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

AB-8099
File: 48-377639 Reg: 02052924

DANIEL BECERRIL QUINTANAR dba El Cielo
20913 Vanowen Street, Canoga Park, CA 91303,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED AUGUST 19, 2004

Daniel Becerril Quintanar, doing business as El Cielo (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 20 days for his bartender having served an alcoholic beverage (beer) to an obviously intoxicated patron, a violation of Business and Professions Code section 25602, subdivision (a).[2]

Appearances on appeal include appellant Daniel Becerril Quintanar, appearing through his counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the

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[1]The decision of the Department, dated February 11, 2003, made pursuant to Business and Professions Code section 11517, subdivision (c), is set forth in the appendix, together with the proposed decision of the administrative law judge (ALJ). Section 11517, subdivision (c)(2)(D) permits the Department to reject the proposed decision, as it did here, and decide the case upon the record, including the transcript of the hearing.

[2] Business and Professions Code section 25602, subdivision (a) provides that every person who sells any alcoholic beverage to any obviously intoxicated patron is guilty of a misdemeanor.

Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public premises license was issued on August 22, 2001. Thereafter, on May 10, 2002, the Department instituted an accusation against appellant charging that appellant's bartender sold an alcoholic beverage to Sergio Perez, a patron who was then obviously intoxicated.

An administrative hearing was held on July 26, 2002, at which time oral and documentary evidence was received. At that hearing, Jesus Puente (Puente), a Los Angeles police officer, testified that appellant's bartender (and wife), Cecilia Quintanar Merino (Merino) served an alcoholic beverage (beer) to Sergio Perez, an obviously intoxicated patron. Merino, in turn, denied that Perez exhibited any symptoms of intoxication.

The administrative law judge (ALJ) dismissed the accusation, concluding that the Department had failed to meet its burden of proof. He found both Puente and Merino to have testified credibly, i.e., Puente observed symptoms that led him to believe Perez was obviously intoxicated, while Merino observed the same symptoms and concluded Perez was not obviously intoxicated. Findings of Fact III and IV reflect the disagreement in the testimony of each:

III

> Sergeant Jesus Puente testified as follows regarding Sergio Perez, the only customer in the bar, and Cecilia Quintanar Merino, Respondent's bartender:
>
> 1. Perez had difficulty keeping his eyes open, he swayed from side to side as he sat on the barstool, his eyes were watery and bloodshot and his speech was

slurred.

2. Perez left the barstool, walked, not swayed, slowly and deliberately to the jukebox, selected a song to play, and returned to his barstool.

3. Perez ordered a shot of tequila from the bartender, who poured an amber-colored liquid, presumably tequila, into a shot glass and served it to Perez. Perez paid for the tequila and drank some of it.

4. Sergeant Puente said to the bartender, in Spanish, “He’s drunk”, referring to Perez.

5. Sergeant Puente continued to observe Perez, who continued to show symptoms of slurred speech, watery eyes, closed eyes, and a strong odor of alcohol.

6. Sergeant Puente again told the bartender that Perez was drunk. The bartender smiled and nodded.

7. Perez ordered another shot of tequila, and the bartender served another liquid, presumably tequila, to Perez. (The Accusation alleges that Respondent’s bartender sold or furnished beer to Perez. Therefore, even if Perez were obviously intoxicated, the sale and service of tequila to him is not evidence to support the allegation in this case.)

8. Perez looked at the clock, which was approximately six feet from him, and asked the bartender for the time. The bartender replied that it was nine o’clock. Perez then said “Nine o’clock. I can’t believe it. I’m drunk already.”

9. Perez then ordered beer for all the customers in the bar: the police officers and himself. The bartender served a bottle of Corona beer to Perez. (The sale and service of this beer is the subject of this case.) Perez paid for his beer, and for the beers served to the officers. He did not have any difficulty paying for the beers.

IV

Respondent’s bartender testified as follows regarding Perez and herself:

1. Perez did not have watery eyes, did not sway, and did not have trouble staying awake.

2. Perez walked from the counter to the restroom, and back, approximately 40 feet altogether, without difficulty.

3. Perez walked from the bar counter to the jukebox, a distance of approximately fifteen feet, without difficulty. He also had no difficulty inserting a

dollar bill into the jukebox or selecting a specific song from a specific CD.

