

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

AB-8320

File: 20-202572 Reg: 03054983

CIRCLE K STORES, INC. dba Circle K Store 8605
5600 Auburn Street, Bakersfield, CA 93306,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jerry Mitchell

Appeals Board Hearing: June 2, 2005
Los Angeles, CA

ISSUED AUGUST 17, 2005

Circle K Stores, Inc., doing business as Circle K Store 8605 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for its clerk, Melissa Ramos ("Ramos") having sold a 24-ounce can of Bud Light beer to Blanca Lara ("Lara"), in 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, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 8, 1988. On May 17, 2003, the Department instituted an accusation against appellant charging the sale

¹The decision of the Department, dated July 15, 2004, is set forth in the appendix.

of an alcoholic beverage to a minor on February 22, 2003.

An administrative hearing was held on September 18, 2003 and June 22, 2004, at which time oral and documentary evidence was received. At the hearing, Joseph Castro, an 18-year-old police decoy, testified that he was participating in a shoulder tap operation conducted by the Bakersfield Sheriff's Department on the night in question.² He testified that Lara, then a 19-year-old minor, agreed to purchase, and did purchase, a can of Bud Light beer for him, after her male companion had declined to do so. Lara's encounter with Castro occurred as she left the store after purchasing two cans of beer. Bakersfield Sheriff's Detective Dennis Sterk testified that he observed Lara purchase the beer for Castro, and that she was not asked for identification. When she was confronted by Sterk after leaving the store, she was found to be in possession of a California driver's license issued to 22-year-old Paola Hernandez (Exhibit B). Lara testified that she discovered the license in the pocket of a sweater she had loaned to a friend, after the sweater was returned to her only that evening, and denied using the license when she purchased the beer. She said that if she had displayed identification during prior visits to the store, it would have been her own driver's license, one that showed her true age. Ramos, the clerk, testified that she had previously asked Lara for identification when Lara was purchasing cigarettes, and believed Lara had shown her a California identification card, which she scanned through a machine. Ramos testified that the Hernandez driver's license did not look familiar to her.

Subsequent to the hearing, the Department issued its decision which determined

² A shoulder tap operation is one in which a minor approaches an adult about to enter a premises, tells that person he is a minor, offers that person money, and asks that person to buy an alcoholic beverage for him. If the person does so, the police officer will arrest the person and charge him or her with furnishing an alcoholic beverage to a minor.

that the charge of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant was denied due process as a result of the ex parte transmission to the decision maker of a prosecutor's report of hearing; (2) Lara was employed to act as a decoy; and (3) a defense was established under Business and Professions Code section 25660. Appellant has also filed a motion to augment the record to include the prosecutor's report of hearing and related documents.

DISCUSSION

I

Appellant asserts the Department violated its right to procedural due process when the attorney (the advocate) 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

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

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 *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,

615, review granted July 13, 2005, S133331.)

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.

II

Appellant contends that Lara was acting as a police-sanctioned decoy because she was specifically asked by Castro to act on his behalf, and because she was watched by the Bakersfield police at every stage of the transaction. Consequently, appellant argues, the transaction was subject to the requirements of Rule 141, with specific reference to the requirement that Lara display the appearance of a person under 21 years of age, and the requirement that the transaction be conducted in a manner which promotes fairness.

The position appellant has taken on this issue is contrary to the position it took at the administrative hearing. There, appellant's counsel agreed with the observation of the ALJ that Lara's appearance was not an issue because she was not a decoy. Lara had been asked to examine some photos taken of her at the scene, and this colloquy followed [RT 112-113]:

Mr. Labin (counsel for appellant): I'm not sure that it's really going to be an issue about her, per se. I -- my point is to compare her appearance to the appearance of the woman on the fake identification, if you think it's necessary.

The Court: Yeah, it's important that you do that, because I understand from the written statement of the clerk, she contends she did not ask for I.D. on the occasion of this incident --

Mr. Labin: Right.

The Court: -- but that she had, quote, carded her previously. So I think it's important to explore that.

Mr. Labin: Sure. Sure. I apologize.

