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

**AB-8779**
File: 20-318669 Reg: 07065857

7-ELEVEN, INC., and HERLINDA N. GONZALEZ, dba 7-Eleven No. 2133-26701
1540 Bear Mountain Road, Arvin, CA 93203,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

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

**ISSUED MARCH 19, 2009**

7-Eleven, Inc., and Herlinda N. Gonzalez, doing business as 7-Eleven No. 2133-26701 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control[1] which suspended their license for 15 days, all of which were conditionally stayed for one year, for their clerk, Maria Hinojosa, selling a six-pack of Bud Light beer, an alcoholic beverage, to Whitney Walker, an 18-year-old Department minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellants 7-Eleven, Inc., and Herlinda N. Gonzalez, appearing through their counsel, Ralph B. Saltsman, Stephen W. Solomon, and Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

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[1]The decision of the Department, dated November 29, 2007, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on May 7, 1996. On May 29, 2007, the Department instituted an accusation against appellants charging that, on April 3, 2007, appellants' clerk, Maria Hinojosa (the clerk), sold an alcoholic beverage (beer) to 18-year-old Whitney Walker. Although not noted in the accusation, Walker was working as a minor decoy for the Department at the time.

An administrative hearing was held on September 26, 2007, at which time documentary evidence was received, and testimony concerning the sale was presented by Walker (the decoy) and by Michael Poore, a Department investigator. The evidence established that the decoy was asked neither her age nor for identification before the sale was made. Counsel for the licensee argued that there was no compliance with Department Rule 141(b)(2) (appearance of decoy) and Department Rule 141(b)(5) (face-to-face identification).[2]

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

Appellants filed an appeal making the following contentions: (1) The Department lacked appropriate screening mechanisms ensuring the non-appearance of bias; (2) the Department engaged in improper communications and lacked appropriate screening mechanisms ensuring the non-occurrence of ex parte communications; (3) the administrative record is incomplete; and (4) the administrative law judge failed to address appellant's concerns about the minor decoy's credibility. Appellant has also

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[2] References 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.

filed a motion to augment the record by the addition of any ABC Form 104 and related documents, as well as General Order No. 2007-09 and documents related to operational or structural modifications in the ABC attorney staff and/or Legal Counsel. Finally, appellants urge the Appeals Board to withhold its decision in this matter until the California Supreme Court issues its decision in a pending appeal. Issues 1, 2, and 3 are interrelated, and will be discussed together.

DISCUSSION

I, II, and III

Appellants, in related contentions, contend that the Department lacked the necessary screening to prevent an ex parte communication or bias in the presentation of the record to the Department's decision maker. They do not offer any specific evidence that there was an ex parte communication, but argue that the burden is on the Department to establish the non-existence of any ex parte communication, citing *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 (50 Cal.Rptr.3d 585) (*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. 295] (*Rondon*).

The Department has submitted a declaration of Matthew G. Ainley, the Department attorney who represented the Department at the administrative hearing in this case, in which he denies preparing any report of hearing. The Appeals Board has in prior decisions held that the filing of the declaration, unsupported by evidence of a written policy from which it could conclude that the Department has instituted an effective policy screening the prosecutors from the decision makers and their advisors,

did not satisfy the Department's burden of proof under the cited cases.

The administrative hearing in this case took place on September 26, 2007, one and one-half months after the Department's adoption of General Order No. 2007-09 on August 10, 2007. The Order sets forth changes in the Department's internal operating procedures which the Director of the Department has determined are "the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications," changes which consist of "a reassignment of functions and responsibilities with respect to the review of proposed decisions." The Order, directed to all offices and units of the Department, provides:

> **Background**:
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> In 2006 the California Supreme Court found that the Department's practice of attorneys preparing a report following an administrative hearing, and the Director and his advisors having access to or reviewing that report, violated the Administrative Procedures [*sic*] Act's prohibition against *ex parte* communications. Subsequent cases in the courts of appeal extended the reasoning of the Supreme Court in holding that such a statutory violation continues to exist even if the Department adopted the administrative law judge's proposed decision without change. In addition, the courts of appeal placed the burden on the Department to establish that no improper *ex parte* communication occurred in any given case.
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> **Procedures**:
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> Although the Supreme Court held that a physical separation of functions within the Department is not necessary, in light of subsequent appellate decisions the Director has determined that the most effective approach to addressing the concerns of the courts and to avoid even the appearance of improper communications, a reassignment of functions and responsibilities with respect to the review of proposed decisions is necessary and appropriate.
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> Effective immediately, the following protocols shall be followed with respect to litigated matters:
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> 1. The Department's Legal Unit shall be responsible for litigating administrative cases and shall not be involved in the review of proposed decisions, nor shall the Chief Counsel or Staff Counsel within the Legal Unit advise the Director or any other person in the decision-making chain

of command with regard to proposed decisions.