4. Perez's speech on February 7 was not different from his speech on other days.

5. Perez did not ask Respondent's bartender for the time, and Respondent's bartender did not tell him the time.

6. Neither Sergeant Puente, nor any other person, told Respondent's bartender that Perez was drunk.

7. Perez goes to Respondent's bar almost every night. On prior occasions when Perez appeared intoxicated, Respondent's bartender sent him home.

8. On February 7, the police arrested Perez and took him home. Fifteen minutes later, Perez was back at Respondent's bar.

The Department, in a decision made pursuant to Business and Professions Code section 11517, subdivision (c), adopted the Findings of Fact made by the ALJ, and found additionally that it was impossible to determine the regular speech pattern of Perez because he did not testify. The Department then substituted its own Determination of Issues, concluding that, even if both witnesses were deemed credible, Puente's version of events was entitled to more weight, because "[t]here is no evidence to suggest that the observations of Sergeant Puente were incorrect. In fact, Sergeant Puente testified that he warned the bartender that Mr. Perez was drunk."

Below the Department's order, the Department's Chief Counsel, Matthew D. Botting, certified the decision as the Department's, adopted on May 20, 2003. .

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) The Department conflated the roles of advocate and decision-maker, thus violating appellant's right to due process; and (2) the decision is not supported by substantial evidence.

After this appeal was filed, appellant filed a Motion to Augment Record, asking the Board to order the Department to include as part of the record on appeal, a Department form called 'Report of Hearing."[3] The Board made such an order, but the Department refused to comply. We discuss this aspect of the appeal following our discussion of the due process issue.

DISCUSSION

I

Appellant contends that its right to due process was violated because the Department's chief counsel, Matthew Botting, was both prosecutor and decision maker in this case. The Department's Web site, appellant points out, says that "Botting oversees all legal issues related to ABC, and a legal staff of nine attorneys"; therefore, appellant asserts, Botting is the Department's "highest ranking prosecutor," charged with oversight in the prosecution of this case. The Department's decision was made by Botting, according to appellant, and Botting also signed and certified the decision, thus "conflating the roles of advocate and decision-maker" and depriving appellant of its due process right to a fair hearing before an unbiased tribunal. Appellant cites *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234] (*Nightlife*) in support of its contention.

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[3] The Report of Hearing appears to be a standardized report prepared by the attorney representing the Department following an administrative hearing. It contains primarily factual information such as the identification of the case heard; the ALJ , parties and witnesses present; the issues; any stipulations; whether the case was completed or continued; and the recommendation for discipline made by the attorney at the hearing. In addition, a section is included entitled "Discussion," with directions to "Summarize evidence for and against with reasons for the recommended decision."

In *Nightlife*, *supra*, Nightlife petitioned the superior court for a writ of administrative mandate to set aside the city's denial of Nightlife's application for renewal of its adult entertainment permit. In Nightlife's unsuccessful administrative appeal of the permit denial, the hearing officer was assisted during the hearing by an assistant city attorney who had advised the city in its initial denial of Nightlife's permit renewal application. The trial court concluded that Nightlife's due process rights had been violated, granted the petition, and ordered the city to grant Nightlife a new hearing.

The city appealed, and the Court of Appeal held that the administrative appeal hearing failed to meet minimum constitutional due process standards. The court stated that procedural due process in administrative proceedings requires a fair hearing before an unbiased decision maker, and Nightlife's administrative hearing had the appearance of unfairness and bias because of the city attorney's dual roles of advocate and advisor to the decision maker.

Nightlife involved a single attorney assuming the roles of advocate and advisor to the decision maker. The court distinguished the cases cited by the city "because they do not involve this same objectionable overlapping of *advocacy* and decision-making roles. In those cases [citations], the same attorney did not act as both a partisan advocate and as an advisor to the neutral decision-maker." (*Nightlife*, *supra*, 108 Cal.App.4th at pp. 94-95.)