The Court: Here are the photos. You may proceed any way you wish.

...

The Court: Maybe I can cut to the chase on this thing, if I understand clearly that you're not going to be contending that the clerk asked for I.D. on --

Mr. Labin: No, I'm not going to be contending that.

The Court: All right. Then we don't have to be worrying about that.

Mr. Sakamoto: Okay.

The Court: And we don't have to worry about her appearance in general, because we're not dealing with a decoy here.

Mr. Labin: Exactly, Your Honor.

In any event, we find nothing to support the notion that Castro was enlisting Lara to act as a decoy. He did not know she was a minor; indeed, appellant now claims she

did not even have the appearance of a minor.

At the conclusion of the hearing, appellant argued only that Lara sufficiently resembled the person whose photo appeared on the Hernandez license (Exhibit 2) to make the clerk's reliance on that document reasonable, and made no suggestion that Lara be considered a decoy, or that her actions were subject to Rule 141.

Appellant is not entitled to raise an issue that it disavowed at the hearing. By analogy, numerous cases have held that the failure to raise an issue or assert a defense at the administrative hearing level bars its consideration when raised or asserted for the first time on appeal. (E.g., *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control* (1966) 65 Cal.2d 349, 377 [55 Cal.Rptr. 23]; *Hooks v. California Personnel Board* (1980) 111 Cal.App.3d 572, 577 [168 Cal.Rptr. 822]; *Shea v. Board of Medical Examiners* (1978) 81 Cal.App.3d 564, 576 [146 Cal.Rptr. 653]; *Reimel v. House* (1968) 259 Cal.App.2d 511, 515 [66 Cal.Rptr. 434]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 182, 187 [17 Cal.Rptr. 167].) This rule applies with even greater force in the circumstances of this case.

III

Business and Professions Code section 25660 provides:

Bona fide evidence of majority and identity of the person is a document issued by a federal, state, county, or municipal government, or subdivision or agency thereof, including, but not limited to, a motor vehicle operator's license or an identification card issued to a member of the Armed Forces, which contains the name, date of birth, description, and picture of the person. Proof that the defendant-licensee, or his employee or agent, demanded, was shown and acted in reliance upon such bona fide evidence in any transaction, employment, use or permission forbidden by Sections 25658, 25663 or 25665 shall be a defense to any criminal prosecution therefor or to any proceedings for the suspension or revocation of any license based thereon.

Appellant contends that it is entitled to a defense under this section on the basis of the clerk's testimony that, on three prior occasions, Lara displayed some form of

identification while purchasing cigarettes that led the clerk to believe Lara was over the age of 21.

The ALJ rejected appellant's claim to a section 25660 defense, finding it unreasonable for the clerk to assume that, because Lara was old enough to buy cigarettes, she was also old enough to buy alcoholic beverages.

Appellant says the ALJ erroneously assumed that the identification displayed by Lara showed only that she was 18, and there is no evidence to support that determination.

Appellant has not specified the identification it claims Lara displayed on those three earlier occasions. The clerk testified that she thought it was Lara's own identification, because she scanned it. Appellant asserts that, whatever the identification, it was not that issued to Paola Hernandez, the identification found on Lara's person on the date in question. The clerk testified that she did not believe the Hernandez identification was what she had been shown: "I think I would have noticed that this wasn't her."

In order to establish a defense under section 25660, a party must show that reliance on the document was reasonable, that is, the result of an exercise of due diligence. (See, e.g., *Lacabanne, supra*, 261 Cal.App.2d 181, 185; *5501 Hollywood, Inc. v. Dept. of Alcoholic Bev. Control* (1957) 155 Cal.App.2d 748, 753 [318 P.2d 820].) Appellant is not in any position to do this, because it has not even identified a document the clerk supposedly relied upon, let alone proved that she relied reasonably. All that the evidence shows is that the clerk thinks that she saw some form of identification which showed Lara to be over the age of 21. That falls far short of meeting the burden of proof under the statute.

ORDER

The decision of the Department is affirmed.⁴

SOPHIE C. WONG, MEMBER
FRED ARMENDARIZ, 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.