. The evidence established that when Quintanilla was asked for identification by an unidentified bartender who served him an earlier drink, he tendered an automobile sales person license issued by the California DMV which showed his true date of birth - December 17, 1986. Yadan, the bartender who served him the drink described as containing distilled spirits, did not ask Quintanilla his age or for his identification.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been established. The Department rejected appellant's claim that it was entitled to mitigation by reason of the extensive efforts it undertook to prevent sales to minors.

Appellant filed a timely notice of appeal in which it raises the following issues: (1) the Department failed to provide adequate screening to ensure against the possibility of bias; (2) the Department engaged in ex parte communications; (3) there was a failure to compile and provide to the Director a complete record on appeal; (4) the Department failed to prove that an "AMF" drink is an alcoholic beverage; and (5) the Board should withhold its decision in this matter until the California Supreme Court issues its decision in the pending case of *Morongo Band of Mission Indians v. State*

Water Resources Control Board (S155589).² Appellant has also moved to augment the record with the addition of any ABC Form 104 and related documents, General Order No. 2007-09 and related documents, and documents pertaining to or evidencing operational or structural modifications to the Department's attorney staff.

DISCUSSION

I and II

Appellant contends that the Department did not adequately screen its prosecutors from its decision maker and engaged in ex parte communications.

This is an appeal in which the administrative hearing took place after the adoption by the Department of General Order No. 2007-09 (the Order) on August 10, 2007. (The administrative hearing took place on November 7, 2007.) The Order notes the court cases prohibiting the Department's practice of ex parte communications with the decision maker and placing the burden on the Department to show that no ex parte communication occurred in a particular case. It also sets out changes in the Department's internal operating procedures which, it states, have been determined by the Director of the Department to be "the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications." The changes 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:

Effective immediately, the following protocols shall be followed with respect to litigated matters:

² The California Supreme Court issued its decision in *Morongo Band of Mission Indians v. State Water Resources Control Board (S155589)* 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.

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.
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.
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 license or applicant. This file shall constitute the official administrative record.
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.
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.
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 to comply with the decisions in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] (*Quintanar*), *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [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.³

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, on an ex parte basis, recommendations in the form of reports of hearing, has been officially changed to comply with the requirements of *Quintanar* and the cases following it. Unlike earlier informal attempts at compliance, the Order is an official statement of the Department 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.

Appellant has not affirmatively shown that any ex parte communication took place in this case. Instead, it has relied on the authorities cited above (*Quintanar, supra; Chevron, supra; Rondon, supra*), for its argument that the burden is on the Department to disprove the existence on any ex parte communication.

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, it by its terms appears to

³The Department's failure to prove compliance with the dictates of the court decisions resulted in more than 100 cases having been remanded to the Department by the Appeals Board for investigative hearings regarding claims of ex parte communications between litigating counsel and the Department's decision makers. We understand that these cases were ultimately dismissed by the Department.

resolve that issue by effectively removing the litigating attorneys from the review process entirely.

In light of the result we reach, we see no need to delay our decision in this matter until the California Supreme Court resolves *Morongo Band of Mission Indians v. State Water Resources Control Board* (S155589). Similarly, there is no need to augment the record as requested by appellant.

III

Appellant asserts that the accusation must be dismissed because the certified record originally provided by the Department did not include certain documents required to be included. The only specific document said to be missing was the first page of the order denying appellant's motion to compel discovery. Appellant argues that omission of this document from the certified record violates rule 188 of the Appeals Board (4 Cal. Code Regs., § 188) and makes it unclear whether and when the documents were considered by the decision maker.

Rule 188 states what is to be included in the record on appeal:

(1) The file transcript, which shall include all notices and orders issued by the administrative law judge and the department, including any proposed decision by an administrative law judge and the final decision issued by the department; pleadings and correspondence by a party; notices, orders, pleadings and correspondence pertaining to reconsideration;

(2) the hearing reporter's transcript of all proceedings;

(3) exhibits admitted or rejected.

In June 2008, the Board received what the Department certified was "a true, correct and complete record (not including the Hearing Reporter's transcript} [sic] of the proceedings" before the Department in this case. Attached to the certification were the Department's Certificate of Decision adopting the ALJ's proposed decision, the

proposed decision of the ALJ, and the exhibits from the administrative hearing.

In November 2008 the Board, and appellant, received additional documents certified by the Department to be "a true, correct and complete record (not including the Hearing Reporter's transcript [sic] of the proceedings" before the Department in this case. Included in these documents were the motion and points and authorities in support of the motion, i.e., the documents that were missing from the first certification.

