

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

AB-8603

File: 20-329247 Reg: 06061806

CIRCLE K STORES, INC. dba Circle K 5432
899 Hawthorne Street, Monterey, CA 93940,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: October 4, 2007
San Francisco, CA

ISSUED DECEMBER 27, 2007

Circle K Stores, Inc., doing business as Circle K 5432 (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, David Russo, having sold a six-pack of Smirnoff Premium Ice Malt Beverage to Sarah McIntyre, 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, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

¹The decision of the Department, dated August 17, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 16, 1997.

Thereafter, on February 22, 2006, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage on December 9, 2005.

An administrative hearing was held on June 21, 2006, at which time oral and documentary evidence was received. At that hearing, Sarah McIntyre, the decoy, testified that she was not asked her age or for any identification when she purchased the Smirnoff malt beverage.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and ordered the suspension from which this timely appeal has been taken. In its appeal, which is accompanied by a motion to augment the record by the addition of any report of hearing communicated to the Department decision maker or his advisors, appellant contends that the Department violated the Administrative Procedure Act² proscriptions against ex parte communications.

DISCUSSION

This contention has been made many times before and has been adjudicated by the California Supreme Court 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*). This Board has followed *Quintanar* in numerous appeals, remanding the matters to the Department for evidentiary hearings to resolve the factual issues regarding ex parte communications raised in these cases. (E.g., *Dakramanji* (2007) AB-8572; *BP West Coast Products, LLC* (2007) AB-8549; *Hong* (2007) AB-8492;

² Gov. Code §11430.10 et seq.

Chevron Stations, Inc. (2007) AB-8488; *Circle K Stores, Inc.* (2006) AB-8404.) The ex parte communication contention in the present appeal is virtually identical to those made in the earlier appeals, and we decide this issue in the present appeal as we did the same issue in the earlier appeals just cited. An evidentiary hearing is required to determine whether appellant's claims are valid.

ORDER

The matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.³

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

³This 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.