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

AB-9355
File: 21-477876 Reg: 12077544

GARFIELD BEACH CVS, LLC and LONGS DRUG STORES CALIFORNIA, LLC,
dba CVS Pharmacy Store 9931
9030 Brooks Road South, Windsor, CA 95492,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: January 9, 2014
Sacramento, CA

ISSUED MARCH 4, 2014

Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, doing business as CVS Pharmacy Store 9931 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days for their clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants Garfield Beach CVS, LLC and Longs Drug Stores California, LLC, appearing through their counsel, Ralph Barat Saltsman and Jennifer L. Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

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[1]The decision of the Department, dated April 3, 2013, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale general license was issued on June 22, 2009. On October 4, 2012, the Department filed an accusation against appellants charging that, on September 19, 2012, appellants' clerk sold an alcoholic beverage to 18-year-old Brythyn Chrysler. Although not noted in the accusation, Chrysler was working as a minor decoy for the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on February 7, 2013, documentary evidence was received and testimony concerning the sale was presented by Chrysler (the decoy). Appellants presented no witnesses.

Testimony established that on the date of the operation, the decoy entered the premises and proceeded directly to the coolers in the alcoholic beverage section, where he selected a 24-ounce can of Coors Light beer. He took the beer to the cash register area. There was one female clerk on duty, and two people in line ahead of the decoy. When the decoy reached the counter, the clerk asked for his identification. The decoy produced his California driver's license and showed it to her. The clerk briefly examined it, then proceeded with the sale.

During the course of the transaction, the decoy engaged in "small talk" with the clerk. While the decoy did not recall exactly what he said, he testified that he usually asks clerks "How is your day going?" or words to that effect. The decoy thought the clerk in this case may have responded, but did not elaborate on her reply. The decoy testified that he makes small talk in order to "show confidence," so that he is not "shaking" when he purchases alcohol. He testified that he imagines himself buying soda instead of beer.

Following the sale, the decoy exited the premises and proceeded to an

automobile where two Department agents, David Cesaretti and Amanda Shaver, were waiting. The decoy got into the vehicle and showed the agents the beer, the change, and the receipt for the transaction. The agents escorted the decoy into the store to conduct the face-to-face identification.

At the commencement of the administrative hearing, five documents were marked for identification. These included appellants' special notice of defense (Exhibit A), as well as four documents from the Department: a packet of procedural documents (Exhibit 1); the ABC Investigation Report of the decoy operation, completed by Department Agent Shaver (Exhibit 2); a copy of the decoy's California driver's license (Exhibit 3); and a copy of a photograph of the decoy with the clerk (Exhibit 4). With the exception of Exhibit 2, all of these documents were formally admitted into evidence without objection. Exhibit 2, the investigative report, was neither admitted nor rejected — in fact, it went unmentioned for the remainder of the hearing. It is undisputed, however, that Exhibit 2 was included in the record supplied to the Department in its decisionmaking capacity.

The Department's decision determined that the violation charged was proved and no defense was established.

Appellants then filed this appeal contending: (1) the ALJ disregarded appellants' arguments and evidence under rules 141(a) and 141(b)(2); (2) the ALJ failed to bridge the analytic gap between his findings and conclusions of law; and (3) the inclusion of Exhibit 2 in the record constitutes an ex parte communication meriting reversal.

DISCUSSION

I

Appellants contend that the ALJ abused his discretion by disregarding evidence that the decoy appeared over 21, in violation of rule 141(b)(2). Appellants allege that the ALJ either failed to consider or erroneously dismissed evidence of the decoy's physical stature, muscular build, confidence, and experience as a police cadet.

Rule 141(b)(2) states: "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense." (Cal. Code Regs., tit. 4, § 141(b)(2).) Rule 141(b)(2) provides an affirmative defense; as such, the burden of proof rests with the licensee.

