

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Petitioner,

v.

ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD,
Respondent;

DANIEL BECERRIL QUINTANAR,
Real Party in Interest.

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Petitioner,

v.

ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD,
Respondent;

KV MART CO.,
Real Party in Interest.

B177986
(Alcoholic Beverage Control Appeals
Board Case No. AB-8099)

(Alcoholic Beverage Control Appeals
Board Case No. AB-8121)

DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL,
Petitioner,

v.

ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD,
Respondent;

RICHARD LEUN KIM,
Real Party in Interest.

(Alcoholic Beverage Control Appeals
Board Case No. AB-8148)

ORIGINAL PROCEEDINGS; review of decisions of the Alcoholic Beverage Control Appeals Board. Affirmed.

Bill Lockyer, Attorney General, Jacob A. Appelsmith, Senior Assistant Attorney General, Silvia M. Diaz and Graeme E. Sharpe, Deputy Attorneys General, for Petitioner.

No appearance for Respondent.

Solomon, Saltsman & Jamieson, Ralph Barat Saltsman and Stephen Warren Solomon for Real Parties in Interest.

We issued writs of review under Business and Professions Code section 23090 to consider three decisions of the Alcoholic Beverage Control Appeals Board (the Board). In each case, the Board reversed a decision of the Department of Alcoholic Beverage Control (the Department) on the ground the Department violated the accused's due process rights in conducting its administrative proceedings. Both the prosecutor and the decision maker were members of the Department's legal staff. After the administrative hearing, the prosecutor prepared a document called a Report of Hearing which summarizes the evidence and makes a recommendation as to the ultimate outcome. The

decision maker had this report available to him for his review in deciding the matter. The Board found the Department had no procedure in place for screening the decision maker (or an advisor to the decision maker) from communication with the prosecutor about the matter. We agree the Department's failure to separate the prosecutorial function from the adjudicative function created an unacceptable risk of bias and unfairness which violated the accused's due process rights. Accordingly, we affirm the Board's reversals of the Department's decisions in these three consolidated matters.

FACTS AND PROCEEDINGS BELOW

Between May and August 2002, the Department filed accusations against the real parties in interest in these writ proceedings, Daniel Becerril Quintanar, KV Mart Co. and Richard Leun Kim. The Department alleged Quintanar's bartender sold beer to an obviously intoxicated customer, and clerks who worked for KV Mart Co. and Kim both sold an alcoholic beverage to a 19-year-old decoy. The procedural facts of these three matters are identical and are the only facts germane to these writ proceedings. The merits of the Department's decisions are not relevant.

In each matter the Department held an administrative hearing before the same administrative law judge (ALJ). One of the Department's staff attorneys represented the Department at the hearing, acting as the prosecutor. In each case the ALJ issued a proposed decision dismissing the accusation, which the Department rejected pursuant to Government Code section 11517, subdivision (c). The Department's Chief Counsel issued decisions suspending the licenses of Kim, Quintanar and KV Mart Co. for periods of 15, 20 and 25 days, respectively.

After the conclusion of the administrative hearing, but before the Chief Counsel rendered his decision, the Department staff attorney who appeared at the hearing prepared a document called a Report of Hearing and apparently sent it to the Chief Counsel, among others. The Report of Hearing is a form document which the

Department's prosecuting attorney fills out. On the form the attorney summarizes the evidence presented at the hearing and recommends a particular disposition for the case.

Quintanar, KV Mart Co. and Kim separately appealed the Department's adverse decision to the Board. They each contended the Department violated their due process rights because the decision maker -- the Department's Chief Counsel -- was the prosecutor's supervisor and a "biased advocate" rather than a "neutral" decision maker. They also each argued the Department's decision was not supported by substantial evidence. The latter argument is not at issue on appeal.

