

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

AB-8645

File: 20-324409 Reg: 06062667

JOGINDER S. BASRA and KASHMIR K. BASRA, dba Basra AM PM Mini Mart
2329 North Texas Street, Fairfield, CA 94533,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

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

ISSUED JANUARY 9, 2008

Joginder S. Basra and Kashmir K. Basra, doing business as Basra AM PM Mini Mart (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ suspending their license for 25 days, with 8 days stayed for a probationary period of 1 year, 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 Joginder S. Basra and Kashmir K. Basra, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

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

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on December 6, 1996. On April 27, 2006 the Department filed an accusation against appellants charging that, on March 18, 2006, their clerk, (the clerk), sold an alcoholic beverage to 19-year-old David Sanchez. Although not noted in the accusation, Sanchez was working as a minor decoy for the Fairfield Police Department at the time.

At the administrative hearing held on August 17, 2006, documentary evidence was received and testimony concerning the sale was presented by Sanchez (the decoy), by Fairfield police officer Matthew Thomas, and by co-appellant Joginder S. Basra.

The evidence established that the decoy took a six-pack of Budweiser beer to the counter and purchased it without the clerk asking his age or for identification. After leaving the store with the beer, the decoy reentered the premises with a police officer and identified the clerk who sold him the beer. Co-appellant Joginder S. Basra testified about the training for employees and the card scanner and cash register prompt which are designed to help clerks prevent sales to minors.

The Department's decision determined that the violation charged was proved and no defense was established. Appellants then filed an appeal contending: (1) The Department's decision was based on evidence not presented at the hearing, depriving appellants of the opportunity to address all the evidence; (2) the administrative law judge did not analyze the reasons for concluding that the decoy's appearance complied with rule 141(b)(2);² (3) the Department did not prove that the

²References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

violation occurred at appellants' premises; (4) the Department violated prohibitions against ex parte communication with the decision maker; and (5) the Department violated appellants' right to discovery.³

DISCUSSION

Although appellants raise several issues, we address only the first one. On that issue we must reverse the Department's decision and, therefore, we need not address the other issues raised.

Appellants' contention that the Department's decision was based on evidence outside the record arises from the presumptive transmission to the Department's decision maker of numerous documents containing factual information about the case that were not admitted, rejected, or even offered as evidence at the administrative hearing. These documents were provided to the Department's decision maker without notice to appellants,⁴ and they were not afforded an opportunity to respond to them. Appellants learned of the decision maker's access to these documents only because they were included in the certified record furnished by the Department to the Appeals Board pursuant to Appeals Board Rule 188.⁵

³Appellants 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.

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

⁵ Rule 188 (4 Cal. Code Regs., § 188) provides that the record filed on appeal shall include all notices and orders issued by the ALJ or the Department; the ALJ's proposed decision and the final decision issued by the Department; pleadings and correspondence of the parties; notices, orders, pleadings and correspondence regarding reconsideration; the hearing reporter's transcript of the administrative hearing; and exhibits admitted or rejected at the hearing.

The documents consist of the following:

(1) **ABC Form 309.** This document contains a brief factual summary of the transaction, notes that licensees did not show up for a meeting regarding the violation, directs the filing of an accusation, notes the standard and recommended penalties for the offense, and states aggravating circumstances.

(2) **ABC Form 304.** This "Decoy Information Sheet," identifies the decoy in question, sets forth his 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 his age or for identification.

(4) **ABC Form 147.** This is the affidavit of the decoy giving his narrative account of the transaction.

(5) **Fairfield Police Department Report.** This contains the officer's narrative report of the incident and his interview with the clerk.

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

(7) **Color photo of Budweiser six-pack.**

(8) **Letter to licensees from the district administrator** informing them of the accusation and offering a pre-hearing settlement.

(9) **Black & white copy of a \$20 bill.**

(10) **Copy of a videotape** from the premises' security camera showing the transaction that is the basis of the accusation.

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

appellants. This resulted in an impermissible ex parte communication pursuant to the terms of Government Code section 11430.10 et seq.

The Department filed no brief in this appeal, essentially conceding this issue. 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 appellants.

The California Supreme Court 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*), 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 un rebutted 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, supra*, 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. At this point, the only remedy the Department could provide that would nullify its ex parte communication violation would be to dismiss the accusation.

ORDER

The decision of the Department is reversed.⁶

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

⁶This 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.