In the present case, appellant argues that one person on the Department's legal staff, Botting, served both as prosecutor and decision maker, violating the teaching of *Nightlife*, *supra*. The Department does not deny that Botting made the Department's

decision in this case; indeed, in oral argument before this Board, the Department conceded that Botting was the decision-maker, that duty being informally delegated to him by the Director of the Department. Nevertheless, the Department's argument seems to treat ALJ Lo, who conducted the administrative hearing, as the decision maker. However, the ALJ is not the decision maker; the Department, acting through the Director, is always the decision maker. The ALJ conducts the hearing and prepares a proposed decision, but the decision to accept or reject the ALJ's proposed decision, and the ultimate decision if the proposal is rejected, is vested in the Director. Botting was, as appellant contends, the decision maker in the present case.

Botting was not, however, the prosecutor in this case. A staff attorney for the Department, David W. Sakamoto, represented the Department at the hearing. Neither Botting's general oversight of all the Department's legal matters nor his position as ultimate supervisor of Sakamoto made him the prosecutor in this case.

These conclusions do not end the matter, however. Even though the roles of advocate and decision maker were not performed by the same individual, as in *Nightlife*, *supra*, the roles were performed by two individuals from the same legal staff, and "[due process] concerns do not disappear simply because different lawyers in the same office perform the two functions." (*Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586 [5 Cal.Rptr.2d 196] (*Howitt*).)

In *Howitt*, *supra*, the county sheriff's department was to be represented by a deputy county counsel at a hearing before a county employment appeals board regarding the transfer and suspension of an employee of the sheriff's department. The

county counsel would advise the appeals board at the hearing and during the decision making process, and would prepare the appeals board's written decision. The employee requested the county counsel's office to disqualify itself from advising the board, but the county counsel refused and the superior court denied the employee's petition for a writ of mandate. The appellate court held that the county counsel's office could both act as an advocate and advise the decision maker "only if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate." (*Howitt*, *supra*, 3 Cal.App.4th at p. 1586.)

The court in *Nightlife, supra*, 108 Cal.App.4th 81, at pages 93-94, described the position taken by the court in *Howitt*:

> The *Howitt* court did recognize that administrative procedures may depart, to some extent, "from the *pure* adversary model of a passive and disinterested tribunal hearing evidence and argument presented by partisan advocates," and yet still comply with constitutionally mandated due process when used as the means for resolving disputes in " '[t]he incredible variety of administrative mechanisms [utilized] in this country. . . . ' " (*Howitt, supra,* 3 Cal.App.4th at p. 1581, quoting *Withrow [v. Larkin* (1975)] 421 U.S. [35] at p. 52 [95 S.Ct. at p. 1467].) . . . .
>
> However, a problem arises once an administrative agency "chooses to utilize the adversary model in large part but modifies it in a way which raises questions about the fairness of the resulting procedure." (*Howitt, supra,* 3 Cal.App.4th at p. 1581.) Thus, when both the agency and the citizen are represented by counsel at a formal hearing before a supposedly neutral decision maker who has not participated in the initial factfinding process of the agency's investigation and prosecution of a matter, and then, "in the midst of this seemingly adversary system," the same lawyer who represented the agency as advocate also advises the hearing officer with regard to its decision affecting that agency, "[t]he mental image comes to mind of a hearing in which [the agency's lawyer, while representing the agency,] raises an objection and then excuses himself from counsel table to consult with the [hearing officer] as to whether the objection should be sustained." (*Id.* at p. 1582.) What makes this scenario objectionable is that the "advocacy and decision-making roles are combined." (*Id.* at p. 1585, italics omitted.)

The implications of the *Howitt* decision, as explained in *Nightlife*, are particularly pertinent to the present case before the Appeals Board:

> [T]o permit an advocate for one party to act as the legal advisor for the decision maker creates a substantial risk that the advice given to the decision maker will be skewed ([*Howitt*, *supra*, 3 Cal.App.4th 1575, 1585]), particularly when the prosecutor serves as the decision maker's advisor in the same or a related proceeding. Then, "[t]o allow an advocate for one party to also act as counsel to the decision-maker creates the substantial risk that the advice given to the decision-maker, 'perhaps unconsciously' as we recognized in *Civil Service Commission v. Superior Court* [(1984)] 163 Cal.App.3d [70,] 78, fn. 1 [209 Cal.Rptr. 159], will be skewed." (*Ibid.*) *Thus, an agency's staff counsel may prosecute a case before the agency when an independent hearing officer presides over the contested case hearing, if the prosecutor plays no role in the agency's deliberations.* (*Id.* at p. 1586.) *So, too, two lawyers from the same office could serve in dual capacities –one as prosecutor and one as legal advisor to the administrative agency– as long as they were effectively screened from each other.* (*Ibid.*) *However, it is improper for the same attorney who prosecutes the case to also serve as an advisor to the decision make*r. (*Ibid.*)

(Nightlife, supra, 108 Cal.App.4th at p. 93, italics added.)

