

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

AB-8695

File: 20-232963 Reg: 06064238

7-ELEVEN, INC., HAMID REZA SHARIFINEJAD and MINNIE JEAN SHARIFINEJAD,
dba 7-Eleven 2172-17923
1679 North Glassell Street, Orange, CA 92867,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 4, 2008
Los Angeles, CA

ISSUED MARCH 18, 2009

7-Eleven, Inc., Hamid Reza Sharifinejad and Minnie Jean Sharifinejad, doing business as 7-Eleven 2172-17923 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 days for their clerk, Krishan Arora, selling a 16-ounce can of Budweiser beer, an alcoholic beverage, to Phillip Rombough, a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., Hamid Reza Sharifinejad and Minnie Jean Sharifinejad, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated April 5, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 26, 1989. On November 3, 2006, the Department instituted an accusation against appellants charging that, on September 15, 2006, appellants' clerk, Krishan Arora (the clerk), sold an alcoholic beverage to 18-year-old Phillip Rombough. Although not noted in the accusation, Rombough was working as a minor decoy for the City of Orange Police Department at the time.

An administrative hearing was held on January 26, 2007, at which time documentary evidence was received, and testimony concerning the sale was presented by Rombough (the decoy) and by Aaron Drootin, a City of Orange police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellants filed an appeal making the following contention: the Department failed to comply with the decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [50 Cal.Rptr.3d 585] (*Quintanar*).

DISCUSSION

Appellants contend that the Department did not comply with the ruling of the California Supreme Court in *Quintanar*.² Appellants contend the Department violated

² Although there is some merit in the Department's contention that appellants' opening brief is deficient in the degree to which it spells out the basis for their appeal, we think that appellants' opening and reply briefs, read together with the notice of appeal filed by appellants, make it sufficiently clear that they are claiming there was an improper ex parte communication with the Department's decision maker. That said, we address the merits of that issue. By doing so, however, we think it appropriate to remind competent counsel that like efforts in future cases may not be afforded a similar
(continued...)

the APA by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the hearing but before the Department issued its decision. They rely on the California Supreme Court's holding in *Quintanar* and appellate court decisions following *Quintanar*, *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board* (2007) 149 Cal.App.4th 116 [57 Cal.Rptr.3d 6] (*Chevron*) and *Rondon v. Alcoholic Beverage Control Appeals Board* (2007) 151 Cal.App.4th 1274 [60 Cal.Rptr.3d 295] (*Rondon*). They assert that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred. The Department denies there was any ex parte communication, and has filed a declaration of counsel stating no report of hearing was prepared.

We agree with appellants that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar, supra*.

Three courts have now issued published decisions in which the Department's practice of ex parte communication with its decision maker or the decision maker's advisors is determined to be endemic in that agency. (*Quintanar, supra*, 40 Cal.4th 1, 5 [ex parte provision of report of hearing was "standard Department procedure"]; *Rondon, supra*, 151 Cal.App.4th 1274, 1287 ["widespread agency practice of allowing access to reports"]; *Chevron, supra*, 149 Cal.App.4th 116, 131 [ex parte communication not unique to *Quintanar* case, "but rather a 'standard Department procedure'"].) The

²(...continued)
degree of acceptance.

Department has presented no evidence in this case, or numerous other cases this Board has seen on this issue, that the "standard Department procedure" had changed at the time this matter was heard. The Department has not provided, for example, a written policy, with a date certain, from which we could conclude that the Department has instituted an effective policy screening prosecutors from the decision makers and their advisors. The Department bears the burden of proving that it has adequate screening procedures (*Rondon, supra*), and without evidence of an agency-wide change of policy and practice, we would be exceedingly reluctant to affirm or reverse on the basis of a single declaration, especially where there has been no opportunity for cross-examination.³

For the foregoing reasons, we will do in this case as we have done in so many other cases, that is, remand this matter to the Department for an evidentiary hearing.

ORDER

This matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing discussion.⁴

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

³"The general rule in civil actions is that absent statutory authorization, stipulation of the parties, or a waiver by failure to object, an affidavit (Code Civ. Proc., § 2003) or a declaration under penalty of perjury (Code Civ. Proc., § 2015.5) is not competent evidence; it is hearsay because it is prepared without the opportunity to cross-examine the affiant. (Evid. Code, §§ 300, 1200; see Code Civ. Proc., § 2009; Witkin, Cal. Evidence (2d ed. 1966) § 628, p. 588.)" (*Windigo Mills v. Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, 597 [155 Cal.Rptr. 63].)

⁴ This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.

