

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

AB-8482

File: 20-190207 Reg: 05059025

CIRCLE K STORES, INC., dba Circle K Store 1527
682 Parker Road, Fairfield, CA 94535,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Robert R. Coffman

Appeals Board Hearing: October 5, 2006
San Francisco, CA

Redeliberation: January 11, 2007; February 1, 2007

ISSUED MARCH 20, 2007

Circle K Stores, Inc., doing business as Circle K Store 1527 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all of which were stayed for a probationary period of one year, for appellant's clerk selling an alcoholic beverage to a 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, Stephen W. Solomon, and Ghazal A. Yashouafar, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean R. Lueders.

¹The decision of the Department, dated September 22, 2005, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 18, 1987. On March 1, 2005, the Department filed an accusation against appellant charging that, on December 21, 2004, appellant's clerk, Pamela Melders (the clerk), sold an alcoholic beverage to 18-year-old Ryan Baker. Although not noted in the accusation, Baker was working as a minor decoy for the Fairfield Police Department at the time.

At the administrative hearing held on August 16, 2005, documentary evidence was received, and testimony concerning the sale was presented by Baker (the decoy) and by Troy Oviatt, a Fairfield police officer. One of appellant's assistant managers testified regarding the store's policies and training with regard to sales of alcoholic beverages.

The Department's decision determined that the violation charged was proved and no defense was established. Appellant then filed this appeal contending: (1) Rules 141(a) and 141(b)(2)² were violated, and 2) Business and Professions Code section 24200, subdivision (a), is unconstitutionally vague and indefinite.³ Appellant also filed a motion to augment the administrative record with any Form 104 (Report of Hearing) included in the Department's file, and a supplemental letter brief regarding the recent decision of the California Supreme Court in *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*).

²References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

³The California Constitution, article III, section 3.5, precludes an administrative agency from holding an act of the Legislature unconstitutional. Therefore, we decline to address the constitutional issues raised by appellant.

DISCUSSION

I

Appellant contends that the decoy violated rule 141(a), which requires that decoy operations be conducted in a fashion that promotes fairness, and rule 141(b)(2), which requires that a decoy display an appearance that could generally be expected of a person under the age of 21. It bases these contentions on the decoy's status as police cadet for 10 months prior to the decoy operation, his college course work in criminal justice, and his lack of nervousness while in appellant's premises.

Other than stating its contentions as described above, appellant presents no facts or argument to support them. The administrative law judge (ALJ) found that the decoy complied with the requirement of rule 141(b)(2) and specifically took into consideration the factors relied upon by appellant.

The Board has routinely rejected these types of contentions, even when facts and argument have been presented in support of them. The ALJ has the opportunity to observe the decoy in person at the hearing, and is in a far better position than this Board to judge the decoy's appearance. There is no reason not to defer to the ALJ's reasonable determination in this instance.

II

On November 13, 2006, the California Supreme Court held that the provision of a Report of Hearing by a Department "prosecutor" to the Department's decision maker (or the decision maker's advisors) is a violation of the ex parte communication prohibitions found in the APA. (*Quintanar, supra*, 40 Cal.4th 1.) In *Quintanar*, the Department conceded that a report of hearing was prepared and that the decision maker or the decision maker's advisor had access to the report of hearing, establishing,

the court held, "that the reports of hearing were provided to the agency's decision maker." (*Id.* at pp. 15-16.)

In the present case, appellant contends a report of hearing was prepared and made available to the Department's decision maker, and that the decision in *Quintanar*, therefore, must control our disposition here. No concession similar to that in *Quintanar* has been made by the Department.

Whether a report was prepared and whether the decision maker or his advisors had access to the report are questions of fact. This Board has neither the facilities nor the authority to take evidence and make factual findings. In cases where the Board finds that there is relevant evidence that could not have been produced at the hearing before the Department, it is authorized to remand the matter to the Department for reconsideration in light of that evidence. (Bus. & Prof. Code, § 23085.)

In the present case, evidence of the alleged violation by the Department could not have been presented at the administrative hearing because, if it occurred, it occurred *after* the hearing. Evidence regarding any Report of Hearing in this particular case is clearly relevant to the question of whether the Department has proceeded in the manner required by law. We conclude that this matter must be remanded to the Department for a full evidentiary hearing so that the facts regarding the existence and disposition of any such report may be determined.⁴

⁴The Department has suggested that, if the matter is remanded, the Board should simply order the parties to submit declarations regarding the facts. This, we believe, would be wholly inadequate. In order to ensure due process to both parties on remand, there must be provision for cross-examination.

The hearing on remand will necessarily involve evidence presented by various administrators, attorneys, and other employees of the Department. While we do not question the impartiality of the Department's own administrative law judges, we cannot think of a better way for the Department to avoid the possibility of the appearance of

(continued...)

ORDER

The decision of the Department is affirmed as to all issues raised other than that regarding the allegation of an ex parte communication in the form of a Report of Hearing, and the matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.⁵

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

⁴(...continued)

bias in these hearings than to have them conducted by administrative law judges from the independent Office of Administrative Hearings. This Board cannot, of course, require the Department to do so, but we offer this suggestion in the good faith belief that it would ease the procedural and logistical difficulties for all parties involved.

⁵This order of remand is filed in accordance with Business and Professions Code section 23085, and does not constitute a final order within the meaning of Business and Professions Code section 23089.