

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

AB-8691

File: 21-408292 Reg: 06063487

7-ELEVEN, INC., and SSR MARKETING, INC., dba 7-Eleven #2173-33191B
1535 Aviation Boulevard, Redondo Beach, CA 90278
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: February 5, 2009
Los Angeles, CA

ISSUED MAY 22, 2009

7-Eleven, Inc., and SSR Marketing, Inc., doing business as 7-Eleven #2173-33191B (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their off-sale general license for 15 days for their clerk, Sunder Dev, having sold a six-pack of Corona beer, an alcoholic beverage, to Alexander Leavitt, a 19-year-old police decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and SSR Marketing, Inc., appearing through their 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 March 16, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' license was issued on February 9, 2004. The Department instituted an accusation against appellants on July 19, 2006, charging the sale, on March 29, 2006, of an alcoholic beverage to a minor. Although not noted in the accusation, the minor was acting as a decoy for the Redondo Beach Police Department.

An administrative hearing was held on January 24, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented. The evidence established that the decoy was not asked for identification or for his age. After the sale, the decoy returned to the store, identified the clerk as the seller, and the clerk was cited.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and that appellants had not established a defense under Department Rule 141(b)(2).

Appellants filed a timely notice of appeal in which they contend that the Department prosecutor communicated with the Department's decision maker on an ex parte basis.²

DISCUSSION

Appellants contend 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, and by its lack of a screening procedure to prevent that from happening.

² The Department's brief argues that the appeal should be dismissed because appellants' brief fails to state a claim. While this Board is disappointed at the quality of appellants' brief, we cannot say it is so deficient that it forfeits appellants' appeal rights. The basis for their appeal can be discerned, albeit poorly stated.

They rely 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*).

They assert that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred.

We agree with appellants 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. Appellants argue that the declaration is inadequate. We agree with appellants.

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 (this matter was heard and decided prior to the adoption by the Department of General Order No. 2007-09), 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.³

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.

ORDER

The matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.⁴

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

³"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].)

⁴This 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.