

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

AB-8247

File: 20-284701 Reg: 03055135

CIRCLE K STORES, INC. dba Circle K Store #2986
3110 Roosevelt Street, Carlsbad, CA 92008,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 5, 2005
Los Angeles, CA

ISSUED JUNE 30, 2005

Circle K Stores, Inc., doing business as Circle K Store #2986 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk, Nikki Pimental, having sold a 12-pack of Heineken beer to Bryan J. Mason, a 19-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1993. On June 16, 2003, the Department instituted an accusation against appellant charging the

¹The decision of the Department, dated February 5, 2004, is set forth in the appendix.

sale of an alcoholic beverage to a minor on October 11, 2002.

An administrative hearing was held on October 23, 2003, at which time oral and documentary evidence was received. Bryan J. Mason, the minor, and Kimberly Wachowski, a Department investigator, described the events which took place during the sale transaction at issue. Brett M. Rowe, retail territory supervisor for Conoco-Phillips, appellant's parent corporation, testified about training provided to Circle K employees with respect to the sale of alcoholic beverages.

Subsequent to the hearing, the Department issued its decision which determined that the transaction had occurred as alleged in the accusation, and that appellant had not established a defense under Business and Professions Code section 25660.

Appellant has filed a timely notice of appeal. In its appeal, appellant contends that a defense was established under Business and Professions Code section 25660. Appellant has also filed a Motion to Augment Record, requesting that a document entitled "Report of Hearing" be included in the administrative record, and has asserted that the Department violated its due process rights when the attorney who represented the Department at the hearing before the ALJ provided a Report of Hearing to the Department's decision maker after the hearing, but before the Department issued its decision.

DISCUSSION

I

To establish a defense under section 25660, there must have been displayed an identification which reasonably purports to be issued by a government agency, and there must be a demonstrated reasonable reliance upon that identification. (*Dept. of Alcoholic Bev. Control v. Masani* (2004) 118 Cal.App.4th 1429 [13 Cal.Rptr.3d 826].)

Appellant premises its appeal on a challenge to the credibility of the minor. According to appellant, the minor's denial of having tendered a false identification, one which would have shown him to be over 21 years of age, should be disbelieved, and the administrative law judge should have rejected that testimony, and made an affirmative finding that false identification sufficient to support a defense under the statute had been shown.

There are several problems with appellant's theory. First, there is no evidence of any identification purporting to show the minor to be over 21 years of age. Second, the minor denied possessing any false identification. He was searched, and none was found. Even if it be assumed that he testified falsely as to whether he remembered if the clerk had asked him for identification, the mere fact that he actually was asked for identification falls far short of proving the affirmative existence of false identification. And, finally, without the testimony of the clerk, there is no evidence that she acted reasonably in her examination of the document presented to her.²

The minor, first to testify at the hearing, stated on direct examination that he did not believe the clerk had asked him for identification. On cross-examination, he said he produced his identification when asked for it by the police officers, but did not remember whether they asked him if he had displayed identification in the store. He denied using identification which showed him to be over 21 years of age, and clarified his earlier testimony by stating that he did not remember whether or not the clerk asked for or checked his identification.

² In *Dept. of Alcoholic Bev. Control v. Masani*, *supra*, 118 Cal.App.4th 1429, 1446, the court of appeal characterized a clerk's failure to testify as a "material failure of proof" on the issue of whether a defense had been established under section 25660. This case is no different.

Department investigator Kimberly Wachowski testified that she observed the minor remove Heineken beer from the cooler and take it to a short line leading to the sales register. The clerk rang the sale, and asked the minor for his identification. He presented identification to the clerk. Wachowski was unable to tell whether the identification was a California driver's license or a California identification.

The minor was stopped as he left the store. Wachowski asked him his age; he replied that he was 19. She asked him for his identification, and he produced a California driver's license from the same wallet in which she had observed him place the identification he had displayed to the clerk. She then took custody of the 12-pack of Heineken. She also asked the minor if he had any form of false identification; he said he had none. Wachowski's partner searched the minor's wallet, and Wachowski searched his person. Wachowski's search included her reaching into his front and back pockets. The searches produced negative results.