The language italicized above describes two situations that may result in due process violations: first, when the agency's hearing advocate participates in the agency's deliberations or acts as an advisor to the decision maker, and second, when two lawyers from the same office serve as advocate and advisor to the decision maker without being effectively screened from each other. In the present appeal, both the Department's advocate (Sakamoto) and its decision maker (Botting), were part of the same legal staff, requiring that they be effectively screened from each other.[4] The Department bears the burden of proving that procedures exist to insulate or screen its

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[4]The first situation described, in which the agency's advocate at the administrative hearing also acts as an advisor to the decision maker, is discussed in the following section on ex parte communications.

decision maker (and the decision maker's advisors) from its advocates. (*Howitt*, *supra*, 3 Cal.App.4th at pp. 1586-1587.)

However, the Department has given no indication that such screening exists. In addition, the Department asserted at oral argument that an attorney in the headquarters legal office makes the initial recommendation whether to accept or reject an ALJ’s proposed decision. While reviewing the case, this attorney has available the Report of Hearing and may call the hearing advocate for information about the case. Thus, there is no screening of the advisor to the Department's decision maker, or the decision maker himself, from the Department's advocate.

The Department argues that since neither Botting nor the Department's advocate at the hearing advised or counseled *the ALJ* during the hearing, no Department attorney was engaged in the "dual-capacity" role condemned in *Nightlife*, *supra*. Additionally, the Department asserts in its brief that *Nightlife*, *supra*, is distinguishable because the Administrative Procedure Act (Gov. Code, § 11340 et seq., APA), which governs the Department's administrative hearing process, was not applicable to the decision making process in that case. Therefore, the Department asserts, the decision did not directly address the APA provisions, "especially as they applied to potential conflicts of interest and due process." (Dept. Supp. Resp. at p. 6.)

The Department points out that the California APA provides a "comprehensive system of formal guidelines and rules for formal decision making and for addressing potential conflicts of interest within that decision making process." (Dept. Supp. Response Br. at p. 6.) It asserts that, in issuing its own decision under section 11517,

subdivision (c), the Department "compl[ied] with all aspects of the APA." (*Ibid*.) However, even if the Department had complied with the provisions of the APA, however, it would still be subject to the due process requirements of the federal and state Constitutions.

California courts have consistently held that, in an administrative proceeding, procedural due process requires that the respondent receive notice of the proposed action, the reasons for the proceeding, the charges and materials on which the action is based, and the opportunity to respond to the proposed action "before a reasonably impartial, noninvolved reviewer." (*Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 736-737 [150 Cal.Rptr. 475, 586 P.2d 956]; accord, *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219 [79 Cal.Rptr.2d 910]*; Linney v. Turpen* (1996) 42 Cal.App.4th 763, 770 [49 Cal.Rptr.2d 813]; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 581 [257 Cal.Rptr. 427]; *Titus v. Civil Service Com.* (1982) 130 Cal.App.3d 357, 362 [181 Cal.Rptr. 699].) "The right to a fair trial by a fair tribunal is a basic requirement of due process applying to administrative agencies which adjudicate, as well as to courts. (*Withrow v. Larkin* [1975] 421 U.S. 35, 46 [43 L.Ed.2d 712, 723].)" *(Burrell*, at p. 577.)

The APA has several provisions designed to ensure the impartiality of the adjudicator in administrative proceedings, among them being sections 11425.30 (specified persons not to serve as presiding officer), 11425.40 (disqualification of presiding officer), and 11430.10 through 11430.80 (prohibiting ex parte communications). The Department asserts that ALJ Lo was qualified to serve as

presiding officer in this matter under Government Code section 11425.30 because he had not served, nor was he subject to the authority, direction, or discretion of a person who had served, as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. It also asserts that Botting was not a "presiding officer" in an "adjudicative proceeding," and even if he were to be considered as such, he would not be disqualified pursuant to section 11425.30. We do not doubt those assertions, but they are not relevant here; ALJ Lo's qualifications as a presiding officer are not in question, and no contention has been made that Botting was a presiding officer.

