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Ogden on Rondon v. Alcoholic Beverage Control Appeals Board

2008 Emerging Issues 1961

Ogden on Rondon v. Alcoholic Beverage Control Appeals Board

By Gregory L. Ogden

February 28, 2008

SUMMARY: The Sixth District Court of Appeal holds that an ex parte communication (i.e. prosecutors hearing report) violated the California Administrative Procedures Act where the report was given to the department decision maker prior to the time the decision maker decided whether or not to adopt the proposed decision of the administrative law judge.

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ARTICLE: California Sixth District Court of Appeal Enforces Ex Parte Communications Ban in California APA

Background. In Rondon v. Alcoholic Beverage Control Appeals Board (2007) 151 Cal. App. 4th 1274, 60 Cal. Rptr. 3d 295, the California Sixth District Court of Appeal held that the Department of Alcoholic Beverage Control violated provisions of the California Administrative Procedures Act (APA) [*Gov. Code § 11430.10*] because the Department allowed its decision makers to have access to a prosecuting attorney's reports of hearings prior to the time the decision maker decided whether or not to adopt the proposed decision of the administrative law judge. These hearing reports were not part of the administrative record in the case, and allowing the decision maker access to the reports resulted in extra-record information being considered by the decision maker, in violation of the administrative law principle that the agency record provides the exclusive basis for the decision. The court in Rondon relied on the decision of the California Supreme Court in the Quintenar case *[Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 4-6, 50 Cal. Rptr. 3d 585, 145 P. 3d 462*] In Quintenar, the California Supreme Court held that the Department of Alcoholic Beverage Control violated the ex parte communications provisions of the APA by following the practice of having the department prosecutor prepare a hearing report after the hearing and issuance of a proposed decision by the Administrative Law Judge and then submitting that report to the chief counsel of the Department before a final decision was reached by the director of the Department in that case [see Quintenar for an expert commentary on this decision].

In Rondon, the Sixth District Court of Appeal held that the prosecutor's hearing report was an ex parte communication and that providing access to that report by the Department decision maker violated a specific provision of the APA [*Gov. Code § 11430.10*] even though the Department adopted the proposed decision of the administrative law judge revoking Rondon's retail on-sale beer and wine license. The court also held that the prosecutor's hearing report was extra-record information that violated the administrative law principal that the decision of the administrative

agency has to be based on the evidence in the record for decision, not on information outside the record [citing *LaPrade v. Department of Water & Power (1945) 27 Cal. 2d 47, 51-52, 162 P. 2d 13*, and *English v. City of Long Beach (1950) 35 Cal. 2d 155, 158, 217 P. 2d 22]*. The court also decided that no showing of prejudice was required to justify reversal of the Department decision revoking Rondon's license to sell beer and wine. Finally the court allowed the introduction of extra record evidence at the appeal stage on the issue whether the prosecutor's hearing report was distributed or made available to the decision maker.

Admitting Extra Record Evidence on Appeal. In deciding this matter, the Sixth District Court of Appeal first had to determine whether there was evidentiary support for the claim that the decision maker had access to the prosecuting attorneys hearing reports. The licensee, Rondon, claimed that the prosecutor provided a hearing report to the department decision maker. However, in his petition for review, Rondon initially failed to provide a declaration or any other evidentiary support for his claim. Rondon moved at the administrative appeal stage to augment the record to allow the introduction of the hearing report, but the board denied that motion. In opposition to Rondon's petition, the Department provided a declaration prepared by the supervisor of the hearing and legal unit. The supervisor denied the claim that the prosecutor's hearing report was in the case file. The supervisor also stated that he instructed Department staff attorneys not to send hearing reports to decision makers, and instructed the hearing and legal unit staff to return hearing reports received by mistake back to the attorney who prepared the report. Finally, the supervisor alleged on information and belief that the attorney who prosecuted the case did not communicate with the decision maker.

Rondon challenged the adequacy of the Supervisors' declaration, and provided declarations of three current or former Department prosecuting attorneys. The declarations stated that they had prepared hearing reports in other cases, that they were not responsible for distribution of the hearing reports, it was done by other staff at the regional office, and that at least in one case, the hearing report was sent to the hearing and legal unit at Department Headquarters in Sacramento. Rondon argued that the Department had failed to adopt adequate screening procedures to make certain that Department decision makers did not receive or have access to prosecutor's hearing reports.

