

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

AB-8558

File: 20-383277 Reg: 05060960

7-ELEVEN, INC. dba 7-Eleven
1161 West Lugonia Avenue, Redlands, CA 92374,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: March 1, 2007
Los Angeles, CA

ISSUED MAY 8, 2007

7-Eleven, Inc., doing business as 7-Eleven (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk, Baudelia Villalba, having sold a 24-ounce can of Budweiser beer to Lalit Bali, an 18-year-old police 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, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 13, 2002.

¹The decision of the Department, dated April 20, 2006, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to an underage person.

An administrative hearing was held on February 9, 2006, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) The decoy did not display the appearance required by Rule 141(b)(2); (2) the Appeals Board must require the presence of the decoy for examination by the Board; and (3) the Department violated statutory prohibitions against ex parte communications. Appellant has also filed a motion to augment the record by the addition of any ABC Form 104 submitted to the Department's decision maker.

DISCUSSION

I

Appellant argues that the evidence establishes as a matter of law that the decoy did not display the appearance required by Rule 14(b)(2), i.e., that he "shall display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." Appellant sets out in its brief the decoy's description of his experience as a police decoy and a police Explorer, and concludes that he "is not a decoy but a plant by the Department of Alcoholic Beverage Control and the Redlands Police Department to entrap the premises to sell to an undercover agent." (App. Br., page 6.)

Old wine in new bottles. Appellant's argument is nothing more than a variation on the theme consistently pursued by its counsel in appeals to this Board, asking the Appeals Board to reweigh the evidence and reach a conclusion more to its liking.

The administrative law judge specifically addressed the decoy's experience as an Explorer, concluding that "it was not shown to bear any relevance to the above-described decoy operation or to his apparent age." (Finding of Fact 10.)

We find no merit in appellant's argument.

II

Appellant asserts that Business and Professions Code section 25666 requires the decoy to be present for view at oral argument before the Board, and has filed a motion seeking to compel his presence.

Section 25666 requires the presence of the minor in *any hearing on an accusation* charging a violation of sections 25658, 25663, and 25665, unless the minor is then dead or unable to attend because of physical or mental illness or infirmity.

The oral argument which takes place before the Appeals Board is not a hearing on an accusation. The hearing that section 25666 speaks to takes place at the Department level. The oral argument before the Appeals Board is for the presentation of substantive and procedural arguments directed at the decision of the Department, and not for the taking of evidence. The Board is neither permitted or equipped to do so. The Board's jurisdictional mandate provides that the Board shall not receive any evidence other than that contained in the record of the proceedings of the Department. (Bus. & Prof. Code §23083.)

It is clear from the findings and conclusions of the decision that the ALJ gave full consideration to those factors bearing on the decoy's apparent age. We are not

permitted to substitute our judgment for his.

III

On November 13, 2006, the California Supreme Court held that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. (*Dept. of Alcoholic Bev. Control v. Alcoholic Bev. Control Appeals Board (2006)* 40 Cal.4th 1 [50 Cal.Rptr.3d 585 (*Quintanar*)] In *Quintanar*, the Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access to the report of hearing, establishing, the court held, "that the reports of hearing were provided to the agency's decision maker." (*Id.* at pp. 15-16.)

In the present case, appellant contends a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar* has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it

occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.²

ORDER

The decision of the Department is affirmed as to all issues raised other than that regarding the allegation of an *ex parte* communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.³

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

² The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

³ 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.