

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

AB-8609

File: 47-69313 Reg: 06061898

EL TORITO RESTAURANTS, INC. dba El Torito Restaurant
5242 Lakewood Boulevard, Lakewood, CA 90712,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: August 2, 2007
Los Angeles, CA

ISSUED OCTOBER 26, 2007

El Torito Restaurants, Inc., doing business as El Torito Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, 10 of which were conditionally stayed, subject to one year of discipline-free operation, for its waitress, Alyssa Vata, having sold a 12-ounce bottle of Bud Light beer to William Chang, a 17-year-old Los Angeles Sheriff's Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant El Torito Restaurants, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated August 24, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general public eating place license was issued on January 2, 1973. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on December 9, 2005.

An administrative hearing was held on May 23, 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 proved.

Appellant thereafter filed a timely notice of appeal. In its appeal, which is accompanied by a motion to augment the record by the addition of any report of hearing submitted to the decision maker or his advisors, appellant contends that the Department violated the APA prohibition against ex parte communications, citing *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*(2007) 40 Ca.4th 1 [50 Cal.Rptr.3d 585] (*Quintanar*).

DISCUSSION

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. (*Quintanar, supra*, 40 Cal.4th 1.) 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

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

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

TINA FRANK, ACTING CHAIRPERSON
SOPHIE C. WONG, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

that it would ease the procedural and logistical difficulties for all parties involved.

³This 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.