

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

CIRCLE K STORES, INC.	)	AB-7018
dba Circle K)	
4381 El Camino Real	)	File: 20-144642
Atascadero, CA 93422,	)	Reg: 97039589
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	February 3, 2000
	)	Los Angeles, CA

Circle K Stores, Inc., doing business as Circle K (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its off-sale beer and wine license for 25 days for its clerk, Robyn Rae Blair, having sold an alcoholic beverage (a six-pack of Miller Genuine Draft beer) to Joseph W. Souza, a minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing

¹*The decision of the Department, dated January 8, 1998, is set forth in the appendix.*

through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 15, 1983. Thereafter, the Department instituted an accusation against appellant charging an unlawful sale to a minor on January 24, 1997.

An administrative hearing was held on August 26, 1997, at which time oral and documentary evidence was received. At that hearing, the sale at issue was the subject of testimony by Joseph Wilmar Souza, a minor, who was participating in a decoy operation conducted by the Atascadero Police Department; by Brian Thomas Dana, the Atascadero police officer who was supervising the actions of the decoy; and by Sheila Horton, a district manager for Circle K, concerning the transaction which formed the basis for the accusation.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven, and ordered the suspension from which this timely appeal is taken.

In its appeal, appellant raises the following issues: (1) there was no compliance with Rule 141(b)(5); (2) there was no compliance with Rule 141(b)(2); and (3) there was no competent proof of a prior discipline to support an enhanced penalty.

DISCUSSION

I

Appellant contends that the decision of the Department must be reversed because there was no face to face identification of the seller by the decoy.

Rule 141(b)(5) requires that, in a decoy operation, there must be a face to face identification by the decoy of the alleged seller before any citation is issued. In Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App. 4th 575 [79 Cal.Rptr.2d 126], the court mandated strict compliance with Rule 141, and reversed the decision of the Department because there had not been the requisite face to face identification.

The facts of this case are very similar to the facts in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board, *supra*. The police officer witnessed the transaction, but did not have the minor identify the seller. Instead, the officer himself confronted the clerk while the minor stood silently beside him [RT 25-26, 47]. This was not sufficient compliance with the rule.

II

Rule 141(b)(2) requires that a minor decoy must present the appearance which could generally be expected of a person under the age of 21 years. Appellant contends that, in assessing whether the decoy presented such an appearance, the Administrative Law Judge (ALJ) applied an incorrect standard, that is, he limited his assessment to the decoy's physical appearance, to the exclusion of all other indicia of age.

The decision recites (Finding of Fact III-1:

“Joseph W. Souza (hereinafter “the minor”) is a youthful looking male, whose

physical appearance is such as to reasonably be asked for identification to verify that he could legally purchase alcoholic beverages.”

This language of this finding is identical, except for the name and gender of the decoy, to the corresponding finding in numerous other cases which this Board has found it necessary to reverse.

In Circle K Stores, Inc. (1999) AB-7080, the Board stated:

“Nonetheless, while an argument might be made that when the ALJ uses the term “physical appearance,” he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what he did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy’s appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.

“It is not the Appeals Board’s expectation that the Department, and the ALJ’s, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ’s are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.

“Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department’s concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).”

This case must be resolved in similar fashion.

III

Appellant challenges the penalty as reflecting an enhancement because of a prior discipline which was not established by competent evidence.

The criticism of the proof is based upon the absence of any evidence of the date of the previous violation. The existence of the violation cannot be challenged, since that is demonstrated by a copy of the decision, entered on October 3, 1996, pursuant to stipulation and waiver, which determined there had been a violation of Business and Professions Code §25658, subdivision (a).

Should there be further proceedings in this matter, the question of the date can then be addressed. We see no need to deal with it at this time.

ORDER

The decision of the Department is reversed.²

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.