

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

AB-8372

File: 20-25587 Reg: 04057799

CIRCLE K STORES, INC. dba Circle K Store #1089
210 West Wood Street, Willows, CA 95988,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

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

ISSUED: DECEMBER 12, 2005

Circle K Stores, Inc., doing business as Circle K Store #1089 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, all of which were conditionally stayed for one year, for its clerk, Heidi Ward,² having sold a six-pack of Budweiser Light beer to Jared Tomlinson, a 19-year-old police minor decoy, 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, Dean Lueders.

¹The decision of the Department, dated December 23, 2004, is set forth in the appendix.

² We have referred to Ms. Ward by the name used by the witnesses. She is referred to in the Department's decision as Heidi Word.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1993. On August 10, 2004, the Department instituted an accusation against appellant charging an unlawful sale of an alcoholic beverage to a minor on May 8, 2004.

An administrative hearing was held on November 17, 2004, at which time oral and documentary evidence was received. At that hearing, Jared Tomlinson, the minor decoy, testified that he selected a six-pack of Budweiser Light beer from the cooler in appellant's store and took it to the counter. He was asked for identification, and gave Heidi Ward, the clerk, his valid California driver's license. The license indicated his true date of birth, October 10, 1984, and carried the legend "AGE 21 in 2005." The clerk returned the license to him and proceeded with the sale. Tomlinson left the store. He was met by Willows police officer Troy McIntyre, placed in handcuffs, and taken back into the store. Officer McIntyre pointed to the clerk and asked Tomlinson if she was the person who sold the beer to him. Tomlinson replied, "Yes, that person was the person that sold me the alcohol." The two were three feet apart and were making eye contact. Tomlinson further testified that he had attended an 18-week course entitled "Introduction to Law Enforcement" at a Yuba College Police Academy. Classes were conducted from 5:00 p.m. to 9:00 p.m., Monday through Friday.

Officer McIntyre testified that he was outside the store and did not witness the transaction. He did not place the handcuffs on Tomlinson, and did not know who did. There were four Department investigators involved in the decoy operation. He was not asked and did not explain how he knew which clerk had sold to Tomlinson, but stated

that she apologized to him for making the sale, saying she had made a mistake.

Anita White, the store manager, described the training Circle K provides to its employees with respect to the sale of alcoholic beverages, and said Ward's employment was terminated in accordance with Circle K's policy.

Subsequent to the hearing, the Department issued a decision which determined that the charge of the accusation had been established. The suspension was stayed in its entirety in light of appellant's theretofore discipline-free operation.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that it was denied due process as a result of an ex parte communication between the attorney who conducted the hearing for the Department and the Department's decision maker.

DISCUSSION

Appellant asserts the Department violated its right to procedural due process when the attorney representing the Department at the hearing before the administrative law judge (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 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

³ 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.)

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 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

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.