2. The Administrative Hearing Office shall forward proposed decisions, together with any exhibits, pleadings and other documents or evidence considered by the administrative law judge, to the Hearing and Legal Unit which shall forward them to the Director's Office without legal review or comment.

3. The proposed decision and included documents as identified above shall be maintained at all times in a file separate from any other documents or files maintained by the Department regarding the licensee or applicant. This file shall constitute the official administrative record.

4. The administrative record shall be circulated to the Director via the Headquarters Deputy Division Chief, the Assistant Director for Administration and/or the Chief Deputy Director.

5. The Director and his designees shall act in accordance with Government Code Section 11517, and shall so notify the Hearing and Legal Unit of all decisions made relating to the proposed decision. The Hearing and Legal Unit shall thereafter notify all parties.

6. This General Order supersedes and hereby invalidates any and all policies and/or procedures inconsistent to [*sic*] the foregoing.

The obvious purpose of the Order is to amend the internal operating procedures of the Department that have resulted in more than 100 cases having been remanded to the Department by the Appeals Board for an evidentiary hearing regarding claims of ex parte communications between litigating counsel and the Department's decision makers.[3] Although not identified in the Order, the "appellate decisions" to which it refers undoubtedly include in their numbers the decision by the California Supreme Court in *Quintanar*, *Chevron,* and *Rondon*, *supra*), the case authorities cited by appellants.

The Order effectively answers the question raised in earlier appeals, i.e.,

[3]We understand that these cases were ultimately dismissed by the Department.

whether the Department's long standing practice of having its staff attorneys submit ex parte recommendations in the form of reports of hearing, has been officially changed to comply with the requirements of *Quintanar* and the cases following it. It replaces an earlier, less formal procedure used by the Department to address the problems of ex parte communications, one which the Appeals Board found was not an effective cure for the problem endemic within the Department, with one intended to isolate the Department decision maker from any potential advice or comment from the attorney who litigated the administrative matter, as well as the Department's entire Legal Unit.

Appellants have not affirmatively shown that any ex parte communication took place in this case. Instead, they have relied on the authorities cited above *(Quintanar, supra; Chevron, supra; Rondon, supra*), for their argument that the burden is on the Department to disprove the existence of any ex parte communication.

We are now satisfied, by the Department's adoption of General Order No. 2007-09, that it has met its burden of demonstrating that it operated in accordance with law. Without evidence that the procedure outlined in the Order was disregarded, we believe it would be unreasonable to assume that any ex parte communication occurred.[4]

While the Order does not specifically address the question whether there was an adequate screening procedure to prevent Department attorneys who acted as litigators

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[4] Appellant suggests that the Department "has apparently taken the words of the Court of Appeal in *Morongo* [*Morongo Band of Mission Indians v. State Water Resources Control Board]* to heart by dividing its staff accordingly," and that the Appeals Board "should take the Department's actions as its word." (App. Mot. To Aug., p.5.) We welcome the suggestion, and note that Evidence Code section 664 creates a presumption that the duty required by the General Order was performed. Appellant has not rebutted that presumption.

from advising the Department decision maker in other matters, by its terms it appears to resolve that issue by effectively removing the litigating attorneys from the review process entirely.

Appellant complains that the record is incomplete, lacking the pleadings and order relating to appellant’s motion at the administrative hearing for the production of records relating to decoys over a period of time. (App. Br., p.11-12.) Appellant asserts that it cannot know which parts of the administrative record were before the ultimate decision maker and those which were not. Thus, says appellant, it can only assume that these documents were before the decision maker.

Appellant’s argument, that the omission of pleadings unrelated to the merits from the certified record of the administrative proceeding is a violation of one of the provisions of the General Order, is technically correct, but it does not follow that an ex parte communication necessarily occurred.