The Sixth District Court of Appeal held that it was proper to allow consideration of extra record evidence on this issue, whether or not the administrative hearing was conducted in a procedurally fair manner notwithstanding the requirement of a decision on the record, since this evidence was not offered to undercut the substantive fact findings of the Department in the decision revoking Rondon's license. In allowing the extra record evidence on this issue, the court relied on the Quintenar case *[Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 4-6, 50 Cal. Rptr. 3d 585, 145 P. 3d 462]*. On the merits of the issue, the court concluded that the evidence did not prove that the Department distributed or made available the hearing report to the decision maker in Rondon's case, and the Department did not stipulate that the decision maker had access to the report. This issue was disputed. However, the court ruled against the Department, based upon the Department's past practice of providing these reports to decision makers as the Department admitted in the Quintenar case *[Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 4-6, 50 Cal. Rptr. 3d 585, 145 P. 3d 462*], and based on the inadequacy of the supervisor's declaration, which provided only second hand information and belief that there was no access, and on the absence of a declaration from the prosecuting attorney or the decision maker denying that the hearing report was provided to the decision maker.

The Sixth District Court of Appeal concluded that the Department had the burden of showing adequate screening [citing *Howitt v. Superior Court (1992) 3 Cal. App. 4th 1575, 1587, 5 Cal. Rptr. 2d 196* (screening of advisor to decision maker in county counsel's office from advocate in same office required to provide fair administrative hearing to sheriff's department employee challenging suspension form employment)], and that it had employed an affective ethical wall in Rondon's case, to prevent the decision maker from using or having access to the prosecutor's hearing report. The Department failed to meet the burden of showing that it did not provide the hearing report to the decision maker, and the evidentiary record did not eliminate that possibility of access. The Department had to disprove access, which it did not do. The Department was given the opportunity to, and did not provide sufficient evidence disproving access, such as a declaration from the decision maker, or the prosecuting attorney in Rondon's case. Thus, the Sixth District Court of Appeal made a factual assumption that the Department decision maker did have access to the

prosecutor's hearing report in Rondon's case.

Purposes Under The California APA for Banning Ex Parte Communications Provisions. The ban on ex parte communications under the California Administrative Procedure Act (APA) applies to pending adjudicative proceedings under the APA and prohibits communications, direct or indirect, regarding any issue in the proceeding, to the presiding officer from insiders (employees or representatives of an agency that is a party to the proceeding) or outsiders (an interested person outside the agency) without notice and opportunity for all parties to participate in the communication [*Gov. Code § 11430.10(a)*]. The ban does not apply to communications made on the record at the hearing [*Gov. Code § 11430.10(b)*]. The ban starts either from the issuance of the agency's pleading, or from an application for an agency decisions, whichever is earlier [*Gov. Code § 11430.10(c)*].

There are several purposes to ex parte communication bans, including the requirement that the decision in the pending case be based exclusively on the record in the agency proceeding [*Gov. Code § 11425.10(a)(6)* (agency adjudicative decision must be based on the record); *Gov. Code § 11425.50(c)* (factual basis for decision must be based exclusively on the evidence in the record, or officially noticed facts)]. Without the ban, ex parte communications could influence the presiding officer but not be placed in the record of the proceeding.

Second, the ban ensures that adversary communications are made in circumstances that allow the opposing advocate to hear and respond to the communication, and to rebut the substance of the communication in front of the presiding officer [see *Matthew Zaheri Corp. v. New Motor Vehicle Bd (1997) 55 Cal. App. 4th 1305, 64 Cal. Rptr. 2d 705* (ex parte communications to ALJ related to fear for safety of counsel should have been disclosed but did not justify reversal of decision)]. The ban is crucial to a fair hearing when the communications relate to the disputed issues in the administrative hearing, as the prosecutor's hearing report did in Qunitenar and Rondon, and the similar case of *Chevron Stations Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 57 Cal. Rptr. 3d 6.*

Third, in administrative law proceedings, it is common for agencies to communicate with those parties regulated by the agency in the rulemaking setting, and this ban on interested outsider communications makes clear that such communications are improper in administrative adjudications.

