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

AB-8121
File: 20-292218 Reg: 02053036

KV MART CO., dba Top Value Market # 16
4700 Inglewood Boulevard, Los Angeles, CA 90066,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: June 10, 2004
Los Angeles, CA

ISSUED AUGUST 24, 2004

KV Mart Co., doing business as Top Value Market # 16 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for appellant's 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 appellant KV Mart Co., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, David B. Wainstein.

[1]The decision of the Department pursuant to Government Code section 11517, subdivision (c), dated March 18, 2003, is set forth in the appendix, as is the proposed decision of the administrative law judge, dated August 30, 2002.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on February 14, 1994. On June 4, 2002, the Department filed an accusation against appellant charging that, on March 1, 2002, appellant's clerk sold an alcoholic beverage to 19-year-old Lea DeGuire. Although not noted in the accusation, DeGuire was working as a minor decoy for the Los Angeles Police Department at the time.

At the administrative hearing held on August 28, 2002, documentary evidence was received, and testimony concerning the sale was presented by DeGuire (the decoy) and by Hsin-Yi Lo, a Los Angeles Police officer.

Following the hearing, the administrative law judge (ALJ) submitted to the Department a proposed decision, dated August 30, 2002, dismissing the accusation. On October 24, 2002, the Department issued a notice that it would not adopt the ALJ's proposed decision. On March 18, 2003, the Department issued its decision pursuant to Government Code section 11517, subdivision (c), adopting Findings I, II, III, and V of the proposed decision. The Department also made additional Findings (IV and VI), and new Determinations of Issues I through IV, and ordered the license suspended for 25 days. Below the order the Department's chief counsel, Matthew D. Botting, certified the decision as the Department's, adopted on March 18, 2003.

Appellant has filed a timely appeal making the following contentions: 1) The Department's decision violates appellant's right to due process, and 2) the decision contains erroneous findings not supported by substantial evidence. After this appeal was filed, appellant filed a Motion to Augment Record, asking the Board to order the Department to include as part of the record on appeal, a Department form called

"Report of Hearing."[2] The Board made such an order, but the Department declined to comply. We discuss this aspect of the appeal following our discussion of the due process issue.

DISCUSSION

I

Appellant contends that its right to due process was violated because the Department's chief counsel, Matthew Botting, was both prosecutor and decision maker in this case. The Department's Web site, appellant points out, says that "Botting oversees all legal issues related to ABC, and a legal staff of nine attorneys"; therefore, appellant asserts, Botting is the Department's "highest ranking prosecutor," charged with oversight in the prosecution of this case. The Department's decision was made by Botting, according to appellant, and Botting also signed and certified the decision, thus "conflating the roles of advocate and decision-maker" and depriving appellant of his due process right to a fair hearing before an unbiased tribunal. Appellant cites *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234] (*Nightlife*) in support of its contention.

In *Nightlife*, *supra*, Nightlife petitioned the superior court for a writ of administrative mandate to set aside the city's denial of Nightlife's application for renewal of its adult entertainment permit. In Nightlife's unsuccessful administrative appeal of the permit denial, the hearing officer was assisted during the hearing by an assistant

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[2]The Report of Hearing appears to be a standardized report prepared by the attorney representing the Department following an administrative hearing. It contains primarily factual information such as the identification of the case heard; the ALJ, parties, and witnesses present; the issues; any stipulations; whether the case was completed or continued; and the recommendation for discipline made by the attorney at the hearing. In addition, a section is included titled "Discussion," with directions to "Summarize evidence for and against with reasons for the recommended decision."

city attorney who had advised the city in its initial denial of Nightlife's permit renewal application. The trial court concluded that Nightlife's due process rights had been violated, granted the petition, and ordered the city to grant Nightlife a new hearing.

The city appealed, and the Court of Appeal held that the administrative appeal hearing failed to meet minimum constitutional due process standards. The court stated that procedural due process in administrative proceedings requires a fair hearing before an unbiased decision maker, and Nightlife's administrative hearing had the appearance of unfairness and bias because of the city attorney's dual roles of advocate and adviser to the decision maker.

Nightlife involved a single attorney assuming the roles of advocate and adviser to the decision maker. The court distinguished the cases cited by the city "because they do not involve this same objectionable overlapping of *advocacy* and decisionmaking roles. In those cases, [citations], the same attorney did not act as both a partisan advocate and as an adviser to the neutral decision maker." (*Nightlife*, *supra*, 108 Cal.App.4th at pp. 94-95.)

