

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

AB-8706

File: 20-290017 Reg: 06064286

CHUNG YING CHAN, dba London Market
1814 Atlantic Avenue, Long Beach, CA 90806,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 7, 2008
Los Angeles, CA

ISSUED: NOVEMBER 14, 2008

Chung Ying Chan, doing business as London Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended her off-sale beer and wine license for five days, all of which were conditionally stayed, subject to one year of discipline-free operation, for her clerk, Kim Ven Vuong, having sold a 24-ounce can of Bud Light beer to Andrew Coates, a 19-year-old Department decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Chung Ying Chan, appearing through her counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated June 1, 2007, is set forth in the appendix.

PROCEDURAL HISTORY

Appellant's license was issued on November 21, 1983. On November 16, 2006, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor.

An administrative hearing was held on April 17, 2007, at which time documentary evidence was received and testimony concerning the violation charged was presented.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and no defense to the charge had been established.

Appellant has filed a timely notice of appeal in which she raises the following issues: (1) The Department lacked effective screening procedures ensuring the non-occurrence of illegal or ex parte communications, or to ensure that no attorney acts as both prosecutor and advisor to the decision maker, or has acted in such capacity in the past; (2) the Department engaged in ex parte communications. Appellant also urges the Board to reserve judgment in the matter pending the decision of the California Supreme Court in *Morongo Band of Mission Indians v. State Water Resources Control Board* (S155589 8/22/2007), a case presently under review. We shall address this argument first.

DISCUSSION

I

Appellant asserts that "economy of resources" compels delaying the Board's decision in this appeal until the California Supreme Court issues a decision in a case that "implicat[es the] same due process and appearance of bias issues as the instant appeal." (App. Br. at p.3.) It urges that, if the Board does not wait for the Court's

decision, appellant "will be compelled to pursue judicial review of any decision otherwise affirming the [Department's decision], thereby continuing this matter indefinitely and continuing to expend Department resources." (*Ibid.*)

Appellant's concern for unnecessary expenditure of Department resources is commendable, but beside the point.

Morongo, supra, is an interesting case that this Board (and, presumably, the Department) will be watching with great interest. The website for the Supreme Court states the issue to be decided as follows:

May a staff attorney for an administrative agency . . . serve as a prosecutor in one matter while simultaneously serving as an advisor to the agency as decision maker in an unrelated matter, without violating the due process rights of parties that appear before the agency?

The issue in *Morongo* is clearly related to the issues that were raised in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Quintanar* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585]. However, in light of the result we reach on the *ex parte* communication issue, we do not believe it is necessary for the Board to address this issue.

II

Appellant contends the Department violated the Administrative Procedure Act (APA)² 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

²Government Code sections 11340-11529.

an appellate court decision following *Quintanar, Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6]. 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.

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*. As we have done in the numerous other cases involving this issue, we will remand the matter to the Department for an evidentiary hearing.

III

Appellant asserts that the Department violated its right to due process because the Department did not have procedures in place to eliminate the "appearance of bias" arising from Department attorneys acting both as advisors to the decision maker and as prosecutors, nor did it have procedures to "screen" advisors from prosecutors.

This contention is related to the issue of ex parte communication addressed earlier. However, while the ex parte issue was properly raised for the first time on appeal (since any communication did not occur until after the hearing), the situation at the root of the present issue existed at the time of the administrative hearing and should have been raised then.

Since appellant did not raise this issue at the hearing, the Board is entitled to consider it waived. (*Bookout v. Nielsen* (2007) 155 Cal.App.4th 1131, 1141-1142 [67 Cal.Rptr.3d 2]; *Vikco Ins. Servs. v. Ohio Indem. Co.* (1999) 70 Cal.App.4th 55, 66-67 [82 Cal.Rptr.2d 442]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564,576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66

Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167]; 9 Witkin, Cal. Procedure (4th ed. 1997 & 2007 supp.) Appeal, §394.)

IV

Appellant filed a motion to have the record augmented with any report of hearing in the Department's file regarding this case and with General Order No. 2007-09 and any documents related to it.

We have said in other appeals where this motion has been made that our conclusion regarding the ex parte communication issue makes augmenting the record unnecessary; that is, if an evidentiary hearing is held, the primary focus of it will be whether or not a report of hearing was prepared and, if so, it will become part of the record. The same conclusion applies in this case with regard to the requested report of hearing.

Appellant also requests that General Order No. 2007-09 (the order) be made part of the record. A copy of a document purporting to be this order is attached to appellant's motion to augment as Exhibit 3. The order is a document issued by the Department over the signature of the director, Stephen M. Hardy, dated August 10, 2007, which is also designated as the order's effective date.

The order notes the court cases putting an end to the Department's practice of ex parte communications with the decision maker and placing the burden on the Department to show that no ex parte communication occurred in a particular case. It then sets out procedures to be implemented by the Department to comply with the courts' directives.

Appellant wants to use this order to show that the Department's procedures

before August 10, 2007, did *not* comply with the courts' directives. It's not the strongest argument, and it seems unnecessary since it is the Department that must show that it did comply. In any case, this too is more appropriately included in a record created during an evidentiary hearing.

The motion to augment is denied.

ORDER

This 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.