We cannot sustain a defense under section 25660 when there is no evidence of the existence of any false identification. This is especially true in this case when the clerk who made the sale did not testify, nor did she claim at the time that she had been presented identification purporting to show that the minor was 21 or older.

The ALJ determined that, despite the contradictions between the minor's testimony and that of investigator Wachowski on whether identification was displayed to the clerk, the minor was a credible witness. Issues of credibility are left to the trier of fact. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].)

Appellant's argument lacks merit.

II

Appellant asserts the Department violated its right to procedural due process when the attorney (the advocate) representing the Department at the hearing before the ALJ provided a document called a Report of Hearing (the report) to the Department's decision maker (or the decision maker's advisor) after the hearing, but before the Department issued its decision. Appellant also filed a Motion to Augment Record (the motion), requesting that the report provided to the Department's decision maker be made part of the record. The Appeals Board discussed these issues at some length, and reversed the Department's decisions, in three appeals in which the appellants filed motions and alleged due process violations virtually identical to the motions and issues raised in the present case: *Quintanar* (AB-8099), *KV Mart* (AB-8121), and *Kim* (AB-8148), all issued in August 2004 (referred to in this decision collectively as "*Quintanar*" or "the *Quintanar* cases").³

The Board held that the Department violated due process by not separating and screening the prosecuting attorneys from any Department attorney, such as the chief counsel, who acted as the decision maker or advisor to the decision maker. A specific instance of the due process violation occurs when the Department's prosecuting attorney acts as an advisor to the Department's decision maker by providing the report

³The Department filed petitions for review with the Second District Court of Appeal in each of these cases. The cases were consolidated and the court affirmed the Board's decisions in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615 [25 Cal.Rptr.3d 821]. In response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. (127 Cal.App.4th 615; ___ Cal.Rptr.3d ___). The Department has petitioned the California Supreme Court for review. The court has yet to act on the petition.

before the Department's decision is made.

The Board's decision that a due process violation occurred was based primarily on appellate court decisions in *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575 [5 Cal.Rptr.2d 196] (*Howitt*) and *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81 [133 Cal.Rptr.2d 234], which held that overlapping, or "conflating," the roles of advocate and decision maker violates due process by depriving a litigant of his or her right to an objective and unbiased decision maker, or at the very least, creating "the substantial risk that the advice given to the decision maker, 'perhaps unconsciously' . . . will be skewed." (*Howitt, supra*, at p. 1585.)

Although the legal issue in the present appeal is the same as that in the *Quintanar* cases, there is a factual difference that we believe requires a different result. In each of the three cases involved in *Quintanar*, the administrative law judge (ALJ) had submitted a proposed decision to the Department that dismissed the accusation. In each case, the Department rejected the ALJ's proposed decision and issued its own decision with new findings and determinations, imposing suspensions in all three cases. In the present appeal, however, the Department adopted the proposed decision of the ALJ in its entirety, without additions or changes.

Where, as here, there has been no change in the proposed decision of the ALJ, we cannot say, without more, that there has been a violation of due process. Any communication between the advocate and the advisor or the decision maker after the hearing did not affect the due process accorded appellant at the hearing. Appellant has not alleged that the proposed decision of the ALJ, which the Department adopted as its own, was affected by any post-hearing occurrence. If the ALJ was an impartial

adjudicator (and appellant has not argued to the contrary), and it was the ALJ's decision alone that determined whether the accusation would be sustained and what discipline, if any, should be imposed upon appellant, it appears to us that appellant received the process that was due it in this administrative proceeding. Under these circumstances, and with the potential of an inordinate number of cases in which this due process argument could possibly be asserted, this Board cannot expand the holding in *Quintanar* beyond its own factual situation.

Under the circumstances of this case and our disposition of the due process issue raised, appellant is not entitled to augmentation of the record. With no change in the ALJ's proposed decision upon its adoption by the Department, we see no relevant purpose that would be served by the production of any post-hearing document. Appellant's motion is denied.

ORDER

The decision of the Department is affirmed.⁴

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

⁴ 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.