Fourth, the ban on insider ex parte communications helps to enforce an internal separation of functions requirements [*Gov. Code § 11425.10(a)(4)* (agency adjudicative functions separated from advocacy, prosecution, and investigative function); *Gov. Code § 11425.30* (presiding officers can not adjudicate in agency proceedings if they have served in advocacy, investigative, or prosecutorial roles in the same matter, or they are subject to supervision of an agency employee with those responsibilities; *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 4-6, 50 Cal. Rptr. 3d 585, 145 P. 3d 462].*

The purpose of internal separation of functions is to protect the impartiality of the agency adjudication process so that advocates, who often work for the same agency as the ALJ, do not unfairly influence the outcome of the agency proceeding or do not get a second chance at influencing the agency decision maker *[Chevron Stations Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 121, 57 Cal. Rptr.3d 6* (prosecutor's ex parte report of hearing sent to department decision maker violated APA ban on ex parte communications; department decision reversed; no showing of prejudice required to justify reversal on the merits of the decision)].

Import of Rondon Decision. The Rondon decision is one of three recent California court opinions deciding ex parte communications questions under the California APA [for expert commentary on these related cases, see *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 50 Cal. Rptr. 3d 585, 145 P. 3d 462; Chevron Stations Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 57 Cal. Rptr.3d 6].*

The Rondon decision is important because it clarified two questions in ex parte communications challenges under the California APA.

First, the ex parte communication violated the California APA regardless of whether the department decision maker rejected or adopted the proposed decision of the administrative law judge. Essentially, what this means is that the challenger does not have to show prejudice from the violation to win on appeal, and the normal rule in appellate practice of harmless error [see *FRCP Rule 61* (harmless error)] does not apply to ex parte communications violations. The usual appellate rule is that an appealing party has to show prejudice from a legal error to convince the appellate court to reverse the judgment or decision of the trial court or agency whose action is being appealed. Requiring proof of prejudice caused by legal error makes it more difficult for an appealing party to obtain a reversal of the trial court judgment or agency. Conversely, if the appellant does not have to show prejudice, then it is much easier to obtain a reversal in the same circumstances. An additional reason given in the Rondon decision was that the exclusive record for decision principle would be considered meaningless if the ex parte communication violation did not lead to reversal of the agency decision.

Second, once the challenger offered evidence of an APA ex parte communications violation, the agency decision maker had the responsibility of showing not only that there was no ex parte communications violation but also that the agency decision maker did not have access to the prosecutor's hearing report. The Department was unable to make that type of showing in this case. This is significant because it is uncommon in appellate practice for extra record information to be allowed into the record on appeal. The Sixth District Court of Appeal allowed evidence that was not part of the agency record to be considered because the evidence related to the issue of whether there were ex parte communications violations in this case. The court would not have allowed extra record evidence related to the merits of the decision being reviewed. The court relied upon the concept of screening agency decision makers from agency prosecutors in a unitary agency with both prosecution and decision making responsibilities in the same agency. Screening requires that advocates and decision makers, or advisors to decision makers do not communicate about the merits of the case, and that decision makers do not have access to the prosecutor's hearing report. Compare this case to *Chevron Stations Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 121, 57 Cal. Rptr.3d 6,* where the appellate court would not permit the agency decision maker to offer rebuttal evidence for the first time on judicial review.

Scope of Ex Parte Communication Ban and Remedies. The ban on ex parte communications under the California APA applies not only to presiding officers, but also to agency heads, who are decision makers [*Gov. Code § 11430.70(a)*]. The ban does not apply to certain types of communications [*Gov. Code §§ 11430.20, 11430.30*]. These include ex parte matters authorized by statute [*Gov. Code § 11430.20(a)*], procedure or practice matters, including continuances, that are not in controversy [*Gov. Code § 11430.20(b)*], technical assistance or advice given to the presiding officer by agency staff that has not participated in the proceeding as an advocate, investigator, or prosecutor [*Gov. Code § 11430.30(a)*], and communications to the presiding officer related to settlement proposals [Gov. Code § 11430.30(b)]. Remedies for violations include disclosure on the record by the presiding officer of the substance of the ex parte communication [*Gov. Code § 11430.50*], disqualification of the presiding officer [*Gov. Code § 11430.60*], and as noted in the California Supreme court decision, above, another remedy can be reversal of the agency decision on the merits.

For further discussion of the prohibition of ex parte communications in public administrative actions, see California Forms of Pleading and Practice § 473.28.