What is relevant here is whether there was sufficient "separation of functions" to satisfy due process, as described in *Howitt*, *supra*. As explained above, the Department had no separation or screening between the attorney acting as its advocate and the attorneys acting as its decision maker and advisor to its decision maker. We conclude that this violated the due process rights of appellant.

II

As noted above, appellant filed a Motion to Augment Record, asking that a Departmental form entitled Report of Hearing be included in the record on appeal. This report, prepared by the attorney representing the Department following an administrative hearing, contains factual information about the hearing, the discipline recommended by the attorney at the hearing, and a summary of "evidence for and against with reasons for the recommended decision."

Appellant based his motion on his allegations that Matthew Botting, the Department's chief counsel, was the decision maker in this case and that Botting relied

on the documents requested in rejecting the ALJ's proposed decision and making the Department's decision under Government Code section 11517, subdivision (c). Appellant contends that "The interrelationship and interdepartmental communications between prosecutor and trier of fact . . . [constitute] just exactly that type of inappropriate communication constituting a denial of Due Process." He asserts that the documents he seeks to place in the record are necessary for this Board to review in order to "accurately assess the propriety" of the Department's decision.

The Appeals Board issued an order on April 13, 2004, directing the Department to produce the requested report. The Board ordered the document to be filed under seal until its further order. The Department refused to produce the Report of Hearing, contending the Board was without authority to augment and seal the record and asserting that the Report of Hearing was a privileged communication. The Department stated that the Report of Hearing "is completed after the hearing . . . before any proposed decision is received . . . [and] is provided to appropriate Department employees as a direct attorney-client communication (the ALJ does not receive a copy)." At oral argument, the Department indicated that, in all likelihood, both the chief counsel and the headquarters attorney reviewing the ALJ's proposed decision would receive copies of the report to use in making their evaluations of the proposed decision.

The issue regarding the Motion to Augment is related to the due process issue discussed above. To satisfy due process, the functions of advocacy and advising the decision maker must be adequately separated. This means that the Department's advocate cannot also be an advisor to the decision maker. By providing the Report of

Hearing to the Department's decision maker, the Department's advocate takes on the role of advisor to the decision maker, violating the prohibition, discussed above, against one attorney performing the dual roles of advocate and advisor to the decision maker.

We conclude that the Report of Hearing must be made part of the record, as requested in appellant's Motion to Augment. This is because the Report of Hearing, as a communication from one of the parties to the decision maker, is an ex parte communication governed by the APA.

The APA provides that a presiding officer may not receive an ex parte communication from either party while a proceeding is pending. (Gov. Code, § 11430.10.) If a presiding officer receives an ex parte communication, he or she must make the communication part of the record, along with any response to the communication and the identity of the person from whom the presiding officer received the communication; notify all parties that the ex parte communication has been made part of the record; upon request, allow a party to comment on the communication; and, in his or her discretion, allow a party to present evidence concerning the subject of the communication or reopen a hearing that has been concluded. (*Id*., § 11430.50.) Receipt of a prohibited communication may also be grounds to disqualify the presiding officer, if necessary to eliminate the effect of the communication. (*Id*., § 11430.60.)

Although these provisions refer to ex parte communication with the presiding officer, usually an ALJ, they apply equally to the agency head or other person to whom the power to decide is delegated. (Gov. Code, § 11430.70.) There are limited permissible communications to the presiding officer or agency head from an employee

or representative of an agency that is a party: for assistance and advice from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, as long as the assistant or advisor does not furnish, augment, diminish, or modify the evidence in the record; to advise concerning a settlement proposal advocated by the advisor; or to advise in a nonprosecutorial adjudicative proceeding. (*Id*., § 11430.30.) Other permissible communications are those required for disposition of an ex parte matter specifically authorized by statute or concerning a matter of procedure or practice that is not in controversy. (*Id*., §11430.20.)

