

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

AB-8931

File: 20-285453 Reg: 08067819

7-ELEVEN, INC., and JANIZEH CORPORATION, dba 7-Eleven 2133-13896
27761 Bouquet Canyon Road, Santa Clarita, CA 91350,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 3, 2011
Los Angeles, CA

ISSUED APRIL 22, 2011

7-Eleven, Inc., and Janizeh Corporation, doing business as 7-Eleven 2133-13896 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk selling an alcoholic beverage to a Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Janizeh Corporation, appearing through their counsel, Ralph B. Saltsman and Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated June 24, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 12, 1993. On January 30, 2008, the Department filed an accusation against appellants charging that, on November 28, 2007, appellants' clerk sold an alcoholic beverage to a person under the age of 21. Although not noted in the accusation, the underage person was working as a minor decoy for the Department at the time.

At the administrative hearing held on May 15, 2008, documentary evidence was received and testimony concerning the sale was presented by the minor decoy and a Department investigator.

The Department's decision determined that the violation charged was proved and no defense to the charge was established.

Appellants then filed an appeal contending: The Department violated the Administrative Procedure Act and General Order No. 2007-09 (1) by allowing its investigative and prosecutorial unit, the Hearing and Legal Unit, to act as decision-maker in this matter, and (2) by allowing the ex parte transmission to the Director of documents containing substantive information. Appellants also filed a Motion to Augment Record, requesting augmentation of the record with the ABC-309 form, General Order No. 2007-09, and numerous other documents.

DISCUSSION

I

Appellants contend that the Department violated the separation of functions mandated by the Administrative Procedure Act (Gov. Code, §§ 11340-11529) (APA) and the California Supreme Court's decision 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*), because the Hearing and Legal Unit includes the Department's prosecutorial branch, and it also was the adjudicator in this case. In addition, they assert, it must be assumed that the Department violated prohibitions against ex parte communications because the Hearing and Legal Unit acted as both prosecutor and decision maker.

Appellants argue that the Hearing and Legal Unit was the adjudicator in this case because the Certificate of Decision was signed by Helen McConville, the supervisor of the Hearing and Legal Unit at the time. They also assert that "[i]f the Department contends that the Hearing and Legal Unit's signature and execution of the Certificate of Decision is the mere transmission of the Director's Decision, it is incumbent upon the Department to show how the Director reviewed the Decision and how it communicated its Decision to the Hearing and Legal Unit." (App. Opening Br. at p. 6.)

The Certificate of Decision states:

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by an Administrative Law Judge of the Administrative Hearing Office, adopted said proposed decision as its decision in the case therein described on June 24, 2008.

A certification is simply a clerical act attesting to the truth of the fact or facts stated in the document, "a written testimony to the truth of any fact." (*Donnellan v. City of Novato* (2001) 86 Cal.App.4th 1097, 1106 [103 Cal.Rptr.2d 882].) It seems obvious to us that the person signing the certification is simply stating that the Department, i.e., the Director or his designee, adopted the proposed decision of the administrative law judge (ALJ) as its own.

Appellants assert that "[w]here a document is signed . . . by an individual . . . , the facts recited in that document are conclusively presumed to be true as between the parties thereto." (App. Opening Br. at p. 5.) From that statement, they leap directly to the conclusion that "the Decision signed and executed by the Hearing and Legal Unit establishes that the Decision was made by the Hearing and Legal Unit on behalf of the Department." Evidence Code section 622 and two California appellate court cases are the only authority appellants cite in support of their contention that someone in the Hearing and Legal Unit was the decision maker in this case.

Evidence Code section 622 states,

The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.

Plaza Freeway v. First Mt. Bank (2000) 81 Cal.App.4th 616 [96 Cal.Rptr.2d 865] (*Plaza Freeway*) and *Sanders Const. Co., Inc. v. San Joaquin First Fed'l Sav. & Loan Ass'n* (1982) 136 Cal.App.3d 387 [186 Cal.Rptr. 218], the two cases relied upon by appellants, applied the conclusive presumption of Evidence Code section 622 to documents other than contracts. However, as the discussion in *Plaza Freeway* at pages 621 through 626 makes clear, the type of "instrument" referred to in the statute is one containing statements or facts that bind the party who made or agreed to the statements, and the term most frequently applies to documents involved in real estate transactions or wills. A certificate of decision is clearly not an "instrument" within the meaning of section 622.

Even if the authorities cited by appellants somehow did apply in this case, they are not authority for appellants' conclusion that the signature on the Certificate of Decision "establishes" that the person signing was the decision maker. The facts

stated in the Certificate of Decision make clear that the person signing is *not* the person who made the decision.²

Appellants' contention that "it must be assumed that the Department violated prohibitions against ex parte communications because the Hearing and Legal Unit acted as both prosecutor and decision maker" is also unsupported. Since they did not establish that Ms. McConville was the decision maker, they have not shown that the Hearing and Legal Unit was both prosecutor and adjudicator.

II

Appellants contend the Department violated the prohibitions against ex parte communications by the transmission of a document containing substantive information about the case to the Director without providing them with notice and an opportunity to be heard. They allege specifically that the Hearing and Legal Unit transmitted an ABC-309 form (309 form) from the Department District Office to the Director. Appellants appear to base this allegation on preprinted routing information on the 309 form which includes the "Director Via Hearing And Legal."

General Order No. 2007-09 (the Order), a copy of which is attached to this decision, modified internal procedures of the Department to comply with the Supreme Court's decision in *Quintanar, supra*, 40 Cal.4th 1. The Order prohibits the Legal Unit attorneys from reviewing proposed decisions or advising anyone involved in the decision-making process; requires that the official administrative record be maintained separate from any other documents or files of the Department regarding the case; and gives specific directions to the Hearing and Legal Unit. The Hearing and Legal Unit is

²See also the discussion in the following section dealing with the responsibility of the Hearing and Legal Unit to notify the parties of the decision made by the Director.

directed to forward the proposed decision and the official administrative record from the Administrative Hearing Office to the Director's Office "without legal review or comment"; to maintain the official administrative record as a file separate from "any other documents or files maintained by the Department regarding the licensee or applicant"; and to notify all parties of decisions made regarding proposed decisions when it is notified of those decisions by the Director.

The Board addressed the same contention made here in the appeal of *Lee Vue* (2009) AB-8851, and rejected it. The Board concluded that, "regardless of the routing, the director is prevented from receiving the 309 reports by General Order No. 2007-09."

The Board continued:

[W]e believe that the effect of language (italicized below) in paragraph 3 of the "Procedures" section is to prevent documents such as the 309 report from becoming *ex parte* communications:

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 licensee or applicant*. This file shall constitute the official administrative record.

The documents included in the "official administrative record" are specified in paragraph 2, and they do not include a 309 report, unless it should happen to be included for some reason as a hearing exhibit. Since it is only the "official administrative record" that goes to the director, the 309 report, even if it did find its way to the Hearing and Legal Unit, would be sequestered in a separate file.

We have not been shown any reason to depart from the conclusion we reached before on this issue.

For the reasons indicated, we conclude that the Department did not engage in *ex parte* communication as alleged by appellant. We decline to order the record augmented with the documents listed in appellant's motion, since we have no evidence

that they were made available to any Department decision maker prior to the Department issuing its decision. As such, they are not properly included in the administrative record on appeal.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
MICHAEL A. PROSIO, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.