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ABOUT THE AUTHOR(S):

Gregory L. Ogden is a professor of law at Pepperdine University where he has taught since 1978. He teaches administrative law, civil procedure, professional responsibility, and remedies. He is a graduate of UCLA, (BA, cum laude) UC Davis school of Law (JD, Law Review Editor), and he has two LLM's, one from Temple University in legal

education, and one from Columbia University in administrative law. He has been an administrative law consultant to the Administrative Conference of the United States, and to the California Law Revision Commission. He has taught administrative law for over 25 years, and was the principal author of California Public Agency Practice, (three volumes, Matthew, Bender & Co., Inc. 1989), and California Public Administrative Law (two volumes in California Forms of Pleading and Practice, (LexisNexis Matthew Bender), the leading treatise on California administrative law. In fall 2005, He completed a major revision of a State Administrative Law in California chapter (200 pages) for a multi volume treatise on California Environmental Law and Land Use Practice (LexisNexis Matthew Bender). He has authored several articles in the administrative law field, including most recently the following article in the Journal of the NAALJ: Ogden, Gregory L., "The Role of Demeanor Evidence in Determining Credibility of Witnesses in Fact Finding: The Views of ALJ's," 20 Journal of NAALJ 1 (2000). Professor Ogden was the 1999 NAALJ Fellowship recipient, and he presented his fellowship paper on demeanor evidence at the 1999 NAALJ Conference in Asheville, North Carolina.

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Ogden on Chevron Stations, Inc. v. Alcoholic Beverage Control Appeals Board

2008 Emerging Issues 1960

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By Gregory L. Ogden

February 28, 2008

SUMMARY: The Third District Court of Appeal holds that an ex parte communication (i.e. prosecutors hearing report) violated the California Administrative Procedures Act where the report was given to the department decision maker prior to the time the decision maker decided whether or not to adopt the proposed decision of the administrative law judge.

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ARTICLE: California Third District Court of Appeal Enforces Ex Parte Communications Ban in California APA

Background. In *Chevron Stations Inc. v. Alcoholic Beverage Control Appeals Board (2007) 149 Cal. App. 4th 116, 57 Cal. Rptr. 3d 6,* the California Court of Appeal for the Third District holds the Department of Alcoholic Beverage Control violated provisions of the California Administrative Procedures Act (APA) [*see Gov. Code § 11430.10*] because the Department prosecutor sent an ex parte communication (prosecutor's hearing report) to the department decision maker prior to the time the decision maker decided whether or not to adopt the proposed decision of the administrative law judge. The Court of Appeal relied on the decision of the California Supreme Court in the *Quintenar* case [*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 50 Cal. Rptr. 3d 585, 145 P.3d 462].* In *Quintenar,* the California Supreme Court held that the Department of Alcoholic Beverage Control violated the ex parte communications provisions of the California Administrative Procedures Act by following the practice of having the department prosecutor prepare a hearing report after the hearing and issuance of a proposed decision by the Administrative Law Judge and then submitting that report to the chief counsel of the Department before a final decision was reached by the director of the Department in that case [*see* Quintenar for an expert commentary on that decision].

In *Chevron,* The Third District Court of Appeal holds that the ex parte communication violated the California Administrative Procedures Act even though the Department adopted the proposed decision of the administrative law judge. The Court of Appeal also holds that the licensee established a prima facie case of a violation of the ex parte communications prohibition of *Gov. Code §§ 11430.10* to *11430.70.* Once that showing was made, the Department had the burden of proof to justify the department's practices under the APA, and the department failed to meet that burden of proof before the Board. The court rejected the department's efforts to make this showing for the first time on appeal. A first showing on appeal violates exhaustion of administrative remedies requirements, as well as the requirement that the

appellate court review the agency decision based on the administrative record before the agency decision maker.

Purposes Under The California APA for Banning Ex Parte Communications Provisions. The ban on ex parte communications under the California Administrative Procedure Act applies to pending adjudicative proceedings under the APA and prohibits communications, direct or indirect, regarding any issue in the proceeding, to the presiding officer from insiders (employees or representatives of an agency that is a party to the proceeding) or outsiders (an interested person outside the agency) without notice and opportunity for all parties to participate in the communication [*Gov. Code § 11430.10(a)*]. The ban does not apply to communications made on the record at the hearing [*Gov. Code § 11430.10(b)*]. The ban starts either from the issuance of the agency's pleading, or from an application for an agency decisions, whichever is earlier [*Gov. Code § 11430.10(c)*].