It does not appear that any of the exceptions to the ex parte rules apply in the present case. On the record before us, we can only conclude that the Report of Hearing was a prohibited ex parte communication from a party to the decision maker or the decision maker's advisor. Therefore, the Department should have made it part of the record, notified the parties of its inclusion, and allowed appellant an opportunity to comment on the communication.

After briefing in this matter had been completed, the Department submitted a copy of the decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board & ALQ* (1981) 118 Cal.App.3d 720 [173 Cal.Rptr. 582] (hereafter *ALQ*), asserting that this case "addressed virtually the same issue(s) raised in [the present appeal]" and that "the holding in [*ALQ*] is controlling for the issue(s) presently before the Board." We must disagree with these assertions.

In *ALQ*, the Court of Appeal vacated the decision of the Appeals Board that reversed the Department's revocation of ALQ's license. The Board had reversed the

Department's decision because the Department refused to furnish to the licensee, before revoking its license, internal departmental documents demanded by the licensee that related to the Department's decision to reject the ALJ's proposed decision suspending the license and to decide the case on the record. The Board had held that due process and Government Code section 11517, subdivision (c), required the Department to provide the documents demanded by the licensee.

The Board's rationale was based on its belief that the statute required the Department itself to present to the licensee an argument in support of rejecting the proposed decision, so that the licensee could present an argument in response. The Board believed that the documents demanded by the licensee contained the Department's "argument."

The court rejected what it called the Board's "misconception of the function and authority of the Department," saying:

> At the heart of the Board's argument is its view, unsupported by anything other than its own notion, that the Department is in fact two separate departments, one which prosecutes accusations against licensees and one which adjudicates the merits of those accusations.
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> Building on that concept, the Board contends that the opinions and recommendations communicated by one part of the agency to another constitutes [sic] the "argument" of which [ALQ] is entitled to be informed. This is contrary to the most fundamental rules of the executive decision-making process.

(*ALQ*, *supra*, 118 Cal.App.3d at p. 726.)

The court explained that "It is in the nature of administrative regulatory agencies that they function both as accuser and adjudicator on matters within their particular jurisdiction," (*ALQ*, *supra*, 118 Cal.App.3d at p. 726) and that due process required only

that "the Department's decision be based upon a record which indicates that the licensee had notice of the Department's proposed action and right to be heard; that the Department made adequate findings [citation] which supports [sic] its decision, and that substantial evidence supports those findings." (*Id*. at p. 727.)

The court also noted that the Department, in deciding a case itself under section 11517, subdivision (c), and the Appeals Board and the courts, in reviewing the Department's decision, do so on the record, which "is that generated in the hearing before the administrative law judge." (*ALQ*, *supra*, 118 Cal.App.3d 720 at p. 728.) It concluded that there was "nothing in the constitutional guarantee of due process which requires or authorizes an inquiry into matters, outside of the record, which might bear on the reasoning or mental processes of the director or his subordinates in the Department." (*Ibid*.)

The factual situation in *ALQ* was not necessarily "virtually the same" as that in the present appeal, as contended by the Department. The documents at issue in *ALQ* are not described with any specificity, and we are left with no idea whether any of them were comparable to the Report of Hearing at issue here.

More importantly, the court in *ALQ* espoused a theory of administrative agency decision making that has since been rejected in cases such as *Howitt*, *supra*, and *Nightlife*, *supra*. These more recent cases make clear that, when making adjudicatory decisions, due process requires precisely the notion, rejected in *ALQ*, that the Department has separate departments for prosecution and adjudication.

Additionally, *ALQ* was decided in 1981, long before the major revision of the

APA, effective in 1997, which contained the present provisions regarding ex parte communications and separation of functions. Notably, the revised APA made a significant change in the ex parte rules by making them applicable not only to the ALJ, but to the agency head or other person to whom the power to decide may be delegated. (Gov. Code, § 11430.70.) Under the present APA, the documents requested by appellant are not "outside the record," but, as ex parte communications, must be made a part of the record.

We find *ALQ* neither controlling nor persuasive in the present appeal.

CONCLUSION

In light of our determinations in parts I and II of this decision that the Department violated due process by failing to separate its advocacy function from its adjudicatory function and made ex parte communications prohibited by the APA, we must reverse the decision of the Department in this matter.

ORDER

The decision of the Department is reversed.[5]

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

[5] 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.