In the present case, appellant argues that one person on the Department's legal staff, Botting, served both as prosecutor and decision maker, violating the holding in *Nightlife*, *supra*. The Department does not deny that Botting made the Department's decision in this case; indeed, in oral argument before this Board, the Department conceded that Botting was the decision maker, that duty being informally delegated to him by the Director of the Department. Nevertheless, the Department's argument seems to treat ALJ Lo, who conducted the administrative hearing, as the decision maker. However, the ALJ is not the decision maker; the Department, acting through the Director, is always the decision maker. The ALJ conducts the hearing and prepares a

proposed decision, but the decision to accept or reject the ALJ's proposed decision, and the ultimate decision if the proposal is rejected, is vested in the Director. Botting was, as appellant contends, the decision maker in the present case.

Botting was not, however, the prosecutor in this case. A staff attorney for the Department, Roxanne B. Paige, represented the Department at the hearing. Neither Botting's general oversight of all the Department's legal matters nor his position as ultimate supervisor of Paige made him the prosecutor in this case.

These conclusions do not end the matter, however. Even though the roles of advocate and decision maker were not performed by the same individual, as in *Nightlife*, *supra*, the roles were performed by two individuals from the same legal staff, and "[due process] concerns do not disappear simply because different lawyers in the same office perform the two functions." (*Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586 [5 Cal.Rptr.2d 196] (*Howitt*).)

In *Howitt*, *supra*, the county sheriff's department was to be represented by a deputy county counsel at a hearing before a county employment appeals board regarding the transfer and suspension of an employee of the sheriff's department. The county counsel would advise the appeals board at the hearing and during the decision making process, and would prepare the appeals board's written decision. The employee requested the county counsel's office to disqualify itself from advising the board, but the county counsel refused and the superior court denied the employee's petition for a writ of mandate. The appellate court held that the county counsel's office could both act as an advocate and advise the decision maker "only if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate." (*Howitt*, *supra*, 3 Cal.App.4th at p. 1586.)

The court in *Nightlife, supra*, 108 Cal.App.4th 81, at pages 93-94*,* described the position taken by the court in *Howitt*:

> The *Howitt* court did recognize that administrative procedures may depart, to some extent, "from the *pure* adversary model of a passive and disinterested tribunal hearing evidence and argument presented by partisan advocates," and yet still comply with constitutionally mandated due process when used as the means for resolving disputes in " '[t]he incredible variety of administrative mechanisms [utilized] in this country. . . . ' " (*Howitt, supra,* 3 Cal.App.4th at p. 1581, quoting *Withrow [v. Larkin* (1975)] 421 U.S. [35] at p. 52 [95 S.Ct. [1456] at p. 1467].) . . . .
>
> However, a problem arises once an administrative agency "chooses to utilize the adversary model in large part but modifies it in a way which raises questions about the fairness of the resulting procedure." (*Howitt, supra,* 3 Cal.App.4th at p. 1581.) Thus, when both the agency and the citizen are represented by counsel at a formal hearing before a supposedly neutral decision maker who has not participated in the initial factfinding process of the agency's investigation and prosecution of a matter, and then, "in the midst of this seemingly adversary system," the same lawyer who represented the agency as advocate also advises the hearing officer with regard to its decision affecting that agency, "[t]he mental image comes to mind of a hearing in which [the agency's lawyer, while representing the agency,] raises an objection and then excuses himself from counsel table to consult with the [hearing officer] as to whether the objection should be sustained." (*Id.* at p. 1582.) What makes this scenario objectionable is that the "advocacy and decision-making roles are combined." (*Id.* at p 1585, italics omitted.)

