

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

AB-8717

File: 20-400793 Reg: 06064106

7-ELEVEN, INC., and GURU RAKHA, INC., dba 7-Eleven Store # 2171-25600 C
10488 Valley View Street, Buena Park, CA 90620,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: November 6, 2008
Los Angeles, CA

ISSUED MARCH 18, 2009

7-Eleven, Inc., and Guru Rakha, Inc., doing business as 7-Eleven Store # 2171-25600 C (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 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 7-Eleven, Inc., and Guru Rakha, Inc., 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 July 26, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 18, 2003. On October 24, 2006, the Department filed an accusation against appellants charging that, on May 30, 2006, appellants' clerk sold an alcoholic beverage to 18-year-old Arthur Julian. Although not noted in the accusation, Julian was working as a minor decoy for the Buena Park Police Department at the time.

At the administrative hearing held on April 18, 2007, documentary evidence was received and testimony concerning the sale was presented by Julian and by Bradley Geyer, a Buena Park police officer. The Department's decision determined that the violation charged was proved and no defense was established. Appellants filed an appeal contending: (1) The Department engaged in improper ex parte communication; (2) the Department did not have effective screening procedures in place to prevent any of its attorneys from acting as both prosecutor and advisor to the decision maker or to prevent ex parte communication with the decision maker; and (3) the prior violation should not be counted as a "first strike." Issues 1 and 2 will be discussed together. Appellants also request that the Board withhold its decision until a matter pending in the California Supreme Court is resolved and augment the record with all documents submitted for potential consideration by the decision maker and related to corrective steps the Department took following the administrative hearing in this case.

DISCUSSION

I and II

Appellants contend the Department violated the Administrative Procedure Act (Gov. Code, §§ 11340-11529) and due process by engaging in ex parte communication with the Department's decision maker, and by its failure to maintain effective screening

procedures within the legal staff to prohibit its prosecutors from engaging in ex parte communications with the decision maker or his advisors. The Department denies an ex parte communication was made. A declaration by the attorney representing the Department at the administrative hearing asserts that the attorney did not prepare a report of hearing or other document, or speak to any person, regarding this case.

In a number of appeals recently, this Board has addressed the same arguments made by the parties here. In those appeals, the Board noted that several recent court decisions had described the Department's practice of ex parte communication with its decision maker or the decision maker's advisors as "standard practice" in that agency. The Board concluded that, "without evidence of an agency-wide change of policy and practice [by the Department], 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." Since a factual question still exists in this case, as it did in the earlier appeals just mentioned, we believe the only appropriate resolution is to remand the matter to the Department for an evidentiary hearing.

As did 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*), at page 17, footnote 13, we decline to address appellants' due process argument:

Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

In light of our decision to remand this matter, neither delaying our decision nor augmenting the record is necessary.

III

Appellants contend that a prior violation on October 28, 2004, cannot be used to make the present violation a "second strike" because the Department may have engaged in an unlawful *ex parte* communication with the decision maker in the earlier case. Because of this alleged unlawful *ex parte* communication, they argue, the Board "should compel the Department to treat this matter as a 'first strike' case and . . . should reverse the 'first' strike" (App. Opening Brief at p. 12.)

At the hearing before the ALJ, appellants made a Motion to Strike Prior Violation (by which they seemed to mean they wanted the *decision* regarding the prior violation stricken). They alleged that decision was constitutionally invalid and violated their right to due process because the Department engaged in *ex parte* communication with the decision maker, which was later declared to violative of the Administrative Procedure Act in *Quintanar, supra*.

The ALJ denied the motion in footnote 2 of the decision:

Respondents' Motion to Strike Prior Violation (Exhibit A) is hereby denied. Respondents are trying to have retroactive effect given to a decision of the California Supreme Court of November 2006. The prior matter in question, Reg. No. 05059331, became final when the time for appeal ran out after the Department's decision, dated October 19, 2006, after Appeals Board decision. (Exhibit 4.)

Appellants cite no authority for giving retroactive effect to the *Quintanar* decision, nor do we believe there is any. Most importantly, however, that prior decision was clearly final on March 26, 2007, when the Department accepted payment from

appellants of a fine in lieu of suspension. Appellants cannot now collaterally attack that decision.²

ORDER

The matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.³

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

²Failure to seek review of an agency's decision will prevent any later challenge to the merits of that decision in a collateral proceeding (*Stockton v. Department of Employment* (1944) 25 Cal.2d 264, 267-268 [153 P.2d 741]; *California Coastal Com. v. Superior Court* (1989) 210 Cal.App.3d 1488, 1493 [258 Cal. Rptr. 567].) This Board rejected similar attempts at collateral attacks in *Circle K Stores, Inc.* (2001) AB-7701, and *Thind* (1999) AB-7139.

³This 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.