There are several purposes to ex parte communication bans, including the requirement that the decision in the pending case be based exclusively on the record in the agency proceeding [*Gov. Code § 11425.10(a)(6)* (agency adjudicative decision must be based on the record), *Gov. Code § 11425.50(c)* (factual basis for decision must be based exclusively on the evidence in the record, or officially noticed facts)]. Without the ban, ex parte communications could influence the presiding officer but not be placed in the record of the proceeding.

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Third, in administrative law proceedings, it is common for agencies to communicate with those parties regulated by the agency in the rulemaking setting, and this ban on interested outsider communications makes clear that such communications are improper in administrative adjudications.

Fourth, the ban on insider ex parte communications helps to enforce an internal separation of functions requirements [*Gov. Code § 11425.10(a)(4)* (agency adjudicative functions separated from advocacy, prosecution, and investigative function); *Gov. Code § 11425.30* (presiding officers can not adjudicate in agency proceedings if they have served in advocacy, investigative, or prosecutorial roles in the same matter, or they are subject to supervision of an agency employee with those responsibilities); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 4-6, 50 Cal. Rptr. 3d 585, 145 P. 3d 462]*. The purpose of internal separation of functions is to protect the impartiality of the agency adjudication process so that advocates, who often work for the same agency as the ALJ, do not unfairly influence the outcome of the agency proceeding, or do not get a second chance at influencing the agency decision maker [*see also Rondon v. Alcoholic Beverage Control Appeals Board (2007) 151 Cal. App. 4th 1274, 60 Cal. Rptr. 3d 295* (prosecutor's ex parte report of hearing sent to department decision maker violated APA ban on ex parte communications; department decision reversed, no showing of prejudice required to justify reversal on the merits of the decision)].

Import of *Chevron* Decision. The *Chevron* decision is one of three recent California court opinions deciding ex parte communications questions under the California APA [for expert commentary on these related cases, *see Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board (2006) 40 Cal. 4th 1, 50 Cal. Rptr. 3d 585, 145 P. 3d 462; Rondon v. Alcoholic Beverage Control Appeals Board (2007) 151 Cal. App. 4th 1274, 60 Cal. Rptr. 3d 295]*.

The *Chevron* decision is important because it clarified three questions in ex parte communications challenges under the California APA.

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challenger does not have to show prejudice from the violation to win on appeal, and the normal rule in appellate practice of harmless error [see *FRCP Rule 61* (harmless error)] does not apply to ex parte communications violations. The usual appellate rule is that an appealing party has to show prejudice from a legal error to convince the appellate court to reverse the judgment or decision of the trial court or agency whose action is being appealed. Requiring proof of prejudice caused by legal error makes it more difficult for an appealing party to obtain a reversal of the trial court judgment or agency. Conversely, if the appellant does not have to show prejudice, then it is much easier to obtain a reversal in the same circumstances.

Second, once the challenger established a prima facie case of an APA ex parte communications violation, then the burden of proof shifted to the agency decision maker to show that there was no ex parte communications violation. The Department was unable to make that type of showing in this case. This is significant because it is uncommon in appellate practice for burden of proof requirements to shift from the appealing party (the challenger licensee in this case) to the responding party. It is even less common in administrative law appeals based on an agency administrative record when the responding party is the agency decision maker. Burden of proof shifting is much more common in trial court or equivalent agency process in which the rules of evidence permit the use of presumptions, allow prima facie case showings, and permit burden shifting. An agency that is subject to burden shifting in similar circumstances would have to anticipate this issue in time to get the rebuttal information into the administrative record, which did not happen in this case.

Third, the agency decision maker could not offer rebuttal evidence for the first time on judicial review because appellate review of the decision is limited to material that was part of the administrative record before the Board, and this evidence was not submitted to the board, and was not included in the administrative record. The requirement of a decision on the record is a procedural safeguard, and the requirement that the evidence be presented at the leave of Board review is designed to satisfy exhaustion of administrative remedies requirements, that the Board be given the opportunity to consider this evidence, and make a ruling on the issue. This would have given the Board the opportunity to correct a mistake, and make a ruling that might have avoided the need for an appeal.

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