Appellant asserts that missing from the groups of documents said to make up the complete administrative record was the first page of an order denying appellant's motion to compel discovery.⁴ This makes it impossible, it argues, to know what documents were provided to the decision maker for consideration. It asserts that "the Department has a lawful obligation to review the record in formulating its decision and then, in turn, provide that record to Appellant and this Board." (App. Opening Br. at p. 17.)

The Department's certifications are less than correct, in that neither complies with its own self-description of a "true, correct and complete record" of the proceedings before the Department or with the description of the "record on appeal" in the Appeals Board's rule 188. Clearly, the Department's proceedings did not commence with its decision, or even with the administrative hearing. Lacking are other notices and orders and pleadings and correspondence by a party required by Rule 188.

In spite of these deficiencies in the record, however, we do not believe that this decision should be reversed on the basis of an incomplete record. We have discussed

⁴ Elsewhere in appellant's brief, it asserts that page 3 of the proposed decision was omitted from the record. While this page does appear to be missing from the supplemental certification filed in November 2008, it was included in the proposed decision included with the original certification filed in June 2008. Appellant described the omission of the first page of the order denying its motion to compel as "glaring." .

this issue in a number of other cases and expressed a number of reasons for rejecting dismissal as an appropriate remedy: This is really a procedural error, which is rarely sufficient by itself to justify reversal of a Department decision (*Reimel v. House* (1969) 268 Cal.App.2d 780, 787 [74 Cal.Rptr. 345]); appellant has not shown that it suffered any prejudice by this error; appellant has not shown that these documents are material to the issues raised in this appeal; and appellant should have included these documents its Motion to Augment Record.

The most compelling reason for rejecting appellant's contention, however, is a simple one: contrary to their assertion that the Department is legally obligated to review the record before making its decision, it has long been the rule under section 11517 of the Administrative Procedure Act (Gov. Code, §§ 11340-11529) "that where the hearing officer acts alone the agency may adopt his decision without reading or otherwise familiarizing itself with the record." (*Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 399 [184 P.2d 323].) This principle was most recently affirmed in *Ventimiglia v. Board of Behavioral Sciences* (2008) 168 Cal.App.4th 296, 309 [85 Cal.Rptr.3d 423].

The record on appeal provides no basis for reversal.

IV

Appellant contends that the Department failed to prove that the "AMF" drink served to the minor was an alcoholic beverage.

Christy Beach, a Department investigator, testified that she observed Quintanilla, the minor, holding a half-full bottle of Corona beer. She later saw him ordering a drink from bartender Yadan. She saw Yadan pour several different liquids into a carafe and

serve it to Quintanilla.⁵ When Quintanilla left the bar with the drink, Beach confronted him. Quintanilla told Beach he was 20 years of age, and that the drink, which he called an "AMF," contained alcohol. Beach seized the drink, and later caused a sample of the drink to be submitted to the Los Angeles County Sheriff's Department laboratory for analysis of its alcoholic content.

Lisette Baron, a criminalist with the Sheriff's crime lab, testified that a head space gas chromatography test she conducted revealed that the drink in question contained 11 percent ethyl alcohol by volume. The results of the test were set forth in her report (Exhibit 2), which was admitted in evidence without objection.

Appellant argues that the Department failed to establish a nexus between the sample tested by Baron and the sample submitted by Beach, and that the minor testified that an AMF drink could be made without alcohol and he did not remember seeing the bartender put gin in the drink.

Appellant's chain of evidence argument is based on a false premise. Appellant argues that Beach failed to testify that the sample in Exhibit 1 belonged specifically to the licensee and not one of the other locations Beach visited that night.

Beach's testimony leaves no room for any doubt as to where she obtained the sample. She testified that she seized the drink from Quintanilla and poured it into a sample container while at the scene. She further testified that she took the sample to the evidence locker at the special operations unit, retrieved it from the evidence locker

⁵ Appellant's chief operating officer testified that an AMF is a combination of Blue Curacao, vodka, gin, rum, and tequila. With the possible exception of Blue Curacao, all are well known as distilled spirits. Pugh did not testify that an AMF could be made without alcohol, as the term "virgin" implies. The complete name of the drink in question is irrelevant to this appeal. Suffice it to say, the name itself suggests a strong alcoholic content.

to take it to the crime lab, and later picked it up from the crime lab along with Baron's report. There is no evidence that would contradict this testimony, or Baron's testimony as to the manner in which samples for testing are delivered to the lab, assigned an evidence number, and returned with her report. Appellant's objection is mere speculation.

ORDER

The decision of the Department is affirmed.⁶

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

⁶ 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.