The implications of the *Howitt* decision, as explained in *Nightlife*, are particularly pertinent to the present case before the Appeals Board:

> [T]o permit an advocate for one party to act as the legal adviser for the decision maker creates a substantial risk that the advice given to the decision maker will be skewed ([*Howitt*, *supra*, 3 Cal.App.4th 1575, 1585]), particularly when the prosecutor serves as the decision maker's adviser in the same or a related proceeding. Then, "[t]o allow an advocate for one party to also act as counsel to the decision-maker creates the substantial risk that the advice given to the decision-maker, 'perhaps unconsciously' as we recognized in *Civil Service Commission v. Superior Court* [(1984)] 163 Cal.App.3d [70,] 78, fn. 1 [209 Cal.Rptr. 159], will be skewed." (*Ibid.*) *Thus, an agency's staff counsel may prosecute a case before the agency when an independent hearing officer presides over the contested case hearing, <u>if</u> the prosecutor plays no role in the*

> *agency's deliberations.* (*Id.* at p. 1586.) *So, too, two lawyers from the same office could serve in dual capacities –one as prosecutor and one as legal adviser to the administrative agency– as long as they were effectively screened from each other.* (*Ibid.*) *However, it is improper for the same attorney who prosecutes the case to also serve as an adviser to the decision make*r. (*Ibid.*)

(Nightlife, supra, 108 Cal.App.4th at p. 93, italics added.)

The language italicized above describes two situations that may result in due process violations: first, when the agency's hearing advocate participates in the agency's deliberations or acts as an adviser to the decision maker, and second, when two lawyers from the same office serve as advocate and adviser to the decision maker without being effectively screened from each other. In the present appeal, both the Department's advocate (Paige) and its decision maker (Botting), were part of the same legal staff, requiring that they be effectively screened from each other.[3] The Department bears the burden of proving that procedures exist to insulate or screen its decision maker (and the decision maker's advisers) from its advocates. (*Howitt*, *supra*, 3 Cal.App.4th at pp. 1586-1587.)

However, the Department has given no indication that such screening exists. In addition, the Department asserted at oral argument that an attorney in the headquarters legal office makes the initial recommendation whether to accept or reject an ALJ's proposed decision. While reviewing the case, this attorney has available the Report of Hearing and may call the hearing advocate for information about the case. Thus, there is no screening of the adviser to the Department's decision maker, or the decision maker himself, from the Department's advocate.

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[3]The first situation described, in which the agency's advocate at the administrative hearing also acts as an adviser to the decision maker, is discussed in the following section on ex parte communications.

The Department argues that since neither Botting nor the Department's advocate at the hearing advised or counseled *the ALJ* during the hearing, no Department attorney was engaged in the "dual-capacity" role condemned in *Nightlife*, *supra*. Additionally, the Department asserts in its brief that *Nightlife*, *supra*, is distinguishable because the Administrative Procedure Act (Gov. Code, § 11340 et seq. (APA)), which governs the Department's administrative hearing process, was not applicable to the decision making process in that case. Therefore, the Department asserts, the decision did not directly address the APA provisions, "especially as they applied to potential conflicts of interest and due process." (Dept. Supp. Resp. at p. 6.)

The Department points out that the California APA provides a "comprehensive system of formal guidelines and rules for formal decision making and for addressing potential conflicts of interest within that decision making process." (Dept. Supp. Response Br. at p. 6.) It asserts that, in issuing its own decision under section 11517, subdivision (c), the Department "compl[ied] with all aspects of the APA." (*Ibid*.) However, even if the Department had complied with the provisions of the APA, it would still be subject to the due process requirements of the federal and state Constitutions.

California courts have consistently held that in an administrative proceeding, procedural due process requires that the respondent receive notice of the proposed action, the reasons for the proceeding, the charges and materials on which the action is based, and the opportunity to respond to the proposed action "before a reasonably impartial, noninvolved reviewer." (*Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 736-737 [150 Cal.Rptr. 475, 586 P.2d 956]; accord, *Gai v. City of Selma* (1998) 68 Cal.App.4th 213, 219 [79 Cal.Rptr.2d 910]*; Linney v. Turpen* (1996) 42 Cal.App.4th 763, 770 [49 Cal.Rptr.2d 813]; *Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d

568, 581 [257 Cal.Rptr. 427]; *Titus v. Civil Service Com.* (1982) 130 Cal.App.3d 357, 362 [181 Cal.Rptr. 699].) "The right to a fair trial by a fair tribunal is a basic requirement of due process applying to administrative agencies which adjudicate, as well as to courts. (*Withrow v. Larkin*, *supra*, 421 U.S. 35, 46 [43 L.Ed.2d 712, 723].)" *(Burrell*, at p. 577.)

