

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

AB-8916

File: 20-448527 Reg: 07065945

7-ELEVEN, INC., VIJAY KUMAR and URMILLA KUMAR,
dba 7-Eleven Store 2237-24490E
711 East F Street, Oakdale, CA 95361,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: July 14, 2011
San Francisco, CA

ISSUED AUGUST 10, 2011

7-Eleven, Inc., Vijay Kumar and Urmilla Kumar, doing business as 7-Eleven Store 2237-24490E (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk having sold a six-pack of Bud Light beer to Amber Gray, a 19-year-old Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Vijay Kumar and Urmilla Kumar, appearing through their counsel, Ralph B. Saltsman and Soheyl Tahsildoost, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kelly Vent.

¹ The decision of the Department, dated August 7, 2008, is set forth in the appendix.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on March 23, 2007. On May 30, 2007, the Department instituted an accusation against appellants charging that an employee of appellants sold a six-pack of Bud Light beer to Amber Sherie Gray, a person under the age of 21.

Following an administrative hearing held on June 18, 2008, at which time documentary evidence was received and testimony given concerning the violation charged, the Department issued a decision which determined that the charge of the accusation had been established and no affirmative defense proven.

Appellants have filed an appeal making the following contentions: The Department violated the Administrative Procedure Act (APA) and General Order No. 2007-09 (1) by allowing its investigative and prosecutorial unit, the Hearing and Legal Unit, to act as decision maker in this matter, and (2) by allowing the ex parte transmission to the Director of documents containing substantive information. Appellants also filed a Motion to Augment Record, requesting augmentation of the record with the ABC-309 form, General Order No. 2007-09, and numerous other documents.

DISCUSSION

I

Appellants contend that the Department violated the separation of functions mandated by the APA and the California Supreme Court's decision 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*), because the Hearing and Legal Unit includes the Department's prosecutorial branch and was the adjudicator in

this case. In addition, they assert, it must be assumed that the Department violated prohibitions against ex parte communications because the Hearing and Legal Unit acted as both prosecutor and decision maker.

Appellants argue that the Hearing and Legal Unit was the adjudicator in this case because the Certificate of Decision was signed by Helen McConville, the supervisor of the Hearing and Legal Unit at the time. They also assert that "[i]f the Department contends that the Hearing and Legal Unit's signature and execution of the Certificate of Decision is the mere transmission of the Director's Decision, it is incumbent upon the Department to show how the Director reviewed the Decision and how it communicated its Decision to the Hearing and Legal Unit." (App. Opening Br. at p. 6.)

The Certificate of Decision states:

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by an Administrative Law Judge of the Administrative Hearing Office, adopted said proposed decision as its decision in the case therein described on August 7, 2008.

A certification is a clerical act attesting to the truth of the fact or facts stated in the document, "a written testimony to the truth of any fact." (*Donnellan v. City of Novato* (2001) 86 Cal.App.4th 1097, 1106 [103 Cal.Rptr.2d 882].) It seems obvious to this Board that the person signing the certification is simply stating that the Department, (i.e., the Director or his designee) adopted the ALJ's proposed decision as its own.

Appellants do not provide any authority for their contention that someone in the Hearing and Legal Unit was the decision maker in this case, nor do we think they could. Appellants cite Evidence Code section 622 and two California appellate court cases for the proposition that "[w]here a document is signed . . . by an individual . . . , the facts

recited in that document are conclusively presumed to be true as between the parties thereto." (App. Opening Br. at p. 5.) From that statement, they leap directly to the conclusion that "the Decision signed and executed by the Hearing and Legal Unit establishes that the Decision was made by the Hearing and Legal Unit on behalf of the Department."

The statute and cases they cite are almost certainly not applicable to a document like the Certificate of Decision. Evidence Code section 622 states:

The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration.

This section is said to codify the common law doctrine of "estoppel by contract" and the word "instrument" usually refers to a contract or other document that reflects an agreement between two parties. (*Plaza Freeway v. First Mt. Bank* (2000) 81 Cal.App.4th 616, 626 [96 Cal.Rptr.2d 865].)

Even if the authorities cited by appellants somehow did apply to the Certificate of Decision, they are not authority for the conclusion reached by appellants, that the signature by someone in the Department's Hearing and Legal Unit "establishes" that the person signing was the decision maker.

Appellants' contention that "it must be assumed that the Department violated prohibitions against ex parte communications because the Hearing and Legal Unit acted as both prosecutor and decision maker" is also unsupported. Since they did not establish that Ms. McConville was the decision maker, they have not shown that the Hearing and Legal Unit was both prosecutor and adjudicator.

We find that appellants' contentions are unsupported and unsupportable because the person certifying the Department's decision is not the decision maker.

II

Appellants contend that the Department violated the APA and General Order No. 2007-09 by the Hearing and Legal Unit transmitting an ABC-309 form (309 form) to the Director without providing appellants with notice and an opportunity to be heard. They allege specifically that the 309 form "was transmitted from the Department District Office to '(1) Division Office, and (2) Director Via Hearing and Legal.'" Appellants appear to base this allegation on preprinted routing information on the form showing the "Director Via Hearing And Legal" as a recipient.

The Board addressed, and rejected, this contention in the appeal of *Lee Vue* (2009) AB-8851. The Board's conclusion was that, "regardless of the routing, the director is prevented from receiving the 309 reports by General Order No. 2007-09." We reach that same conclusion here.

In *Vue* the Board discussed the origin and reasons for General Order No. 2007-09, which modified internal procedures of the Department to comply with the Supreme Court's decision in *Quintanar, supra*, 40 Cal.4th 1. Then the Board addressed how the General Order affects the handling of the 309 form:

[W]e believe that the effect of language (italicized below) in paragraph 3 of the "Procedures" section is to prevent documents such as the 309 report from becoming *ex parte* communications:

The proposed decision and included documents as identified above shall be *maintained at all times in a file separate from any other documents or files maintained by the Department regarding the licensee or applicant*. This file shall constitute the official administrative record.

The documents included in the "official administrative record" are specified in paragraph 2, and they do not include a 309 report, unless it should happen to be included for some reason as a hearing exhibit. Since it is only the "official administrative record" that goes to the director, the

309 report, even if it did find its way to the Hearing and Legal Unit, would be sequestered in a separate file.

Appellants have not shown us any reason to depart from the conclusion we reached before on this issue.

For the reasons indicated, we conclude that the Department did not engage in ex parte communication as alleged by appellants. We decline to order the record augmented with the documents listed in appellants' motion, since we have no evidence that they were made available to any Department decision maker prior to the Department issuing its decision. As such, they are not properly included in the administrative record on appeal.

ORDER

The decision of the Department is affirmed.²

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

²This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.