

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

AB-9134

File: 21-215362 Reg: 10072709

7-ELEVEN, INC., dba 7-Eleven # 2121-20174
6571 El Cajon Boulevard, San Diego, CA 92115,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 4, 2011
Los Angeles, CA

ISSUED AUGUST 29, 2011

7-Eleven, Inc., doing business as 7-Eleven # 2121-20174 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all of which were stayed on the condition that appellant complete one year of discipline-free operation, for its 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 appellant 7-Eleven, Inc., appearing through its counsel, Ralph B. Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer M. Casey.

¹The decision of the Department, dated October 21, 2010, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 3, 1989. On March 17, 2010, the Department filed an accusation charging that, on September 24, 2009, appellant's clerk sold an alcoholic beverage to a 17-year-old. Although not noted in the accusation, the 17-year-old was working as a minor decoy for the Department at the time.

At the administrative hearing held on July 28, 2010, documentary evidence was received, and testimony concerning the sale was presented by the decoy and by a Department investigator. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed an appeal contending that the advisor to the Department's decision maker improperly engaged in prosecutorial functions² and received prohibited ex parte communications from the Department's district office. Appellant does not dispute that the violation occurred as charged.

DISCUSSION

Appellant contends the Department violated the Administrative Procedure Act (APA), the decision of 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*), and appellant's right to due process³ by

²Although the lack of separation of functions is stated as an issue, appellant's brief contains no discussion or argument regarding it. The issue is deemed abandoned.

³Although appellant alleges a due process violation, its brief contains no argument in support of that issue. Therefore, the issue is deemed abandoned.

stamping the signature of Matthew Botting, the Department's General Counsel and an advisor to the Director, on a form letter accompanying the accusation and related documents that were sent to it. Because Botting's stamped signature appears on that form letter, appellants allege that the accusation and "all other documents accompanying it must have been sent to Mr. Botting by the District Administrator or a district office, directly or indirectly" (App. Opening Br. at p. 5), in violation of Government Code section 11430.10, subdivision (a),⁴ which prohibits ex parte communications.

At the hearing, appellant asserted that the letter bearing Botting's signature⁵ shows that Botting "is involved in the Accusation process and the prosecutorial function of the ABC while simultaneously being impermissibly involved in the adjudicatory function and review of Administrative Law Judge decisions." [RT 37-38.] At one point in closing argument, appellant said that Botting's involvement with the letter showed violations of due process, "the prohibitions on ex-parte communications under the APA," and the *Quintanar* case, but appellant did not mention ex parte communications at any other time during the hearing.

Because appellant did not raise this issue until the end of the hearing, the administrative law judge (ALJ) asked the parties to submit post-hearing briefs stating their arguments and including the documents they referred to in their arguments at the

⁴Government Code section 11430.10, subdivision (a) provides:

While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.

⁵The original of the letter was entered into evidence as Exhibit A. Botting's signature appears on the letter in blue ink.

hearing. The Department sent its brief addressing the allegation that Botting improperly engaged in both prosecutorial and adjudicatory functions, attaching the Department's General Order 2007-09 and the affidavits of Department employees Judy Carlton and Laura Lawrence describing the clerical procedure that created the Exhibit A letter and explaining that Botting did not sign the letter, but his signature was affixed using a stamp.

Appellant's post-hearing brief addressed only the issue of ex parte communications, basing its argument on excerpts from the Department's Policy Manual, which it attached as an exhibit, and attacking the affidavits submitted by the Department. The Department then sent a letter to the ALJ objecting to appellant's brief as "beyond the scope of the argument raised at the hearing" and asking that the brief be disregarded.

The ALJ's proposed decision, which was adopted by the Department, discussed the hearing arguments and the post-hearing briefs at length in Finding of Fact II, paragraph F:

F. The Respondent argued that Exhibit B shows that Matthew Botting, the Department's general counsel, is the Department's ultimate decision maker, that Exhibit A shows that Mr. Botting was involved in the prosecutorial process and that the Department violated the Respondent's due process of law, that the Department violated its General Order 2007-09 and that the Department violated *Quintanar* by failing to keep the prosecutorial and adjudicative functions separate.

1. Exhibit A is the original of the Department's ABC-166-A form letter which was sent out by the Department's Hearing and Legal Unit to the law office of Respondent's attorney. It bears a signature line for Matthew D. Botting, General Counsel, a blue signature and it enclosed the accusation package filed against the Respondent. The Department's attorney argued at the hearing that the signature in blue is actually a signature stamp that was affixed to the form letter in question by an employee in the Hearing and Legal Unit and that the Department was in possession of affidavits in a separate case stating the same. The Department's brief contains two affidavits. The affidavit of Judy Carlton indicates that in February of 2010

during a period of time when the Hearing and Legal Unit did not have a supervisor, she was instructed to replace the boilerplate signature line used on ABC forms that listed the Hearing and Legal Supervisor with the a [sic] signature line for the Department's General Counsel Matthew Botting and that thereafter, staff members in the Hearing and Legal Unit used a signature stamp bearing Mr. Botting's signature to sign each form letter. Carlton's affidavit further states that the form letter in question was generated by staff member Laura Lawrence who then stamped Mr. Bottings's signature on the form letter.