In connection with their appeals, Quintanar, KV Mart Co. and Kim each filed a motion to augment the record, seeking all documents available to the Chief Counsel at the time he rendered his decision, including the Report of Hearing. In opposition, the Department argued the documents sought are protected by the attorney-client privilege and the work product doctrine and, in any event, the Board does not have the authority to augment the record. The Board granted the motion in each case and ordered the Department to file under seal its Report of Hearing. The Department did not comply with the Board's order and instead sought clarification of the basis for the order.¹ Apparently the Board did not respond to the Department's request for clarification.

The Board held hearings in these three matters on the same date. After taking the matters under submission, the Board reversed the Department's decisions. The Board concluded the Department's failure to screen its decision maker and the decision maker's advisors from communications with its advocates (prosecuting attorneys) deprives an accused of the right to a fair trial by a fair tribunal and constitutes a due process violation. The Board also found the Report of Hearing qualifies as an ex parte communication between a presiding officer (the Department's Chief Counsel) and a party (the

¹ Accordingly the administrative records do not contain copies of the Reports of Hearing prepared by the Department's prosecuting attorneys in these three matters. This court has available for its review only copies of the blank form documents real parties in interest submitted in connection with their motions to augment the record before the Board.

Department's prosecuting attorney) under the California Administrative Procedure Act (APA) and must be made part of the administrative record.

DISCUSSION

The Department contends the Board erred in reversing its decisions because there is nothing improper about a member of its legal staff acting as both a prosecutor and an advisor to the decision maker. We disagree and conclude the manner in which the Department conducts its administrative proceedings violates an accused's due process rights by creating an unacceptable risk of bias and unfairness.²

“[A] ‘fair trial in a fair tribunal is a basic requirement of due process.’ [Citation.] This applies to administrative agencies which adjudicate as well as to courts. [Citation.] Not only is a biased decisionmaker constitutionally unacceptable but ‘our system of law has always endeavored to prevent even the probability of unfairness.’ [Citations.]”³

As the Department correctly points out, the United States and California Supreme Courts have concluded a combination of *investigative* and adjudicative functions within an administrative agency does not necessarily constitute a due process violation unless the special facts and circumstances of the particular case demonstrate “the risk of unfairness is intolerably high.”⁴ While cases such as *Withrow v. Larkin* and *Kloepfer v.*

² The Board's scope of review of the Department's decisions is “limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record.” (Cal. Const, art. XX, § 22.) The scope of our review is the same. (Bus. & Prof. Code, § 23090.2.) In this case, we are asked to determine only whether the Department proceeded in the manner required by law.

³ *Withrow v. Larkin* (1975) 421 U.S. 35, 46-47.

⁴ *Withrow v. Larkin, supra*, 421 U.S. at pages 55, 58 (“The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the [medical examining] Board members at a later adversary hearing”); *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 835

Commission on Judicial Performance are an appropriate starting point for our analysis, they do not answer the question whether the Department’s conflation of *prosecutorial* and adjudicative functions is a violation of due process rights.

California appellate courts have addressed this issue in contexts similar to that presented here. *Howitt v. Superior Court*,⁵ for example, involved proceedings before a county employment appeals board concerning a deputy sheriff’s transfer and suspension without pay. The same deputy county counsel who represented the sheriff’s department at the hearing also advised the board at the hearing “and throughout the decisionmaking process” and prepared the board’s written decision.⁶ The employee unsuccessfully petitioned the trial court for a writ of mandate after the county counsel’s office denied his request to disqualify itself from advising the board.

The Court of Appeal found “[a] more difficult question [than that addressed in *Withrow* or *Kloepfer*] is presented where the administrative agency chooses to utilize the adversary model in large part but modifies it in a way which raises questions about the fairness of the resulting procedure.”⁷ The court stated the role of advocate “is inconsistent with true objectivity, a constitutionally necessary characteristic of an adjudicator.”⁸ The court concluded the same law office may perform the roles of both advocate and advisor to the decision maker only where the latter “is screened from any inappropriate contact” with the former.⁹ The court explained the administrative agency bears the burden of demonstrating it has proper screening procedures in place. The court denied the employee’s writ petition without prejudice in order to allow the county

(“That during the course of the initial investigation or thereafter the Commission may become aware of the reports regarding the investigation is not a sufficient basis for believing that either the Commission or this court is not, or cannot be, an impartial decision maker”).