This Board is bound by the factual findings in the Department's decision as long as they are supported by substantial evidence. The standard of review is as follows:

> We cannot interpose our independent judgment on the evidence, and we must accept as conclusive the Department's findings of fact. (Citations.) We must indulge in all legitimate inferences in support of the Department's determination. Neither the Board nor [an appellate] court may reweigh the evidence or exercise independent judgment to overturn the Department's factual findings to reach a contrary, although perhaps equally reasonable, result. (Citations.)

(*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (Masani)* (2004) 118 Cal.App.4th 1429, 1437 [13 Cal.Rptr.3d 826].)

The ALJ made the following findings regarding the decoy's appearance, including his experience and level of confidence:

> C. . . . . Chrysler testified that he makes "small talk" to "show confidence." He does not want to be "shaking" when he is attempting to purchase an alcoholic beverage. Chrysler purposely tries to boost his confidence during undercover operations because he does not want to give the impression he is underage. He imagines himself buying soda instead of

beer. Chrysler believes his "confidence" played a role in the clerk only reviewing his [California driver's license] for a couple of seconds. Nevertheless, Chrysler testified that he still feels a little nervous inside during the decoy operations because he knows that purchasing alcoholic beverages at his age is unlawful.

[¶ . . . ¶]

G. . . . . [A] picture was taken of Chrysler and the clerk that sold him the beer. The decoy is holding the 24-ounce can of Coors Light beer and his [California driver's license]. Chrysler is wearing dark shorts and a dark body builder's t-shirt. There are Ipod-like earbuds dangling in the front of his t-shirt. They were in the same position when he purchased the beer. (State's Exhibit 4.)

H. The decoy's overall appearance including his demeanor, his poise, his mannerisms, his size, and his physical appearance were consistent with that of a person under the age of twenty one years and his appearance at the time of the hearing was substantially the same as his appearance on the day of the decoy operation.

1. On the day of the sale and at the hearing, the decoy was six feet, one inch tall. On September 19, 2012, Chrysler weight 195 pounds. At hearing he weighed a bit more; 202 pounds. Chrysler is a well-proportioned young man. He does work out regularly, but his musculature is not excessively dense or defined.

2. Chrysler had some facial hair at the hearing; a very light stubble on his chin. The rest of his face had little or no hair. He did not shave the morning of the hearing. He could not recall if he shaved the morning of the decoy operation. Respondent's counsel indicated to the decoy that she believed he (Chrysler) had a "5 o'clock shadow." The decoy agreed that he did. This description of the decoy's facial hair is entirely inaccurate. What little hair Chrysler had on his face was primarily around his chin, and this was sparse. The rest of his face had little or no hair visible. At hearing, the decoy had pimples on his cheeks. No evidence was adduced concerning his acne on the day of the decoy operation.

3. The decoy testified in a straightforward manner at hearing. He answered questions rather quickly and seemed anxious to please the ALJ's and counsel's queries. Chrysler's testimony was credible concerning the salient events of purchasing an alcoholic beverage in Respondent's premises.

4. Chrysler had participated in approximately five prior alcoholic beverage decoy operations. During each prior decoy operation, he visited about ten or twelve licensed premises. During the decoy operation on September

> 19, 2012, Chrysler visited around ten stores. There is no evidence that he purchased alcoholic beverages at any other licensed premises on this day.
>
> [¶ . . . ¶]
>
> 6. Chrysler is employed as a police cadet at Santa Rosa Community College. His duties include providing escorts for students to their cars at night, building security checks, and observing and reporting incidents on campus. Chrysler's training included handcuffing protocol and learning radio codes. He does not carry a weapon. There was no credible evidence presented that Chrysler's prior experience as a police cadet caused or contributed to the clerk selling an alcoholic beverage to him. As previously noted, the selling clerk did not testify at the hearing.
>
> 7. After considering State's Exhibits 3 and 4, the decoy's overall appearance when he testified, and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale.

(Findings of Fact II.)

