

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

AB-8604

File: 20-395445 Reg: 06061825

CHEVRON STATIONS, INC., dba Chevron Station # 1715
2450 Fremont Street, Monterey, CA 93940,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: October 4, 2007
San Francisco, CA

ISSUED JANUARY 9, 2008

Chevron Stations, Inc., doing business as Chevron Station # 1715 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 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 Chevron Stations, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

¹The decision of the Department, dated August 17, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 9, 2005. On February 23, 2006, the Department filed an accusation against appellant charging that, on December 9, 2005, appellant's clerk sold an alcoholic beverage to 18-year-old Sarah McIntyre. Although not noted in the accusation, McIntyre was working as a minor decoy for the Monterey Police Department at the time.

At the administrative hearing held on June 20, 2006, documentary evidence was received, and testimony concerning the sale was presented. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved, and no defense was established.

Appellant filed an appeal contending the Department communicated ex parte with its decision maker.²

DISCUSSION

This case presents two aspects of ex parte communication: a contention that the Department's decision maker had available a document entitled "Report of Hearing" prepared by the Department's advocate after the administrative hearing, and a contention that several documents, only a few of which were offered in evidence and either received or rejected, were included in the file submitted to the Department's decision maker or his advisors.

The first contention has been made many times before and has been adjudicated by the California Supreme Court in *Department of Alcoholic Beverage*

²Appellant also filed a motion asking the Board to augment the record with any Report of Hearing in the Department's file for this case. Our decision makes augmenting the record unnecessary, and the motion is denied.

Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*). This Board has followed *Quintanar* in numerous appeals, remanding the matters to the Department for evidentiary hearings to resolve the factual issues regarding ex parte communications raised in these cases. (E.g., *Dakramanji* (2007) AB-8572; *BP West Coast Products, LLC* (2007) AB-8549; *Hong* (2007) AB-8492; *Chevron Stations, Inc.* (2007) AB-8488; *Circle K Stores, Inc.* (2006) AB-8404.) The first ex parte communication contention in the present appeal is virtually identical to those made in the earlier appeals, and we would resolve this issue in the present appeal as we did the same issue in the earlier appeals just cited.

The second contention in this appeal also regards ex parte communication, but in a different context that has not been resolved by the courts. The documents involved in this instance were included in the certified record furnished to the Appeals Board pursuant to Appeals Board Rule 188,³ and apparently provided to the Department's decision maker without notice to appellant.⁴

The documents consist of the following:

(1) **ABC Form 309**. This document contains a brief factual summary of the transaction, the standard and recommended penalties for the offense, and a short

³ Rule 188 provides:

The record on appeal filed with the board shall consist of:

(1) The file transcript, which shall include all notices and orders issued by the administrative law judge and the department, including any proposed decision by an administrative law judge and the final decision issued by the department; pleadings and correspondence by a party; notices, orders, pleadings and correspondence pertaining to reconsideration;

(2) the hearing reporter's transcript of all proceedings;

(3) exhibits admitted or rejected.

⁴ Appellant was aware of the existence of such documents, having been provided copies through discovery. However, there is nothing to indicate to appellant that they would become part of the certified record.

summary of the telephonic conference in which appellant's counsel was advised of the Department's intent to file an accusation.

(2) **ABC Form 304.** This document, captioned "Decoy Information Sheet," identifies the decoy in question, sets forth her height, weight, eye and hair color, and provides information to the effect that the requirements of rule 141 were satisfied,

(3) **ABC Form 338.** This document, captioned "Decoy Operation Results," lists the premises visited during the decoy operation, indicating the ones at which violations were committed and whether the decoy was asked her age or for identification.

(4) **Monterey Police Department Report.** The police report contains the officer's narrative report of the incident and his interview with the clerk.

(5) **Copy of Notice to Appear** issued to the clerk who sold to the decoy.

(6) **Black & white copies of eight photographs** (thumbnails on two pages), five of which were not in evidence.

(7) **Copy of the receipt** for the decoy's purchase.

(8) **Black & white copies of five \$20 bills** on one page.

Needless to say, these documents as a whole contain a great deal of information about the transaction that either duplicates or expands upon the evidence adduced at the hearing. We doubt it could seriously be contended that a decision maker presented with these documents would not be influenced by the support they lend to the decision under review.

The inclusion of these documents in the certified record raises an inference that they were in the file presented to the Department's decision maker, without notice to appellant. This resulted in an impermissible ex parte communication pursuant to the terms of Government Code section 11430.10 et seq.

In its brief, the Department states only that it submits the matter to the Appeals Board. Given the unusual circumstances of this case, and the Department's failure to offer any opposition, it would seem that a remand for fact-finding is unnecessary. The Department's position leads inevitably to the conclusion that the ex parte communication occurred as alleged by appellant.

The court in *Quintanar, supra*, discussed the appropriate remedy for the Department's violation of the ex parte communication rules. It gave two reasons it was not persuaded by the Department's position that any submission was harmless and no remedy was warranted. The first reason was the impossibility of determining the import of the reports because the Department refused to provide copies of them to review.

The court went on:

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 advisers, only one side had that chance. The APA's administrative adjudication bill of rights was designed to eliminate such one-sided occurrences. We will not countenance them here. Thus, reversal of the Department's orders is required.

(40 Cal.4th at page 17.)

As the Supreme Court recognized in *Quintanar*, an ex parte communication violates the APA simply by occurring, regardless of whether it gave some actual advantage to the party making it. The Department's secret provision of documents to its decision maker is at least as egregious as providing an advocate's report of hearing to the decision maker. There is no way at this point to "un-ring the bell"; the bell has tolled for the Department and it must be a death knell for the Department's accusation.

ORDER

The decision of the Department is reversed.⁵

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

⁵This 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.