

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

AB-8579

File: 20-284711 Reg: 05060700

CIRCLE K STORES, INC. dba Circle K Store #2967
420 North Coast Highway, Oceanside, CA 92054,
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 AUGUST 7, 2007

Circle K Stores, Inc., doing business as Circle K Store #2967 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk, Richard Digregorio, having sold two cases of Bud Light beer to Benjamin Bauch, a 17-year-old non-decoy minor, 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 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 June 23, 1993. On

¹The decision of the Department, dated June 8, 2006, is set forth in the appendix.

September 15, 2005, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on July 29, 2005.

An administrative hearing was held on April 6, 2006, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Tom Pelligrini and Benjamin Bauch, the minor, concerning the transaction at issue. Pelligrini testified that, while seated in his vehicle, he saw a youthful looking male, later identified as Bauch, enter the store. He observed Bauch transport two cases of beer to the counter, make a purchase without having displayed any identification, and leave the store with the beer. Bauch was searched for false identification, and none was found. Bauch testified that the clerk asked his age, and he gave a false age over the age of 21. Appellant presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established. Appellant thereafter filed a timely notice of appeal. In its appeal, appellant contends that its right to cross examination was improperly limited. Appellant has also filed a motion to augment the administrative record with any form 104 (Report of Hearing) included in the Department's file, and has filed a supplemental 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 [50 Cal.Rptr 3d. 585] (*Quintanar*).

DISCUSSION

I

Appellant acknowledges in its brief (App. Br., page 2) that it stipulated at the

hearing that its clerk sold alcohol to the minor. What merit could there be, then, to a claim that cross-examination was improperly limited, or what prejudice could there be, when the only defense properly asserted at the hearing (and not raised on this appeal) was that the investigator allowed the minor to commit a crime, i.e., attempt to purchase an alcoholic beverage, when he was in a position to prevent it.²

When a non-decoy minor purchases an alcoholic beverage without being required to show identification, the defenses available to a licensee are few and narrow. The seller can claim reliance on a false governmentally issued identification purporting to show that the minor is of legal age (Bus. & Prof. Code §25660) previously displayed to the seller. The seller may claim he or she acted reasonably in relying on the document, but unless he has it or a copy, it is unlikely his claim will be sustained. In any event, appellant did not claim a defense under section 25660.

Appellant argues that it should have been permitted to question the minor on cross-examination about his probation status, claiming that the subject became relevant after Department counsel and the administrative law judge questioned him about it.

At no time did appellant assert the minor's credibility was at issue. The only justification offered by appellant for a line of questioning exploring the minor's probationary status was that "as far as the relevance, I'm just trying to determine if the alcohol he was in possession with [in the probation-related incident] was obtained from

² There is no evidence that the investigator knew that Bauch was under the age of 21 before the purchase was made. The fact that Bauch may have displayed a youthful appearance may have understandably aroused a suspicion on the part of the investigator, but until the clerk made the sale, he had no duty to intervene. The clerk could well have requested identification and after reviewing it declined to go forward with the sale.

this site.” [RT 6-7.] Once that reason was tendered, he was permitted to ask if that was the case. It was not. [*ibid.*] Hence, any limitation on appellant’s right to cross-examine evaporated once he asked the minor where he got the alcoholic beverage that resulted in his ending up on probation.

The only real and relevant issue at the administrative hearing was whether an alcoholic beverage was sold to a minor, and appellant stipulated to that fact.

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.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

³ The 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.

accordance with the foregoing opinion.⁴

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

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.