In his conclusions of law, the ALJ weighed these findings and determined that appellants had failed to prove the affirmative defense. He first addressed appellants' arguments and evidence under rule 141's fairness provisions:

> Respondent's counsel argues that the general *fairness*[fn] provision of Rule 141, subsection (a), was violated because the decoy wanted to appear old enough to purchase alcoholic beverages by attempting to exude an air of *confidence*. Department counsel countered there is no law or regulation that mandates a decoy look nervous during a decoy operation.
>
> A determination concerning the *fairness* of any particular minor decoy operation must be judged by a multitude of factors surrounding each sale. Generally, a single factor, like a decoy attempting to appear confident, is not dispositive of the fairness issue. While a decoy's confidence level may be considered in determining if an operation complies with Rule 141(a), a decoy's atempt to act confident is not *per se* unfair.
>
> Respondent's argument suffers from a material failure of proof. Namely, the clerk who supposedly fell prey to the decoy's *confidence* did not testify. Without the clerk's testimony there is no way of telling what she thought about the decoy's age, appearance, or attempt to appear

> confident. What the Court does know, however, is the clerk did request Chrysler's identification, which contained the decoy's correct date of birth and a prominent stripe indicating "AGE 21 in 2014." (State's Exhibit 3.) She sold an alcoholic beverage to a minor decoy despite the unequivocal information pertaining to the decoy's true age; 18 years old.
>
> The Court also notes the clerk offered an explanation for the sale. She told Department Agents she made a mistake in determining the decoy's age because she forgot to bring her glasses to work and could not read the [driver's license] properly. The clerk never mentioned or suggested to the Agents that she sold beer to the minor decoy because he appeared *confident*.
>
> The evidence did not establish the decoy operation violated the *fairness* provision of Rule 141(a).

(Determination of Issues II, emphasis in original.) It is worth acknowledging, briefly, appellants' complaint that the ALJ's rejection of appellants' confidence arguments based on the clerk's failure to testify is "flat out wrong." (App.Br. at p. 11.) In fact, it is appellants who are incorrect; mere speculation about the state of mind of a witness who did not testify cannot constitute competent evidence. (See, e.g., *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 582 [140 Cal.Rptr. 330] ["A witness may not speculate regarding the state of mind of another person absent proper evidence of such state of mind such as declarations or conduct."].)

The ALJ went on to weigh appellants' arguments and evidence and determined that they had failed to establish a defense based on the decoy's appearance under rule 141(b)(2):

> Respondent's counsel also argues that the Rule 141, subsection (b) (2) was violated because the decoy appeared to be over 21 years of age. Respondent's counsel contends that the decoy violated the appearance standards set out in Rule 141(b)(2) because his testimony was "mature and stoic," his physical size makes him appear older, and his experience as a police cadet and prior decoy operations combine to present a decoy whose general appearance does not comply with Rule 141(b)(2).
>
> The Court had the opportunity to observe the decoy at hearing, along with

> the photographs presented in State's Exhibits 3 and 4, and concluded Chrysler displayed an overall appearance which could generally be expected of a person under the age of twenty-one years under the actual circumstances presented to the seller at the time of the sale. [See Findings of Fact II]
>
> Respondent's argument is merely conjecture since the selling clerk did not testify and no other evidence was presented by the Respondent on the issue. The lack of evidence to support the Respondent's contention is a material failure of proof and no affirmative defense was established. There was compliance with Rule 141(b)(2), Article 22 of Division I, Title 4, California Code of Regulations, as set forth in Findings of Fact II.

(Determination of Issues III.)

