

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

AB-8842

File: 20-210882 Reg: 07065555

CIRCLE K STORES, INC., dba Circle K Store 5009
158 Higuera Street, San Luis Obispo, CA 93401,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: May 7, 2009
Los Angeles, CA

ISSUED MARCH 23, 2010

Circle K Stores, Inc., doing business as Circle K Store 5009 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all conditionally stayed subject to a one-year probationary period, for its 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, Stephen W. Solomon, and Ryan Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

¹The decision of the Department, dated February 20, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1993. On April 19, 2007, the Department filed an accusation charging that appellant's clerk sold an alcoholic beverage to 18-year-old James Hortillosa on February 23, 2007. Hortillosa was working as a minor decoy for the San Luis Obispo Police Department at the time.

At the administrative hearing held on January 3, 2008, documentary evidence was received and testimony concerning the sale was presented. Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

Appellant filed a notice of appeal. In its brief, appellant contends the decision must be reversed because the Department provided two separate administrative records, each certified to be the "true, correct and complete record."²

DISCUSSION

Appellant contends the decision must be reversed because the Department certified two completely different administrative records to the Appeals Board. This makes it impossible, appellant argues, to know what the Department decision maker reviewed when deciding whether to accept, reject, or modify the proposed decision of the administrative law judge (ALJ).

²A certification dated December 4, 2008, accompanied one set of documents comprising the certificate of decision, the proposed decision, and the hearing exhibits. A second set of documents consisting of appellant's motion to compel discovery, points and authorities in support of the motion to compel, the Department's opposition to the motion, and an order denying the motion to compel, was provided under a certification dated January 14, 2009. Each certification stated that the documents attached to it were a "true, correct and complete record" of the administrative proceedings that are the subject of the present appeal.

A problem with the record certified for the appeal, however, is not a basis for an appeal. Appellants do not allege that the record is incomplete, only that it was not delivered all at once. It is obvious from the two certifications, when read together, that the second certification was intended to supplement the original certification.

Appellant attempts to present this as a serious issue by asserting that, given the irregularities of the certified record, neither it nor the Appeals Board knows what administrative record the director reviewed.³ However, even though the record on appeal was not distributed to the parties all at one time, that does not mean that the entire record was unavailable to the director. Unless appellant has some evidence that the bifurcated certified record was the result of something other than clerical error, this does not even raise an inference, much less constitute evidence, of what the director did or did not review before adopting the ALJ's proposed decision. Speculation about possible events does not carry appellant's burden of proving error in the Department's decision.

Appellant received the complete administrative record from the Department, no more and no less. Since appellant based its appeal entirely on the erroneous assertion that it did not receive the proper record on appeal, it clearly had no basis for maintaining an appeal. The appeal must be dismissed.

³Contrary to appellant's assertion that the Department is legally obligated to review the record before making its decision (App. Opening Br. at p. 14), it has long been the rule under section 11517 of the Administrative Procedure Act (Gov. Code, §§ 11340-11529) "that where the hearing officer acts alone the agency may adopt his decision without reading or otherwise familiarizing itself with the record." (*Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 399 [184 P.2d 323].) This principle was recently affirmed in *Ventimiglia v. Board of Behavioral Sciences* (2008) 168 Cal.App.4th 296, 309 [85 Cal.Rptr.3d 423].

ORDER

The appeal is dismissed.

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