The analogy appellant draws between this case and *Circle K Stores* (2007) AB-8597 is inapposite. In *Circle K Stores*, the problem was that certain documents were included in the certified record that were neither pleadings nor documents placed in evidence, and were of a type which could well have offered additional support to the proposed decision. In this case, pleadings unrelated to the merits were omitted from the certified record. The assumption that they may have been available to the decision maker is speculative, and even if true, does not demonstrate that appellant has been prejudiced.

The subject matter of the discovery pleadings dealt with the broader issue of whether the decoy displayed the appearance required by Rule 141(b)(2). Appellant has not raised any issue concerning the decoy’s appearance, nor has appellant raised any

issue relating to any improper denial of discovery.

We are left, then, with the theoretical proposition that the decision maker was improperly influenced in some manner by either the presence or absence from the record it reviewed of documents properly part of the record but unrelated to any substantive claim raised in the appeal. If the missing documents were before the decision maker, where is the prejudice? Even if they were not, the same question must be asked. It is a leap of logic to say that either their presence or absence is evidence of an ex parte communication.

Finally, in light of the result we reach, we see no need to withhold our decision in this matter until the California Supreme Court resolves *Morongo Band of Mission Indians v. State Water Resources Control Board* (rev. granted October 24, 2007, S155589). Similarly, there is no need to augment the record as requested by appellants.

IV

Appellants contend that the administrative law judge (ALJ) abused his discretion by failing to analyze the basis for his conclusions as to the credibility of either party's witnesses. Since appellants called no witnesses, the only issue is whether the ALJ erred in choosing to believe the testimony of the minor decoy, despite the inability of the decoy to remember certain aspects of the sale transaction.

That the transaction took place was established by the testimony of both the decoy and the accompanying Department investigator, Michael Poore.

Poore testified that he followed the decoy into appellants' premises, observed her select a six-pack of Bud Light in bottles, and proceed to the counter. The clerk rang up the sale, asked for an undetermined amount of money, returned change, and the

decoy left the premises with the beer. The decoy was not asked her age or for identification. Poore followed the decoy from the store. The two then returned to the store, where the decoy identified the clerk who made the sale.

The decoy testified that she took beer from the cooler, took it to the counter, paid for it, and left the store. She did not remember whether the clerk said anything, or whether she was asked for her age or for identification. Not surprisingly, she was unable to remember a number of details concerning her store visit. The administrative hearing took place almost six months after the incident.

Appellants argue that the extent of the decoy's lack of recall compels the ALJ to identify specific evidence of the decoy's observed demeanor, manner, or attitude that supports a credibility determination. The ALJ did not do so, and we disagree with appellants that he was required to do so.

We have examined each of the transcript references appellants claim concerned "key facts" (App. Br., p.16) and find none material to the only real issue in this case, i.e., whether there was a sale of an alcoholic beverage to a minor. Appellant presented no witnesses to refute any of the testimony of the investigator and the decoy that the transaction occurred as they described it. Appellants have culled the record for memory lapses of whatever degree of importance, no matter whether they might tend to undermine the basic testimony of the decoy that she purchased beer at appellants' premises. We have taken pains to point out just what these supposed memory deficiencies were.[5] It is readily apparent that they might have some conceivable

[5] RT 31 at 9, 19: decoy could not remember what clerk said or whether she gave her change; RT 32 at 2, 4: decoy could not remember whether she was asked her age or for identification; RT 39 at 25: could not remember whether clerk nodded or smiled; RT 40 at 3, 7, 12, 14, 19-20: could not remember how many people working that day,

relevance to a defense that the transaction never took place, but little else. Needless to say, appellants have never claimed there was no sale.

ORDER

The decision of the Department is affirmed.[6]

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

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whether one or more people were behind counter, how many people were in line, or what brand of beer she bought; RT 41 at 18, 24: did not remember saying anything to clerk or whether anything was said; RT 42 at 2: where investigator was in store while she was at counter; RT 43 at 2: could not remember how many ABC representatives entered store after transaction; RT 44 at 23-24: could not remember whether customers were behind her when she identified clerk; RT 45 at 1: could not remember whether clerk was doing anything at counter when she identified clerk; RT 47 at 16: could not remember waiting before approaching clerk to identify her; and RT 51 at 11: could not remember how many times she had been decoy.

[6] This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.

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