The ALJ's findings are extensive and detailed, and address the decoy's physical build, musculature, confidence, and experience both as a decoy and as a police cadet. His conclusions are equally detailed, and are reasonable. Nevertheless, appellants insist that "if the Administrative Law Judge would have followed the Appeals Board's guidance and decisions . . . then the Administrative Law Judge would have found that all the evidence and factors to be considered require a finding that the minor decoy's appearance did not comply with rule 141(b)(2)." (App.Br. at pp. 10-11.) Appellants point this Board to a series of minor decoy cases and argue that this Board's previous factually dependent holdings constitute binding law in the present case. (App.Br. at p. 10.) Appellants are mistaken. As this Board has recently observed, "minors come in all shapes and sizes, and we are reluctant to suggest, without more, that minor decoys of large stature automatically violate the rule, or that a serious demeanor necessarily makes one appear older." (*Garfield Beach CVS, LLC* (2013) AB-9261 at p. 4.) The appearance of one decoy cannot be binding on the appearance of another; an element of appearance that proves decisive in one minor decoy case may be entirely insignificant in the next.

In reality, appellants would simply have this Board reach a different conclusion on the same set of facts. As this Board has said on many occasions, the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he testifies, and making the determination whether the decoy's appearance met the requirement of rule 141 that he possessed the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages. We are not in a position to second-guess the trier of fact or to reweigh the evidence, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that he did not.

II

Appellants contend that the ALJ failed to "bridge the analytic gap" between his findings and conclusions.

Appellants argue that, pursuant to the California Supreme Court's decision in *Topanga*, the ALJ was required to establish a "link" between his findings and his ultimate conclusion. (See *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 [113 Cal.Rptr. 836].)

There are two significant flaws in appellants' argument. First, appellants are simply reiterating its contention, addressed above, that the ALJ reached the wrong conclusion. Appellants phrase their *Topanga* argument thus:

> [T]he Administrative Law Judge makes findings regarding the minor's large physical stature, his muscular build, his intentional use of acting confident in order to procure a sale of an alcoholic beverage, his prior minor decoy operation experience, and his experience as a Police Cadet in dealing with the public but, then *the Administrative Law Judge erroneously ultimately concludes* that the minor decoy displayed the appearance of someone generally expected to be under the age of 21. In

> all, there is no link between the [ALJ]'s factual findings and the ultimate conclusion.

(App.Br. at p. 12, emphasis added.) Appellants' *Topanga* argument is simply another attempt to induce this Board to reach a different decision on the same set of facts.

Second, nothing in *Topanga* requires that the ALJ explain the analytical process that connects his findings and conclusions of law. As this Board has repeatedly noted:

> Appellants misapprehend *Topanga*. It does not hold that findings must be explained, only that findings must be made. This is made clear when one reads the entire sentence that includes the phrase on which appellants rely: "We further conclude that implicit in section 1094.5 is a requirement that the agency which renders the challenged decision *must set forth findings* to bridge the analytic gap between the raw evidence and the ultimate decision or order."

(*Topanga*, *supra*, 11 Cal.3d at p. 515, emphasis added.)

In *No Slo Transit v. City of Long Beach* (1987) 197 Cal.App.3d 241, 258-259 [242 Cal.Rptr. 760], the court quoted with approval, and added italics to, the comment regarding *Topanga* made in *Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 389 [137 Cal.Rptr. 909]: "The holding in *Topanga* was, thus, that *in the total absence of findings in any form on the issues supporting the existence of conditions justifying a variance*, the granting of such variance could not be sustained." Appellants concede that the ALJ made findings. (See App.Br. at p. 12.) Thus, there was no "total absence of findings" that would invoke the holding in *Topanga*. (*7-Eleven, Inc. & Cheema* (2004) AB-8181 at pp. 6-7.)

This Board has repeatedly rejected what have become tiresome, repetitive arguments by counsel based on the supposed authority of *Topanga* when it is plainly not apposite. In stating our displeasure with attempts to stretch *Topanga* beyond its reasonable reach, we hope to deter counsel appearing before us from doing so in the

future.

III

Appellants contend that the Department's Exhibit 2, the investigative report of the decoy operation, was improperly included in the record. Appellants argue that this document is highly influential, and therefore its inclusion constitutes an illegal ex parte communication meriting reversal.

