

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

**AB-8340**

File: 20-403518 Reg: 04057115

KAYO OIL COMPANY dba Circle K #76-2705794  
3031 P Street, Sacramento, CA 95816,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: October 6, 2005  
San Francisco, CA

**ISSUED: DECEMBER 12, 2005**

Kayo Oil Company, doing business as Circle K #76-2705794 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its license for 15 days for its clerk, Mark Montgomery, having sold a six-pack of Bud Light beer to Huey Nguyen, a 19-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Kayo Oil Company, appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

**FACTS AND PROCEDURAL HISTORY**

Appellant's off-sale beer and wine license was issued on October 15, 2003. The Department instituted an accusation against appellant on April 7, 2004, charging an

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<sup>1</sup>The decision of the Department, dated September 9, 2004, is set forth in the appendix.

unlawful sale of an alcoholic beverage by Montgomery to Nguyen on January 4, 2004.

An administrative hearing was held on July 29, 2004, at which time oral and documentary evidence was received. Subsequent to the hearing, the administrative law judge (ALJ) issued a proposed decision which determined that the charge of the accusation had been established, and appellant had failed to establish any affirmative defense under Department Rule 141. The Department adopted the proposed decision without change.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) there was no compliance with Rule 141(b)(5); and (2) appellant was denied due process as a consequence of an ex parte communication by the Department in violation of the prohibition against ex parte communications set forth in the Administrative Procedure Act (APA) (Gov. Code §§11430.10 - 11430.80).

## DISCUSSION

### I

Appellant frames the Rule 141(b)(5) face to face identification issue this way: “At issue here [is] the ALJ’s failure to adequately resolve the conflicting testimony regarding a key moment in time, which, depending on minute details, either supports adherence to Rule 141(b)(5) or not. Five individuals testified, resulting in five different versions of what transpired during the alleged face to face identification.” (App.Br., page 7.)

It is incorrect to say that the ALJ failed to resolve the conflicting testimony. He resolved the conflicts in favor of the Department, stating [Findings of Fact 10 and 11, and Conclusion of Law 6]:

FF10. After Nguyen left the store, Buno entered the store, identified himself to clerk Montgomery, “froze” the scene and retrieved the premarked \$10 bill from the cash register.

FF11. Outside the store, decoy Nguyen met ABC Investigator Erik Szakacs [Szakacs]. Szakacs and Nguyen then went into the store and approached the counter where Buno and Montgomery were standing. Either Buno or Szakacs asked Nguyen to identify who had sold him the beer. Nguyen pointed to Montgomery with his finger and said something to the effect, “[h]e is the one.” When this was done, Nguyen was about 5 feet from Montgomery and Montgomery appeared to be looking in the direction of Szakacs and Nguyen. A citation was issued to clerk Montgomery after Nguyen identified him as the seller.

CL 6. ... The testimony given by Nguyen, Buno and Szakacs is credited on the subject of the face-to-face identification over that of Montgomery and Rivera on the basis that the Officers performed their duties as required, while the clerks had no particular reason to observe and retain in memory exact details of what occurred with the identification during an obviously stressful time. ...

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Bev. Control App. Bd.* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821, 826-827 [40 Cal.Rptr. 666].)

We have carefully reviewed all of the record testimony on the face to face identification issue. We are satisfied that, in all important particulars, the ALJ's factual findings and legal conclusions are fully supported by the consistent testimony of Huey Nguyen, the decoy, Department Investigator Szakacs, and Sacramento Police Sergeant Buno. [See RT 8-9, 19 (Nguyen); 28-29, 30-31 (Buno); 53-55, 56 (Szakacs).]

Appellant has focused on selected excerpts of the testimony of Mark Montgomery, the clerk who sold Nguyen the beer, and of a second clerk, Maria Rivera, to the effect that neither was aware that Montgomery had been identified as the person who made the sale. The self-serving testimony of appellant's clerks in no way diminishes or negates the testimony of the Department witnesses, and the ALJ was entitled to discredit it.

Appellant is by this appeal and the arguments it has presented asking the Board to reweigh the evidence, offering only bits and pieces of the body of testimony that the ALJ considered. The Board declines to do so.

## II

Appellant asserts the Department violated its right to procedural due process when the attorney 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").<sup>2</sup>

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 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 ALJ had submitted a proposed

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<sup>2</sup> The 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 response to the Department's petition for rehearing, the court modified its opinion and denied rehearing. The cases are now pending in the California Supreme Court and, pursuant to Rule of Court 976, are not citable. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2005) 127 Cal.App.4th 615, review granted July 13, 2005, S133331.)

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.<sup>3</sup>

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

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<sup>3</sup> 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.