

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

AB-8642

File: 20-202572 Reg: 06062832

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: John W. Lewis

Appeals Board Hearing: November 1, 2007
Los Angeles, CA

ISSUED JANUARY 17, 2008

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 25 days for appellant's 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 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, Matthew G. Ainley.

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

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on March 14, 1997. On May 10, 2006, the Department filed an accusation against appellant charging that, on February 15, 2006, appellant's clerk, Mapo Feagai (the clerk), sold an alcoholic beverage to 17-year-old Houston Fesler. Although not noted in the accusation, Fesler was working as a minor decoy for the Bakersfield Police Department at the time.

At the administrative hearing held on July 26, 2006, documentary evidence was received, and testimony concerning the sale was presented by Fesler (the decoy) and by Kevin Brewer, a Bakersfield police officer. Appellant's store manager testified about training for the employees and store policies regarding sales of alcoholic beverages.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant has filed an appeal contending that the Department violated prohibitions against ex parte communication with the decision maker.^{2,3}

DISCUSSION

Appellant contends the Department violated due process and the Administrative Procedure Act (APA)⁴ by transmitting a report of hearing, prepared by the Department's advocate at the administrative hearing, to the Department's decision maker after the

²Appellant also argued in its brief that the decoy's appearance violated rule 141(b)(2) (4 Cal. Code Regs., subd. 141(b)(2)); however the argument in appellant's brief clearly had nothing to do with the present appeal. We assume it was included in appellant's brief in error and ignore it.

³Appellant also filed a motion asking the Board to augment the record with any Report of Hearing in the Department's file for this case. Our decision on the ex parte communication issue makes augmenting the record unnecessary, and the motion is denied.

⁴Government Code sections 11340-11529.

hearing but before the Department issued its decision, citing 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 argues that this violation of the APA is ipso facto a violation of due process. Due process was also violated, appellant asserts, because the Department's attorney assumed the roles of both advocate and advisor to the decision maker.⁵ Appellant contends the decision of the Department must be reversed.

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*.

However, we agree with the Department that remand is the appropriate remedy at this juncture. As we have done in the numerous other cases involving this issue, we will remand the matter to the Department for an evidentiary hearing concerning whether the ex parte communication alleged by appellant occurred.

ORDER

⁵In *Quintanar, supra*, on page 17, footnote 13, the Court stated:

Because limited internal separation of functions is required as a statutory matter, we need not consider whether it is also required by due process. As a prudential matter, we routinely decline to address constitutional questions when it is unnecessary to reach them. [Citations.] Consequently, we express no opinion concerning how the requirements of due process might apply here.

We also decline to address appellant's due process contention.

The matter is remanded to the Department for an evidentiary hearing in accordance with the foregoing opinion.⁶

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

⁶This 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.