

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

AB-8657

File: 20-386236 Reg: 06061987

BP WEST COAST PRODUCTS, LLC dba AM/PM
1949 Arden Way, Sacramento, CA 95815,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: January 10, 2008
San Francisco, CA

ISSUED MARCH 26, 2008

BP West Coast Products, LLC, doing business as AM/PM (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for its clerk having sold a 24-ounce can of Budweiser beer to Michael Severi, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant BP West Coast Products, LLC, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

¹The decision of the Department, dated November 14, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 26, 2002. The Department instituted an accusation against appellant on February 27, 2006, charging the sale of an alcoholic beverage to Michael Severi on December 7, 2005.

An administrative hearing was held on September 26, 2006, at which time oral and documentary evidence was received. The evidence at the hearing established that Severi produced his California driver's license (Exhibit 3) when asked for identification. The license set forth Severi's true date of birth, and contained a red stripe with the words "AGE 21 IN 2007." The clerk examined the license, then completed the sale of the beer.

Subsequent to the hearing, the Department issued its decision which determined that the violation occurred as alleged in the accusation, and no affirmative defense had been established. The decision also determined that the violation was appellant's second within a 36-month period.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends the Department communicated ex parte with its decision maker in violation of the Administrative Procedure Act.

DISCUSSION

Appellant contends the Department violated the APA by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision. It relies on the California Supreme Court's holding 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 appellate court decisions following *Quintanar, Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6] (*Chevron*) and *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274 [60 Cal.Rptr.3d 295] (*Rondon*). It asserts that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred.

The Department makes no argument in its appeal brief, but states that none of the documents requested in the motion to augment exist. Attached to this statement is a declaration signed by Department staff attorney Dean Leuders who represented the Department at the administrative hearing. In this declaration, Leuders states that at no time did he prepare a report of hearing or other document, or speak to any person, regarding this case. In its brief, the Department makes no statements or assertions concerning these denials or what it believes should be the effect of them on this appeal. At oral argument, the Department argued that the Board should accept the declaration as conclusive evidence that the documents requested do not exist.

We agree with appellant that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar, supra*.

The Department apparently believes that it need only include a declaration denying the existence of an ex parte communication for the Appeals Board to rule in its favor. The appellant argues that the declaration is inadequate. We agree with appellant.

Three courts have now issued published decisions in which the Department's practice of ex parte communication with its decision maker or the decision maker's advisors is determined to be endemic in that agency. (*Quintanar, supra*, 40 Cal.4th 1, 5 [ex parte provision of report of hearing was "standard Department procedure"]; *Rondon, supra*, 151 Cal.App.4th 1274, 1287 ["widespread agency practice of allowing access to reports"]; *Chevron, supra*, 149 Cal.App.4th 116, 131 [ex parte communication not unique to *Quintanar* case, "but rather a 'standard Department procedure'"].) The Department has presented no evidence in this case, or any of the numerous other cases this Board has seen on this issue, that the "standard Department procedure" has changed. The Department has not provided, for example, a written policy, with a date certain, from which we could conclude that the Department has instituted an effective policy screening prosecutors from the decision makers and their advisors. The Department bears the burden of proving that it has adequate screening procedures (*Rondon, supra*), and without evidence of an agency-wide change of policy and practice, we would be exceedingly reluctant to affirm or reverse on the basis of a single declaration, especially where there has been no opportunity for cross-examination.²

For the foregoing reasons, we will do in this case as we have done in so many other cases, that is, remand this matter to the Department for an evidentiary hearing.

²"The general rule in civil actions is that absent statutory authorization, stipulation of the parties, or a waiver by failure to object, an affidavit (Code Civ. Proc., § 2003) or a declaration under penalty of perjury (Code Civ. Proc., § 2015.5) is not competent evidence; it is hearsay because it is prepared without the opportunity to cross-examine the affiant. (Evid. Code, §§ 300, 1200; see Code Civ. Proc., § 2009; Witkin, Cal. Evidence (2d ed. 1966) § 628, p. 588.)" (*Windigo Mills v. Unemployment Ins. Appeals Bd.*(1979) 92 Cal.App.3d 586, 597 [155 Cal.Rptr. 63].)

ORDER

The matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.³

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

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.