

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

AB-8742

File: 20-360202 Reg: 06064567

7-ELEVEN, INC., HARMINDER SINGH NAGRA, and MANJIT KAUR SUNNER,
dba 7-Eleven Store #2133-25194
620 West Ocean Avenue, Lompoc, CA 93436,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

ISSUED FEBRUARY 27, 2009

7-Eleven, Inc., Harminder Singh Nagra, and Manjit Kaur Sunner, doing business as 7-Eleven Store #2133-25194 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 15 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., Harminder Singh Nagra, and Manjit Kaur Sunner, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Julia H. Sullivan, and the Department of Alcoholic Beverage

¹The decision of the Department, dated August 22, 2007, is set forth in the appendix.

Control, appearing through its counsel, Kerry Winters.

PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on July 2, 2002. On December 21, 2006, the Department instituted an accusation against appellants charging that, on November 3, 2006, appellants' clerk, Nancy Chapman (the clerk), sold an alcoholic beverage to 18-year-old Eduardo Martinez. Although not noted in the accusation, Martinez was working as a minor decoy for the Lompoc Police Department and the Department of Alcoholic Beverage Control at the time.

An administrative hearing was held on June 13, 2007, at which time documentary evidence was received, and testimony concerning the sale was presented by Martinez (the decoy) and by Sean Gowing, a Lompoc 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 contentions: (1) The Board should withhold its decision in this case until the California Supreme Court issues its decision in *Morongo Band of Mission Indians v. State Water Resources Control Board* (S15589) (October 22, 2007), now pending on review; (2) the Department lacked screening procedures and a personnel structure adequate to eliminate the appearance of bias by attorneys implicated in the adjudication of this matter; (3) the Department must prove it did not engage in ex parte communications during the adjudication of this matter; and (4) the person acting as a decoy did not display the appearance required by Rule 141(b)(2). Appellants have also filed a motion to augment the record by the addition of any ABC Form 104 and any related documents in the file, and General Order No. 2007-09 and documents relating to any operational or structural modification

of the ABC attorney staff and/or Legal Counsel. In view of the result we reach, we see no need to address this motion.

DISCUSSION

I

Appellants suggest to the Board that it withhold its decision in this matter until the California Supreme Court issues its decision in the pending case of *Morongo Band of Mission Indians v. State Water Resources Control Board* (S155589) (2007), because, say appellants, it involves issues similar to those in this case, and a delay in the Board's decision will result in an economy of resources.

The Board has declined to follow this suggestion in earlier appeals. We believe that, in cases such as this, where we intend to order a remand, delay serves no useful purpose.

II and III

Appellants contend the Department violated 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 *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*) 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 submitted with its brief a declaration signed by Department staff attorney Kerry Winters, who represented the Department at the administrative hearing. In this declaration, Winters states that at no time did she prepare a report of hearing or other document, or speak to any person, regarding this case. In its brief and at oral argument, the Department argued that the Board should accept the declaration as conclusive evidence that the documents requested do not exist.

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*.

The Department argues that it need only include a declaration denying the existence of an ex parte communication for the Appeals Board to rule in its favor. Appellants argue that the declaration is inadequate. We agree with appellants.

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 Department has presented no evidence in this case, or any of the numerous other cases this Board has seen on this issue, that the "standard Department procedure" has changed. 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.² 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.

IV

Appellants contend that the decoy did not display the appearance required by Department Rule 141(b)(2) (4 Cal. Code Regs., §144), i.e., “the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.” They argue that the decoy’s size (5' 11" tall and weighing approximately 160 pounds), combined with his maturity and demeanor gave him an appearance of a person older than 21 years of age. Additionally, appellants point to the fact that the

² The Department has adopted, subsequent to the administrative hearing in this case, General Order No. 2007-09, which effects an operational and structural reorganization of the Department’s legal staff to achieve compliance with the court rulings in the *Quintanar* series of cases. It has no application to this case.

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].)

decoy had attended college, had studied administrative law, and had knowledge of law enforcement procedure.

The administrative law judge (ALJ) considered all of the things that appellants say made the decoy appear to be older than 21, and reached a contrary result. The ALJ wrote (Findings of Fact II-C):

C. The overall appearance of the decoy including his demeanor, his poise, his mannerisms, his size and his physical appearance were consistent with that of a person under the age of twenty-one and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he had a mustache and was approximately fifteen pounds heavier on the day of the hearing.

1. The decoy is a youthful looking male. On the day of the sale, his hair was short, he had no facial hair and he wore no jewelry. His clothing consisted of a black short sleeve shirt, brown cargo shorts and black Adidas tennis shoes. The photograph depicted in Exhibit 3 was taken at the premises on the day of the sale and it shows how the decoy looked and what he was wearing on that day.

2. The decoy testified that he had not participated in any prior decoy operations, that he was enrolled in an administrative law class with Officer Lupo, that Officer Lupo recruited him to be a decoy and that he would like to be involved in law enforcement.

3. The decoy was soft-spoken, he appeared to be nervous while testifying and he testified that he was a little nervous at the premises and while he was testifying at the hearing.

4. The clerk who sold the beer to the decoy did not testify at the hearing.

5. After considering the photograph depicted in Exhibit 3, the overall appearance of the decoy when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance that could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

We agree with the Department that appellants are simply asking the Board to reweigh the evidence and reach a result contrary to that of the ALJ.

We have said many times in the face of similar arguments by other appellants that we do not function as a trier of fact. That is the Department's role. Where there is substantial evidence to support the findings, we will not question them.

ORDER

The decision is affirmed as to the issue involving the decoy's appearance, and the case is remanded to the Department for an evidentiary hearing on the issue involving the claim of ex parte communication.⁴

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

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.