

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

AB-9033

File: 21-440759 Reg: 08069462

NEW ALBERTSONS, INC., dba Albertsons
1736 Avenida De Los Arboles, Thousand Oaks, CA 91362,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 6, 2010
Los Angeles, CA

ISSUED JULY 26, 2010

New Albertsons, Inc., doing business as Albertsons (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its off-sale general license for 25 days for its clerk, Diana M. Nolan, having sold a 16-ounce can of Sparks Premium Malt Liquor to Bret Bassett, an 18-year-old police minor decoy, in violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant New Albertsons, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on August 24, 2006. The Department instituted an accusation against appellant on August 15, 2008, charging an

¹The decision of the Department, dated April 21, 2009, is set forth in the appendix.

unlawful sale of an alcoholic beverage to a minor. Although not stated in the accusation, the minor, Bret Bassett, was acting as a decoy for the Ventura Police Department.

An administrative hearing was held on February 26, 2009, at which time documentary evidence was received and testimony concerning the violation charged was presented.

Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale had been proved, and that it was the second sale-to-minor violation within a three-year period.

Appellant filed a timely notice of appeal in which it contends that the Department engaged in an unlawful ex parte communication by admitting into evidence documents from a prior proceeding the decision in which was tainted by an earlier unlawful ex parte communication, resulting in an enhanced penalty.

DISCUSSION

Appellant contends that the standard penalty of a 15-day suspension for a sale-to-minor violation prescribed by Department Rule 144 should not have been enhanced, as it was in this case, because of a prior sale-to-minor violation within a 36-month period. Appellant argues that Exhibit 6,² evidence of the prior violation, should not have been admitted because the decision was flawed by an ex parte communication violative of the Supreme Court's decision in *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board/Quintanar* (2006) 40 Cal.4th 1 [50

² Exhibit 6 is a multi-page document consisting of the decision and related documents pertaining to the resolution by way of compromise of the proceeding in Registration No. 06063953, on July 5, 2007.

Cal.Rptr.3d 585].

The Department argues that the prior decision is res judicata; appellant never sought to overturn the Department's finding of a violation, but instead resolved the matter by paying a fine in lieu of serving a suspension.

A similar issue was presented to the Board in *7-Eleven, Inc./Guru Racqha, Inc.* (2009) AB-8717, where the Board stated:

Appellants cite no authority for giving retroactive effect to the *Quintanar* decision, nor do we believe there is any. Most importantly, however, that prior decision was clearly final on March 26, 2007, when the Department accepted payment from appellants of a fine in lieu of suspension. Appellants cannot now collaterally attack that decision.²

² Failure to seek review of an agency's decision will prevent any later challenge to the merits of that decision in a collateral proceeding (*Stockton v. Department of Employment* (1944) 25 Cal.2d 264, 267-268 [153 P.2d 741]; *California Coastal Com. v. Superior Court* (1989) 210 Cal.App.3d 1488, 1493 [258 Cal. Rptr. 567].) This Board rejected similar attempts at collateral attacks in *Circle K Stores, Inc.* (2001) AB-7701, and *Thind* (1999) AB-7139.

There is nothing in appellant's argument that persuades us we should revisit our decision in that case.

Appellant's motion to augment the record is denied.

ORDER

The decision of the Department is affirmed.³

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

³ 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.