The APA has several provisions designed to ensure the impartiality of the adjudicator in administrative proceedings, among them being sections 11425.30 (specified persons not to serve as presiding officer), 11425.40 (disqualification of presiding officer), and 11430.10 through 11430.80 (prohibiting ex parte communications). The Department asserts that ALJ Lo was qualified to serve as presiding officer in this matter under Government Code section 11425.30 because he had not served, nor was he subject to the authority, direction, or discretion of a person who had served, as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage. It also asserts that Botting was not a "presiding officer" in an "adjudicative proceeding," and even if he were to be considered as such, he would not be disqualified pursuant to section 11425.30. We do not doubt those assertions, but they are not relevant here; ALJ Lo's qualifications as a presiding officer are not in question, and no contention has been made that Botting was a presiding officer.

What is relevant here is whether there was sufficient "separation of functions" to satisfy due process, as described in *Howitt*, *supra*. As explained above, the Department had no separation or screening between the attorney acting as its advocate and the attorneys acting as its decision maker and adviser to its decision maker. We conclude that this violated the due process rights of appellant.

II

As noted above, appellant filed a Motion to Augment Record, asking that a Departmental form entitled Report of Hearing be included in the record on appeal. This report, prepared by the attorney representing the Department following an administrative hearing, contains factual information about the hearing, the discipline recommended by the attorney at the hearing, and a summary of "evidence for and against with reasons for the recommended decision."

Appellant based its motion on its allegations that Matthew Botting, the Department's chief counsel, was the decision maker in this case and that Botting relied upon the documents requested in rejecting the ALJ's proposed decision and making the Department's decision under Government Code section 11517, subdivision (c). Appellant contends that "The interrelationship and interdepartmental communications between prosecutor and trier of fact . . . [constitute] just exactly that type of inappropriate communication constituting a denial of Due Process." It asserts that the documents it seeks to place in the record are necessary for this Board to review in order to "accurately assess the propriety" of the Department's decision.

The Appeals Board issued an order on February 26, 2004, directing the Department to produce the requested report. The Board ordered the document to be filed under seal until its further order. By letter dated March 22, 2004, the Department refused to produce the Report of Hearing, contending the Board was without authority to augment and seal the record and asserting that the Report of Hearing was a privileged communication. The Department stated that the Report of Hearing "is completed after the hearing . . . before any proposed decision is received . . . [and] is provided to appropriate Department employees as a direct attorney-client

communication (the ALJ does not receive a copy)." At oral argument, the Department indicated that, in all likelihood, both the chief counsel and the headquarters attorney reviewing the ALJ's proposed decision would receive copies of the report to use in making their evaluations of the proposed decision.

The issue regarding the Motion to Augment is related to the due process issue discussed above. To satisfy due process, the functions of advocacy and advising the decision maker must be adequately separated. This means that the Department's advocate cannot also be an adviser to the decision maker. By providing the Report of Hearing to the Department's decision maker, the Department's advocate takes on the role of adviser to the decision maker, violating the prohibition, discussed above, against one attorney performing the dual roles of advocate and adviser to the decision maker.

We conclude that the Report of Hearing must be made part of the record, as requested in appellant's Motion to Augment. This is because the Report of Hearing, a communication outside the hearing from one of the parties to the decision maker, is an ex parte communication governed by the APA.

The APA provides that a presiding officer may not receive an ex parte communication from either party while a proceeding is pending. (Gov. Code, § 11430.10.) If a presiding officer receives an ex parte communication, he or she must make the communication part of the record, along with any response to the communication and the identity of the person from whom the presiding officer received the communication; notify all parties that the ex parte communication has been made part of the record; upon request, allow a party to comment on the communication; and, in his or her discretion, allow a party to present evidence concerning the subject of the communication or reopen a hearing that has been concluded. (*Id.*, § 11430.50.)

Receipt of a prohibited communication may also be grounds to disqualify the presiding officer, if necessary to eliminate the effect of the communication. (*Id*., § 11430.60.)

Although these provisions refer to ex parte communication with the presiding officer, usually an ALJ, they apply equally to the agency head or other person to whom the power to decide is delegated. (Gov. Code, § 11430.70.) There are limited permissible communications to the presiding officer or agency head from an employee or representative of an agency that is a party: for assistance and advice from a person who has not served as investigator, prosecutor, or advocate in the proceeding or its preadjudicative stage, as long as the assistant or adviser does not furnish, augment, diminish, or modify the evidence in the record; to advise concerning a settlement proposal advocated by the adviser; or to advise in a nonprosecutorial adjudicative proceeding. (*Id*., § 11430.30.) Other permissible communications are those required for disposition of an ex parte matter specifically authorized by statute or concerning a matter of procedure or practice that is not in controversy. (*Id*., §11430.20.)