⁵ *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575.

⁶ *Howitt v. Superior Court, supra*, 3 Cal.App.4th at page 1578.

⁷ *Howitt v. Superior Court, supra*, 3 Cal.App.4th at page 1581.

⁸ *Howitt v. Superior Court, supra*, 3 Cal.App.4th at page 1585.

⁹ *Howitt v. Superior Court, supra*, 3 Cal.App.4th at page 1586.

counsel's office an opportunity to demonstrate whether it had such screening procedures in place at the time of the employee's administrative hearing.¹⁰

More recently, in *Nightlife Partners, Ltd. v. City of Beverly Hills*, the Court of Appeal held the owners and operators of a cabaret who challenged the city's denial of their permit application in an administrative appeal did not receive a hearing which satisfied "minimum constitutional standards of due process."¹¹ At the time petitioners were pursuing their administrative remedies, they also were involved in federal litigation with the city concerning the city's regulation of adult entertainment. The assistant city attorney was one of the attorneys litigating the federal lawsuit on the city's behalf.¹² The assistant city attorney also engaged in a written debate with petitioners concerning whether their application for a renewal permit was complete. Ultimately the city refused to consider petitioners' allegedly incomplete application, and the city's finance director sent petitioners a letter denying the application.¹³ The assistant city attorney also acted as an advisor to the city's risk manager (an attorney) when the latter served as presiding officer at a hearing on petitioners' administrative appeal. The two men sat next to each other at the hearing and "conferred from time to time, apparently in connection with evidentiary rulings and legal issues."¹⁴ The city hired other counsel to serve as its advocate at the hearing. The city's risk manager issued a decision denying petitioners' administrative appeal. Petitioners sought a writ of mandate from the trial court, which

¹⁰ *Howitt v. Superior Court, supra*, 3 Cal.App.4th at page 1587.

¹¹ *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 86.

¹² *Nightlife Partners, Ltd. v. City of Beverly Hills, supra*, 108 Cal.App.4th at page 84.

¹³ *Nightlife Partners, Ltd. v. City of Beverly Hills, supra*, 108 Cal.App.4th at page 84.

¹⁴ *Nightlife Partners, Ltd. v. City of Beverly Hills, supra*, 108 Cal.App.4th at page 85.

the court granted on the ground the city violated petitioners' due process rights during the course of the administrative proceedings.¹⁵

The Court of Appeal used the APA as a starting point for its analysis even though the City, as a local agency, is not bound by the APA. The court noted “[o]ne of the basic tenets of the California APA . . . is that, to promote both the appearance of fairness and the absence of even a probability of outside influence on administrative hearings, the *prosecutory* and, to a lesser extent, investigatory, aspects of administrative matters must be adequately separated from the adjudicatory function.”¹⁶ The court concluded “[t]here was a clear *appearance* of unfairness and bias” which violated petitioners' right to due process: an “objectionable overlapping of the role of advocate and decision maker occurred when [the assistant city attorney] acted as both an advocate of City's position and as adviser to the supposedly neutral decision maker. It is true that the official role of City's advocate during the *review* of City's decision to deny the application was filled by [other counsel], not [the assistant city attorney]. However, [the assistant city attorney] had been City's advocate in connection with the decision to deny the application. Thus, [the assistant city attorney]'s presence as [the risk manager]'s advisor was the equivalent of trial counsel acting as an appellate court's advisor during the appellate court's review of the propriety of a lower court's judgment in favor of that counsel's client.”¹⁷ Accordingly, the Court of Appeal affirmed the trial court's order granting the petition for writ of mandate.¹⁸

¹⁵ *Nightlife Partners, Ltd. v. City of Beverly Hills, supra*, 108 Cal.App.4th at pages 85-86.