2. The affidavit of Laura Lawrence states that her unit files and processes accusation packages, that the accusation package is comprised of a letter from the District, a copy of the Accusation, a Notice of Defense, a Statement re Discovery, the Department's Request for Discovery, a Stipulation and Waiver for pre-hearing settlement and a proof of service and that the Hearing and Legal Unit neither conducts the underlying investigation nor makes any decisions about whether or not to file an accusation. Lawrence's affidavit further states that she completed the form letter in Exhibit A, that that [sic] she used a signature stamp for Matthew Botting, that Mr. Botting was not aware that she had generated Exhibit A, that she assembled the accusation package and proof of service and that at no time was the accusation package given to or reviewed by Matthew Botting prior to her mailing it to the licensee's attorney.

3. Exhibit B shows that Mr. Botting acted as the Department's ultimate decision maker in one particular case.

4. The preponderance of the evidence did not establish that Mr. Botting signed Exhibit A or that he reviewed Exhibit A and/or its attachments. The evidence did not establish that the Department's general counsel was involved in the prosecutorial process in this matter or that the Department violated General Order 2007-09 or that the Department violated *Quintanar* by failing to keep the prosecutorial and adjudicative functions separate. Furthermore, the evidence did not establish that there was a violation of the Respondent's due process of law.

5. Respondent's attorney raised an additional issue and/or argument in his brief that he did not raise at the time of the hearing. The additional issue and/or argument that was raised in Respondent's brief consists of an allegation that the Department is engaging in ex parte communications. In making said allegation, said brief makes references to certain sections of the Department's policy manual and attaches two pages from a November 22, 2000 policy manual. These sections of the policy manual were not offered at the hearing and they were not admitted into evidence. Nevertheless, the preponderance of the evidence did not establish that the Department is engaging in a pattern and practice of unlawfully submitting ex parte communications.

In deciding this appeal, the Board is guided by certain principles:

We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (*CMPB Friends, Inc. v. Alcoholic Bev. Control Appeals Bd.* (2002) 100 Cal.App.4th [1250,]1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779]; [Bus. & Prof. Code] §§ 23090.2, 23090.3.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (See *Lacabanne Properties, Inc. v. Dept. Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] (*Lacabanne*).) The function of an appellate Board or Court of Appeal is not to supplant the trial court as the forum for consideration of the facts and assessing the credibility of witnesses or to substitute its discretion for that of the trial court. An appellate body reviews for error guided by applicable standards of review.

(*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*

(*Masani*) (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

Appellant's argument on appeal hinges, first, on whether Botting actually signed the letter that was sent to its attorneys and, secondly, on the implications that appellant attributes to the supposed actual signature:

The signature of Matthew Botting upon this letter reasonably implies Mr. Botting had access and may have in fact seen documents relating to the hearing outside the presence or notice to the licensee and/or its representatives.

(App. Opening Br. at p. 4.)

[D]ocuments are unlawfully being submitted to Hearing and Legal Unit where Matthew Botting signs the cover letter acknowledging directly and/or indirectly he had access to the above documents unlawfully without an opportunity for a licensee to respond to these documents.

(App. Opening Br. at p. 7.)

The ALJ made a factual finding that Botting did not sign the letter. The Board is bound by the factual findings in the Department's decision as long as they are

supported by substantial evidence. Substantial evidence exists to support the finding in the form of Exhibit A which, upon examination, clearly bears a stamped signature. The affidavits from the Department employee's further support the finding. Therefore, the foundation upon which this argument is built is non-existent.

Even if we were to ignore the finding that Botting did not actually sign the letter, the inferences appellant draws from the purported signature cannot be sustained. Appellant's assertion that the signature "reasonably implies" and "acknowledges" that Botting had access to documents that he should not have, is totally unsupported by any evidence or reasoning beyond appellant's say-so. Clearly, the ALJ drew different inferences from the evidence, which the Appeals Board is bound to accept as long as they are not unreasonable.

Although we address appellant's contentions on appeal, we do not ignore the fact that appellant did not broach the subject of the letter until the very end of the administrative hearing, making it difficult for the Department to respond to the argument. Then, when the Department was given an opportunity to respond by submitting a post-hearing brief, it was blind-sided by appellant's responsive brief raising a new issue, which the Department had no opportunity to address. We might have deemed the ex parte communication issue waived, but appellant's argument was so obviously ill-conceived and poorly written that the Department has not suffered any real disadvantage by the Board reaching the "merits" of the appeal.

Appellant has not carried its burden of showing that the Department's decision should be overturned as an abuse of discretion.

ORDER

The decision of the Department is affirmed.⁶

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁶This 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.