It does not appear that any of the exceptions to the ex parte rules apply in the present case. On the record before us, we can only conclude that the Report of Hearing was a prohibited ex parte communication from a party to the decision maker or the decision maker's adviser. Therefore, the Department should have made it part of the record, notified the parties of its inclusion, and allowed appellant an opportunity to comment on the communication.

After briefing in this matter had been completed, the Department submitted a copy of the decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board & ALQ* (1981) 118 Cal.App.3d 720 [173 Cal.Rptr. 582]

(hereafter *ALQ*), asserting that this case "addressed virtually the same issue(s) raised in [the present appeal]" and that "the holding in [*ALQ*] is controlling for the issue(s) presently before the Board." We must disagree with these assertions.

In *ALQ*, the Court of Appeal vacated a decision of the Appeals Board that reversed the Department's revocation of ALQ's license. The Board had reversed the Department's decision because the Department refused to furnish to the licensee, before revoking its license, internal departmental documents demanded by the licensee that related to the Department's decision to reject the ALJ's proposed decision suspending the license and to decide the case on the record. The Board had held that due process and Government Code section 11517, subdivision (c), required the Department to provide the documents demanded by the licensee.

The Board's rationale was based on its belief that the statute required the Department itself to present to the licensee an argument in support of rejecting the proposed decision, so that the licensee could present an argument in response. The Board believed that the documents demanded by the licensee contained the Department's "argument."

The court rejected what it called the Board's "misconception of the function and authority of the Department," saying:

> At the heart of the Board's argument is its view, unsupported by anything other than its own notion, that the Department is in fact two separate departments, one which prosecutes accusations against licensees and one which adjudicates the merits of those accusations.
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> Building on that concept, the Board contends that the opinions and recommendations communicated by one part of the agency to another constitutes [sic] the "argument" of which [ALQ] is entitled to be informed. This is contrary to the most fundamental rules of the executive decision-making process.

(*ALQ*, *supra*, 118 Cal.App.3d at p. 726.)

The court explained that "It is in the nature of administrative regulatory agencies that they function both as accuser and adjudicator on matters within their particular jurisdiction," (*ALQ*, *supra*, 118 Cal.App.3d at p. 726) and that due process required only that "the Department's decision be based upon a record which indicates that the licensee had notice of the Department's proposed action and right to be heard; that the Department made adequate findings [citation] which supports [sic] its decision, and that substantial evidence supports those findings." (*Id*. at p. 727.)

The court also noted that the Department, in deciding a case itself under section 11517, subdivision (c), and the Appeals Board and the courts, in reviewing the Department's decision, do so on the record, which "is that generated in the hearing before the administrative law judge." (*ALQ*, *supra*, 118 Cal.App.3d 720 at p. 728.) It concluded that there was "nothing in the constitutional guarantee of due process which requires or authorizes an inquiry into matters, outside of the record, which might bear on the reasoning or mental processes of the director or his subordinates in the Department." (*Ibid*.)

The factual situation in *ALQ* was not necessarily "virtually the same" as that in the present appeal, as contended by the Department. The documents at issue in *ALQ* are not described with any specificity, and we are left with no idea whether any of them were comparable to the Report of Hearing at issue here.

More importantly, the court in *ALQ* espoused a theory of administrative agency decision making that has since been rejected in cases such as *Howitt*, *supra*, and *Nightlife*, *supra*. These more recent cases make clear that, when making adjudicatory decisions, due process requires precisely the notion, rejected in *ALQ*, that the Department has separate "departments" for prosecution and adjudication.

Additionally, *ALQ* was decided in 1981, long before the major revision of the APA, effective in 1997, which contained the present provisions regarding ex parte communications and separation of functions. Notably, the revised APA made a significant change in the ex parte rules by making them applicable not only to the ALJ, but to the agency head or other person to whom the power to decide may be delegated. (Gov. Code, § 11430.70.) Under the present APA, the documents requested by appellant are not "outside the record," but, as ex parte communications, must be made a part of the record.

