

Filed 4/13/05

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)

ORDER MODIFYING OPINION
AND DENYING REHEARING
[no change in the judgment]

(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)

It is ordered that the opinion filed herein on March 15, 2005 is modified in the following particulars:

1. On page three, delete the entire second sentence of the first paragraph, which begins “Both the prosecutor.”
2. On page three, in the third sentence of the first paragraph (which becomes the second sentence after the preceding modification is made), which begins “After the administrative hearing,” add the word “Department’s” before the word “prosecutor.” As modified, the sentence reads, “After the administrative hearing, the Department’s prosecutor prepared a document called a Report of Hearing which summarizes the evidence and makes a recommendation as to the ultimate outcome.”
3. On page four, in the first full sentence, delete the first phrase which reads “The Department’s Chief Counsel,” and replace it with “The Department.” In the same sentence, after the word “decisions,” add a comma and then the phrase, “certified by Matthew D. Botting, its Chief Counsel” and then another comma. As modified, the sentence reads, “The Department issued decisions, certified by Matthew D. Botting, its Chief Counsel, suspending the licenses of Kim, Quintanar and KV Mart Co. for periods of 15, 20 and 25 days, respectively.”

4. On page four, in the first sentence of the first full paragraph, which begins “After the conclusion of,” delete the words “Chief Counsel” the first time they appear in the sentence and replace these words with “Department.” Do not delete or replace the words “Chief Counsel” the second time they appear in that sentence. In the same sentence delete the word “his,” which appears after the word “rendered” and replace it with “its.” At the end of that same sentence add a comma and the phrase “and placed a copy of the report in the file for the particular matter.” As modified, the sentence reads, “After the conclusion of the administrative hearing, but before the Department rendered its 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, and placed a copy of the report in the file for the particular matter.”

5. On page four, at the end of the second sentence of the second full paragraph, add a footnote, stating: “Both below and in these writ proceedings, real parties in interest have claimed the Department’s Chief Counsel was the Department’s decision maker in these three matters.”

6. On page five, at the end of the first full paragraph, just before the “DISCUSSION” section, add a footnote, stating: “In each of the three written decisions at issue here, the Board stated: ‘The Department does not deny that Botting [the Department’s Chief Counsel] made the Department’s decision in this case; indeed, in oral argument before this Board, the Department conceded that Botting was the decision-maker, that duty being informally delegated to him by the Director of the Department.’ In its three writ petitions, the Department acknowledged the Board found the Department’s Chief Counsel was the decision maker. The Department did not specifically dispute this in the writ petitions or identify someone else who was the decision maker. At oral argument before this court, however, counsel for the Department asserted (apparently for the first time) the Department’s Director was its decision maker. Whether this latter assertion is

true is not material to our resolution of the issues in these writ proceedings.

Assuming the Director was the decision maker, the Chief Counsel, who certified the Department's decision, would certainly qualify as an advisor to the decision maker for purposes of our analysis."

7. On page nine, in the first sentence of the first full paragraph, which begins "Following the rationale," after the phrase "prepares a Report of Hearing recommending a particular outcome and sends that report," add a comma and the phrase "or makes that report available," and then another comma. In the same sentence delete the words "Chief Counsel" and replace them with "decision maker." In the parentheses at the end of the sentence, delete the words "the decision maker" and replace them with "or an advisor to the decision maker." As modified, the sentence reads, "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, or makes that report available, to the Department's decision maker (or an advisor to the decision maker)."

8. On page 10, in the third sentence of the second full paragraph, after the words "The Department's Chief Counsel" (the first words in the sentence), add the words "or Director" in parentheses. As modified, this sentence reads, "The Department's Chief Counsel (or Director) is the ultimate decision maker."

This modification does not result in a change in the judgment.

The petition for rehearing is denied.

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PERLUSS, P.J.

JOHNSON, J.

ZELON, J.