¹⁶ *Nightlife Partners, Ltd. v. City of Beverly Hills, supra*, 108 Cal.App.4th at page 91.

¹⁷ *Nightlife Partners, Ltd. v. City of Beverly Hills, supra*, 108 Cal.App.4th at page 94.

¹⁸ See also *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 816 (probability of actual bias demonstrated where deputy city attorney who represented the city before the personnel board previously acted as the board's advisor in other matters).

Following the rationale outlined in *Howitt* and *Nightlife Partners*, we conclude the Department creates an unacceptable risk of bias and unfairness which violates an accused's right to due process where a member of the Department's legal staff, who acts as the prosecuting attorney at the administrative hearing, prepares a Report of Hearing recommending a particular outcome and sends that report to the Department's Chief Counsel (the decision maker).¹⁹ The Department's representative at the administrative hearing inappropriately assumes the dual roles of prosecuting attorney and advisor to the decision maker. We hold the Department must institute screening procedures to prevent communications between the prosecutor and the decision maker (or an advisor to the decision maker) about a pending matter. Accordingly, the prosecuting attorney may not transmit a Report of Hearing to the decision maker or an advisor to the decision maker while the administrative proceeding is pending. Moreover, the Report of Hearing must not be included in the record or file the Department's decision maker (or an advisor to the decision maker) reviews before rendering a decision.

The Department argues *Howitt* and *Nightlife Partners* are not applicable here because they involve local (as opposed to state) agencies which are not bound by the APA. The Department does not explain why the APA would compel a different result under the facts of this case. The APA certainly does not sanction violations of an accused's *constitutional* due process rights.

The Department further argues *Howitt* and *Nightlife Partners* are distinguishable because the intermingling of prosecutorial and adjudicative functions occurred at a different step in the administrative process. In *Howitt*, the deputy county counsel who

¹⁹ We note there are some older California appellate court decisions which concluded members of an administrative agency's staff may serve in both a prosecutorial and adjudicative capacity. See *Chosick v. Reilly* (1954) 125 Cal.App.2d 334, 337-338; *Ford v. Civil Service Commission of the County of Los Angeles* (1958) 161 Cal.App.2d 692, 697; *Greer v. Board of Education of Santa Rosa City School District* (1975) 47 Cal.App.3d 98, 119-120. Neither the parties nor the Board cited these decisions in the present matters. We do not find these decisions helpful to the Department's cause as they were rendered before the United States Supreme Court decided *Withrow* and clarified the due process principles applicable in the administrative agency context.

represented the sheriff's department at the hearing before the appeals board also acted as an advisor to the appeals board. In *Nightlife Partners*, an assistant city attorney who participated in the decision to deny petitioner's permit application also acted as an advisor to the presiding officer at the hearing on petitioner's administrative appeal.

We believe the communication between the prosecutor and the decision maker in this case occurred at the most critical stage of the proceedings. The Department says this communication was irrelevant because it took place after the hearing. What the Department's analysis ignores is the fact, after the hearing, the ALJ issues only a *proposed* decision which the Department is free to accept or reject. The Department's Chief Counsel is the ultimate decision maker. The Board undertakes only a limited review of the Department's decision. Thus, the prosecutor communicated with (and in effect advised) the decision maker about the substance of the matter while that decision maker was deciding the case.

There is no reason for this court to hold (as the Board did) the Report of Hearing must be made part of the administrative record. Based on our imposition of screening requirements, a Department prosecuting attorney will no longer be permitted to transmit a Report of Hearing to the Department's decision maker or any advisor to the decision maker while the administrative proceeding is pending. Moreover, the Report of Hearing will not be included in the record or file the decision maker (or an advisor to the decision maker) reviews before rendering a decision.

DISPOSITION

The Board's reversals of the Department's decisions are affirmed. The parties are to bear their own costs in these writ proceedings.

CERTIFIED FOR PUBLICATION

JOHNSON, J.

We concur:

PERLUSS, P.J.

ZELON, J.