

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

CIRCLE K STORES, INC.	)	AB-7108
dba Circle K)	
1650 Camino Ruiz	)	File: 20-207685
San Diego, CA 92126	)	Reg: 97040874
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.	)	April 1, 1999
	)	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 appellant's clerk having sold an alcoholic beverage to a person under the age of 21, such sale being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

¹*The decision of the Department, dated April 16, 1998, is set forth in the appendix.*

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 22, 1989.

Thereafter, the Department instituted an accusation charging that on April 25, 1997, appellant's clerk, Homayoun M. Taheb (Taheb), sold an alcoholic beverage (beer) to Jennifer L. Saber (Saber), a minor who was then 19 years of age. The minor was operating as a police decoy under the supervision of the San Diego Police Department (SDPD).

An administrative hearing was held on January 14, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the charges of the accusation.

Saber entered the premises at about 7:00 p.m., took a six-pack of Budweiser beer from the cooler, and carried it to the counter [RT 10, 42-44]. Four customers were in line in front of her [RT 44]. Seeing another cash register with a clerk, Taheb, Saber went to that register and placed the beer on the counter [RT 45]. The clerk asked for her identification, examined it, looked at Saber, and returned the identification to her [RT 11, 23-24, 45-46]. The identification produced by Saber was her California driver's license showing her to be under the age of 21 [RT 42, 45]. Taheb then took the money she tendered, rang up the sale, gave her change, and put the beer in a bag [RT 14, 46-47]. Saber left the premises with the beer, went outside to the waiting officers, and reentered the premises with them [RT 14, 45, 48]. While standing near Taheb and facing him, Saber pointed him out as the selling clerk, and a citation was issued to him [RT 13, 17, 49].

Following the hearing, the Department entered its decision finding that the violation had occurred as alleged in the accusation.

Appellant has filed a timely notice of appeal, and contends that 1) the decoy operation was conducted during the store's busiest time of the week, thereby contravening the Rule's requirement that decoy operations be conducted "in a fashion that promotes fairness," and 2) the Department impermissibly used a standard different from that set out in Rule 141(b)(2) to judge the appearance of the minor decoy.

DISCUSSION

I

Appellant argues that Rule 141 requires decoy operations to be conducted "in a fashion that promotes fairness," and this one was not because it was conducted on a Friday evening, the busiest time of week at the premises." The training material provided by the Department advises that "rush hours" are to be avoided for decoy operations. Although this material is not part of any rule or statute, it is designed to help ensure that decoy operations are conducted fairly. Appellant argues it is "patently obvious" that conducting a decoy operation during the busiest time of the week for a business does not promote fairness and, therefore, does not comply with Rule 141.

Even assuming the operation was conducted during what was considered the busiest time for the store, there is no evidence that the premises was so busy at the time as to create an unfair situation. There were several customers in the store at the time, but no evidence that the clerk was overwhelmed or distracted by an inordinate number of customers demanding his attention. Without specific evidence of unfairness in this particular instance, general statements about the store's busiest time do not convert this into an operation conducted unfairly during the store's "rush hour."

II

This is one of several cases in which appellants contend that the Department has misapplied Rule 141(b)(2). All were initially decided by the same Administrative Law Judge (ALJ), whose proposed decisions were adopted by the Department.

Rule 141(b)(2) (4 Cal.Code Regs. §141, subd. (b)(2)), requires that a decoy “shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.”

Appellant’s attack on the decision of the Department is directed at findings with respect to the decoy that:

“[The decoy] is a youthful looking female, whose physical appearance is such as to reasonably be considered as being under twenty-one years of age and who would reasonably be asked for identification to verify that she could legally purchase alcoholic beverages. The [decoy’s] appearance at the time of her testimony was substantially the same as her appearance at the time of the sale”

Appellant now contends that the Department, as a result of its lack of understanding of the rule, misinterpreted and misapplied it. Appellant argues that the Department discounts all other indicia of age than physical appearance, and by doing so, reaches a conclusion contrary to fact.

Appellant argues that the Department’s use of the term “physical appearance” is a departure from, and violation of Rule 141(b)(2), because the rule uses only the term “appearance.” While it is true that the ALJ and the Department employ words and terms that are not expressly in the rule, the issue is not so simplistic.

Nonetheless, while an argument might be made that when the ALJ used the term “physical appearance,” he was reflecting the sum total of present sense impressions he experienced when he viewed the decoy during her testimony, it is not at

all clear that is what the ALJ 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, and the like. 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 the Department's decision. 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]).

ORDER

The decision of the Department is reversed.²

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
JOHN B. TSU, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² *This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §23090.7 of said code.*

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.