An ex parte communication is broadly defined as "[a] generally prohibited communication between counsel and the court when opposing counsel is not present." (Black's Law Dictionary (7th ed. 1999) p. 597.) Section 11430.10 of the Government Code provides, in relevant part:

> (a) While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.
>
> (b) Nothing in this section precludes a communication, including a communication from an employee or representative of an agency that is a party, made on the record at the hearing.

Section 11430.70 extends the prohibition on ex parte communications to agency heads:

> (a) Subject to subdivision (b) and (c), the provisions of this article governing ex parte communication to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

The California Supreme Court, in *Quintanar*, reinforced the language of section 11430.70 and further held that ex parte communications are forbidden not only during the trial stage, but at any point in the course of adjudication, including the decisionmaking phase. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Board (Quintanar)* (2006) 40 Cal.4th 1, 11-14 [50 Cal.Rptr.3d 585].)

Quintanar involved hearing reports, prepared by Department counsel following the hearing, which summarized the issues in the case and recommended a particular disposition. (*Id*. at p. 6.) These reports were provided to the Department's chief counsel, who is an adviser to a decision maker equipped with the authority to accept or reject the ruling submitted by the ALJ. (See *ibid.*) These reports, however, were not supplied to the licensees, nor were licensees given the opportunity to respond. (*Ibid.*) The reports and the recommendations contained in them were wholly secretive; on appeal, the Department refused to supply copies of the reports to this Board, citing attorney-client privilege. (*Id*. at pp. 6-7.) The court held that the reports constituted an illegal ex parte communication. "[T]he APA sets out a clear rule: An agency prosecutor cannot secretly communicate with the agency decision maker or the decision maker's adviser about the substance of the case prior to issuance of a final decision." (*Id.* at p. 10; see also *Chevron Stations, Inc. V. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6] [ex parte hearing reports require reversal even where Department accepts the ALJ's decision].)

Section 11430.50 provides guidance where a presiding officer (or agency head, pursuant to section 11430.10(a)) receives an improper written communication:

> (a) If a presiding officer receives a communication in violation of this article, the presiding officer shall make all of the following a part of the record in the proceeding:
>
> > (1) If the communication is written, the writing and any written response of the presiding officer to the communication.
> >
> > ¶ . . . ¶
>
> (b) The presiding officer shall notify all parties that a communication described in this section has been made a part of the record.
>
> (c) If a party requests an opportunity to address the communication within

10 days after receipt of notice of the communication:

(1) The party shall be allowed to comment on the communication.

(2) The presiding officer has discretion to allow the party to present evidence concerning the subject of the communication, including discretion to reopen a hearing that has been concluded.

Thus, the proper remedy, when a decision maker receives an unsolicited ex parte communication, is to immediately lift the veil of secrecy and give the opposing party an opportunity to respond.

In *Quintanar*, the court reversed the Department's orders largely because of the secretive nature of the hearing reports:

> The Department implies no remedy is necessary because any submission was harmless; according to the Department, the decision maker could have inferred the contents of the reports of hearing (to wit, a summary of the hearing and requested penalty) from the record. We are not persuaded. First, because the Department has refused to make copies of the reports of hearing part of the record, despite a Board order that it do so, whether their contents are as innocuous as the Department portrays them to be is impossible to determine. Second, although both sides no doubt would have liked to submit a secret unrebutted review of the hearing to the ultimate decision maker or decision maker's advisors, only one side had that chance. The APA's administrative adjudication bill of rights was designed to eliminate such one-sided occurrences.

(*Quintanar*, *supra*, 50 Cal.Rptr.3d at p. 17.)

Notably, the *Quintanar* decision closed with an observation that the Department's post-hearing reports were, in fact, permissible, provided the Department complied with the requirements of section 11430.50:

> The APA bars only advocate-decision maker ex parte contacts, not all contacts. Thus, for example, nothing in the APA precludes the ultimate decision maker from considering posthearing briefs submitted by, and served on, each side. The Department if it so chooses may continue to use the report of hearing procedure, *so long as it provides licensees a copy of the report and the opportunity to respond*. (Cf. § 11430.50 [contacts with presiding officer or decision maker must be public, and all parties must be afforded opportunity to respond].)

