

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

AB-8641

File: 20-403445 Reg: 06062545

KAYO OIL COMPANY, dba Circle K 76 2705216
7287 Archibald Avenue, Rancho Cucamonga, CA 91701,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: December 6, 2007
Los Angeles, CA

ISSUED FEBRUARY 26, 2008

Kayo Oil Company, doing business as Circle K 76 2705216 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 12 days for its 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 Stephen A. Jamieson, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated October 19, 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 April 13, 2006, the Department filed an accusation against appellant charging that, on February, 27, 2006, appellant's clerk, Abdelaziz Mrich (the clerk), sold an alcoholic beverage to 18-year-old Alberto Alvarado. Although not noted in the accusation, Alvarado was working as a minor decoy for the San Bernardino County Sheriff's Department at the time.

At the administrative hearing held on August 29, 2006, documentary evidence was received, and testimony concerning the sale was presented by Alvarado (the decoy) and by Department investigator Scott Stonebrook. Judy Arnold, a store manager and a trainer of new employees, testified about appellant's employee training program regarding alcoholic beverage sales.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant then filed an appeal contending that the Department communicated with the decision maker on an ex parte basis in violation of the Administrative Procedure Act (APA),² and the decoy's appearance violated rule 141(b)(2).³

DISCUSSION

I

Appellant contends the Department violated the APA by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the

²Government Code sections 11340-11529.

³References 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.

Department's decision maker after the hearing but before the Department issued its decision. It relies on the California Supreme Court's holding in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1 [145 P.3d 462, 50 Cal.Rptr.3d 585] (*Quintanar*). Appellant asserts that, at a minimum, this matter must be remanded to the Department for an evidentiary hearing regarding whether an ex parte communication occurred.

The Department disputes appellant's allegations of ex parte communications and asks the Appeals Board to remand this matter so that the factual question of whether such a communication was made can be resolved.

We agree with appellant that transmission of a report of hearing to the Department's decision maker is a violation of the APA. This was the clear holding of the Court in *Quintanar, supra*.

Both parties agree that remand is the appropriate remedy at this juncture. We agree, and as we have done in the numerous other cases involving this issue, we will remand the matter to the Department for an evidentiary hearing.

II

Rule 141(b)(2) requires that the decoy display the appearance, at the time of the sale, that could generally be expected of a person under the age of 21. Appellant contends that the decoy appeared to be over the age of 21 at the time of the decoy operation, as demonstrated in photographs taken of the decoy after he⁴ purchased the

⁴In its brief, appellant consistently refers to the decoy as a female, although the decoy was male. This leads us to question even more the appropriateness of appellant's argument regarding the decoy's appearance.

alcoholic beverage. It argues that the finding of compliance with the rule is based on facts outside the record and is not supported by substantial evidence.

Findings of Fact 5, 10, and 11 of the Department's decision constitute the discussion of the decoy's appearance:

5. Alvarado appeared at the hearing. He weighed approximately 135 pounds and stood about 5 feet, 7 inches tall. There had been little or no change in Alvarado's height since he visited Respondent's Licensed Premises on February 27, 2006, but he had put on about 10 pounds. At Respondent's store, Alvarado appeared as he appears in the Exhibits 2 and 5 photographs,² wearing a brown and blue zipper-front jacket over a white T-shirt, blue jeans and black tennis shoes with white stripes. His light brown hair appeared gelled and looks as is shown in the Exhibits 2 and 5 photographs. He dressed almost the same at the hearing and his hair at the hearing looked nearly identical to the photographs. Alvarado had no facial hair and wore no jewelry at Respondent's store. At Respondent's Licensed Premises on the date of the decoy operation, Alvarado looked substantially the same as he did at the hearing.³

² The Exhibit A photograph, although purporting to be a blown-up version of the Exhibit 5 photograph, appears to significantly distort the facial appearance of decoy Alvarado compared with the young man who appeared at the hearing and who appears in the Exhibits 2 and 5 photographs.

³ The decoy's brow did furrow a bit when he spoke, but when he was not talking it showed no lines at all. He had a pimple below his lower lip near the left corner of his mouth. His hair line did not show any balding.

[¶] . . . [¶]

10. This was the first decoy operation for decoy Alvarado. He had some experience as a Police Explorer. In that work, Alvarado had taken a criminal justice class and been on some ride-a-longs with Deputies. His Explorer experience was not shown to have affected his apparent age in the slightest.

11. Decoy Alvarado is an adult male who appears his age, or even a bit less than his age. At times while he testified Alvarado gave the appearance of a little boy. Based on his overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms

shown at the hearing, and his appearance/conduct in front of clerk Abdelaziz Mrich at the Licensed Premises on February 27, 2006, Alvarado displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to clerk Mrich. Alvarado appeared his true age or younger.

Appellant's contention that the ALJ relied on evidence outside the record appears to be based on the ALJ's purported "interpreting the photographic process" and reliance on a concession appellant asserts it never made. It may well be true that appellant never made the "concession" it refers to, since the decision does not refer either to a concession or to an interpretation of the photographic process. "Finding II C3" referred to in appellant's brief, simply does not exist in the Department's decision. We can only conclude that this contention arose from someone's imagination or an unedited "cut-and-paste" job from a brief in some other matter. In either case, the Board is entitled to disregard this part of appellant's argument.

Appellant's contention regarding a lack of substantial evidence to support a finding of compliance with rule 141(b)(2), may similarly be disregarded. Appellant is simply asking the Board to substitute its own judgment of the evidence for that of the ALJ, something the Board is not allowed to do.

It is the province of the trier of fact to evaluate the evidence and make findings. The ALJ here considered all the relevant evidence before him, including his observation of the decoy himself and the photographic evidence, and concluded that the decoy's appearance, at the time of the decoy operation, was that which could generally be expected of a person under the age of 21. Appellant has shown no reason for us to depart from our usual deference to the ALJ's determination.

ORDER

The decision of the Department is affirmed as to the issue of the decoy's appearance, but the matter is remanded to the Department for an evidentiary hearing on the issue regarding ex parte communication, in accordance with the foregoing opinion.⁵

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

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.