

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

AB-8608

File: 20-403476 Reg: 06062265

KAYO OIL COMPANY, dba Circle K 76 2702981
190 West San Marcos Boulevard, San Marcos, CA 92069,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 7, 2007
Los Angeles, CA

ISSUED OCTOBER 3, 2007

Kayo Oil Company, doing business as Circle K 76 2702981 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days 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 Kayo Oil Company, appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated August 24, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 15, 2003. On March 23, 2006, the Department filed an accusation against appellant charging that, on February 16, 2006, his clerk sold an alcoholic beverage to 19-year-old Casey Burns. Burns was working as a minor decoy for the San Diego Sheriff's Department at the time.

At the administrative hearing held on June 20, 2006, documentary evidence was received and testimony concerning the sale was presented. Decoy Burns was asked for identification by the clerk when she brought a six-pack of Coors Light beer to the counter. The decoy showed the clerk her valid California driver's license which bore a red stripe with the words "AGE 21 in 2007," the clerk looked at it, handed it back to the decoy, and proceeded to sell the beer to her. After leaving the store, the decoy reentered and identified the clerk as the person who sold beer to her.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant has filed an appeal making the following contentions: (1) The ALJ erred in denying appellant's motion to compel discovery, and (2) the Department violated due process and Administrative Procedure Act (APA) (Gov. Code, §§ 11340-11529) prohibitions against ex parte communications.²

DISCUSSION

I

For its argument regarding the ALJ's alleged error in denying appellant's motion to compel discovery, appellant refers the Appeals Board to the arguments made in the

²Appellant also filed a motion asking the Board to augment the record with any Report of Hearing in the Department's file for this case. Our decision on the ex parte communication issue makes augmenting the record unnecessary, and the motion is denied.

case of *7-Eleven, Inc./Dharni* (2007) AB-8497. The Board's opinion in that case had not been issued at the time appellant's brief was filed.

We reject the argument in the present case just as we did in *7-Eleven, Inc./Dharni, supra*, for the reasons stated in the Board's opinion in that case.

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. (*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*) .) 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 clearly is 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.³

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.⁴

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

³The 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 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.

⁴This 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.