(*Ibid*., emphasis added.)

In *City of Pleasanton*, the court of appeals interpreted this passage from *Quintanar* to mean that "under the APA the agency decision maker cannot properly solicit or receive *private*, *ex parte* advice from the personnel who serve as adversaries in the case." (*City of Pleasanton v. Board of Administration of the Public Employees' Retirement System* (2012) 211 Cal.App.4th 522, 533 [149 Cal.Rptr.3d 729], emphasis in original.) Thus, as a matter of law, the decisionmaking body in *City of Pleasanton* was not precluded from receiving a written prosecutorial analysis and recommended disposition as part of a public agenda packet that *also* included the opposing party's analysis and recommendations. (*Ibid*.) The court of appeals laid out guidelines for when such communications are permissible:

> [D]ue process . . . does not in general preclude the advocate for the agency staff's position from communicating with and making recommendations to the agency decision maker or the decision maker's advisors about the substance of the matter as long as (1) no part of the communication is made ex parte, (2) the administrative appellant is simultaneously afforded at least the same opportunity to communicate with the decision maker as the staff advocate, and (3) the decision maker is not subject to the advocate's authority or direction.

(*Id.* at p. 536.)

This Board is left, then, to determine whether the inclusion of Exhibit 2 in the record provided to the Department Director constitutes an ex parte communication. If we were to consider only the inclusion of the report in the record provided to this Board, we might rule that it does not constitute an ex parte communication. After all, as the Department points out, the APA mandates that the record, for purposes of judicial review, should include "the pleadings, all notices and orders issued by the agency, any

proposed decision by an administrative law judge, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case." (Cal. Gov. Code § 11523.) Exhibit 2, though neither admitted or rejected, arguably falls within this list.

We are not, however, addressing the inclusion of Exhibit 2 in the record provided to this Board. It is undisputed that Exhibit 2 was also included in the record provided to the Department Director in his decisionmaking capacity. The Director does not accept briefing or conduct an appellate review, nor is he authorized to make or reconsider evidentiary rulings. (See Cal. Gov. Code § 11512(b) [entrusting evidentiary rulings solely to presiding ALJ].) Thus, section 11523 cannot tell us what should be included in the record supplied to the Director, as that section outlines procedures for judicial review only.

Instead, we turn to the Department's own procedures. In the wake of the *Quintanar* decision, the Department issued a general order outlining the documents to be included in the record provided to the Director: "The Administrative Hearing Office shall forward proposed decisions, together with any exhibits, pleadings and other documents or evidence *considered by the administrative law judge*, to the Hearing and Legal Unit which shall forward them to the Director's Office without legal review or comment." (Department of Alcoholic Beverage Control, General Order 2007-09 (August 10, 2007), emphasis added.) By its plain language, the Department's order excludes documents *not* considered by the ALJ. Thus, where a document is marked for identification but never admitted into evidence, it is not "evidence considered by the administrative law judge," and both parties can reasonably expect that it will not find its way to the Director's desk.

Despite the language of General Order 2007-9, Exhibit 2 appeared in the record provided to the Director. Appellants, though certainly aware the document existed, had no notice that this would occur, and were given no opportunity to respond. (Cf. *Basra* (2007) AB-8645 [notice of documents via discovery insufficient to establish notice that document would be included in record]; accord *Circle K Stores, Inc.* (2007) AB-8597.) This constitutes an ex parte communication even where, as here, the Director adopts the ALJ's decision without comment. (See *Chevron Stations*, *supra*, 149 Cal.App.4th at p. 133.)

In closing, we take note of the Department's argument that the inclusion of the report was unintentional. (Reply Br. at p. 6.) Lack of intent is no defense to an ex parte communication; the potential for abuse is obvious. As observed in its General Order 2007-09, the Department should "avoid even the appearance of improper communications" or face reversal.

ORDER

The decision of the Department is reversed.[2]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[2]This 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.