We find *ALQ* neither controlling nor persuasive in the present appeal.

III

Appellant contends the Department's determination that the decoy operation was conducted fairly, as required by rule 141(a), is not supported by substantial evidence. The Department decision, in Determination of Issues IV, stated:

> Respondent introduced no evidence on the issue of whether or not the Department established that alcoholic beverages were purchased and sold. The Department was not required to establish "fairness" under Rule 141 as part of its prima facie case. It is not unfair, given the state of the evidence in the present case, and in the context of this decoy operation under Rule 141, to expect a clerk to know her alcoholic beverage inventory. The decoy operation was fair, both because of the terms on the carton and bottles, and because the cash register alerted the clerk that a person was attempting to purchase a restricted item.

Appellant contends that the Department's decision must be reversed because no evidence in the record supports the last reason given for finding that the decoy operation was conducted fairly: "the cash register alerted the clerk that a person was attempting to purchase a restricted item."

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (*Universal Camera Corp. v. Labor Bd.* (1951) 340 U.S. 474, 477 [95 L.Ed. 456, 71 S.Ct. 456]; *Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When an appellant charges that a Department decision is not supported by substantial evidence, the Appeals Board's review of the decision is limited to determining, in light of the whole record, whether substantial evidence exists, even if contradicted, to reasonably support the Department's findings of fact, and whether the decision is supported by the findings. (Cal. Const., art. XX, § 22; Bus. & Prof. Code, §§ 23084, 23085; *Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].) In making this determination, the Board may not exercise its independent judgment on the effect or weight of the evidence, but must resolve any evidentiary conflicts in favor of the Department's decision and accept all reasonable inferences that support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734] *(Lacabanne*); *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Officer Lo testified as follows:

Q: Okay. What did she do with the Bartles and Jaymes hard lemonade four-pack when she put it on the counter?

A: She placed it on the counter, and the lady – the cash register lady

rung it through. And from what I observed, it appeared to me that the register locked up.

Q: Okay. I'm sorry, did you say – the register lady did what?

A: Ran it through the scanner.

Q: Okay. And what happened after the register locked up?

A: It appeared to me that it locked up. All I saw afterwards is that the cash register lady pressed a button on the cash register, and it just – then they started talking, and Lea handed her the money, and she handed her the change.

[RT 12.]

We must agree with appellant that there is nothing in the record to support the Department's statement about the register alerting the clerk that a restricted item was being purchased. In a number of cases that have come before this Board, the record has contained testimony establishing that, when an alcoholic beverage is scanned at the checkout, the cash register responds in some way to alert the clerk about the restricted-sale item. Here, no evidence was presented regarding what would happen when a restricted-sale item was scanned. Given the variety of possible reasons for a cash register to "lock up," we do not believe that it was reasonable for the Department to infer that "the cash register alerted the clerk that a person was attempting to purchase a restricted item." However, we do not agree that this requires reversal of the Department's decision.

The Department also based its determination of fairness on the reasonable assumption that the clerk was familiar with the alcoholic beverage products sold in the store and on the words on the carton and the bottles. The decision describes the carton and bottles in paragraph B of Finding VI:

The carton containing the four bottles of beverages has the words "Raspberry Hard Lemonade" in big letters. One of the definitions of "hard"

> is "strongly alcoholic." Merriam-Webster's Collegiate Dictionary, 10th Edition, 1999. As the middle word in the name of the drink, there is a reasonable inference that "hard" in this context cannot mean anything other than "alcoholic." The carton also contains the words "an alcohol beverage." Each of the four bottles contains the words "an alcohol beverage" and "flavored beer." The beverages are one of many commonly referred to as "wine coolers."

We cannot say that Finding VI is not supported by substantial evidence. Similarly, we cannot say that this finding does not support the Department's Determination IV. Based on the evidence presented, it was not unreasonable for the Department to determine that the decoy operation was conducted fairly.

CONCLUSION

In light of our determinations in parts I and II of this opinion that the Department violated due process by failing to separate its advocacy function from its adjudicatory function and made ex parte communications prohibited by the APA, we must reverse the decision of the Department in this matter.

ORDER

The decision of the Department is reversed.[4]

TED HUNT, CHAIRMAN
KAREN GETMAN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[4]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.