ISSUED APRIL 5, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CIRCLE K STORES, INC. dba Circle K Store #5246 3350 College Boulevard Oceanside, CA 92056, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7506 File: 20-295720 Reg: 99046276 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: September 7, 2000 Los Angeles, CA

Circle K Stores, Inc., doing business as Circle K Stores #5246 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for appellant's employee selling an alcoholic beverage to a person under the age of 21, 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).

[1]The decision of the Department, dated September 16, 1999, is set forth in the appendix.

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, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 15, 1994. Thereafter, the Department instituted an accusation against appellant charging that, on January 2, 1999, appellant's employee, Melissa St. Romain ("the clerk"), sold an alcoholic beverage to George O. Flint ("the minor"), who was under 21 years of age. The minor was acting as a decoy for the Oceanside police department.

An administrative hearing was held on July 29, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the sale.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(5) was violated; and (3) the Department violated appellant's discovery rights.

DISCUSSION

I

Appellant contends that the minor, at the time of the sale, did not display the appearance which could generally be expected of a person under the age of 21. In addition, appellant argues, the minor's appearance at the administrative hearing

was "starkly and vastly different," such that it was unreasonable to base a finding about his appearance in January 1999 on his appearance in July 1999.

A. **The Decoy's Appearance During the Decoy Operation**

The ALJ described the decoy's appearance at the time of the sale and at the administrative hearing in Finding II.D.:

> "The decoy is youthful looking and his appearance at the time of his testimony was similar to his appearance at the time of the sale in some respects and different in other respects. On the date of the sale, the decoy had extremely short hair which was about one eighth of an inch in length and brown in color, he had a small goatee that covered the tip of his chin that was about one eighth inch in length or less, he had short sideburns which were above the earlobe in length, he was six feet in height and he weighed about one hundred seventy pounds. At the time of the hearing, the decoy's appearance was similar to his appearance on the date of the sale in that his height and weight were essentially the same. However, the decoy's appearance at the hearing was different in that his hair was substantially longer and blond in color, his goatee was substantially longer and his sideburns were longer and below the earlobe. The photographs in Exhibits 3 and 4 which were taken on January 2, 1999 accurately depict the decoy's appearance as of that date."

In Finding II.E. the ALJ made a specific finding regarding the minor's appearance at the time of the sale:

> "Based upon the entire evidence presented at the hearing, a finding is made that the decoy displayed the appearance and demeanor 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 does not disagree with the ALJ's description, but contends that the decoy's appearance at the time of the sale should have disqualified him as a decoy, and, given the difference in appearance, the ALJ could not possibly have concluded from the minor's appearance at the hearing that he displayed the appearance of a person under 21 years of age at the time of the sale.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.[2]

"Substantial evidence" is relevant evidence which reasonable minds would accept as reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [95 L.Ed. 456, 71 S.Ct. 456] and Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269 Cal.Rptr. 647].) When, as here, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of

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[2]The California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; and Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].) Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857] (in which the positions of both the Department and the license-applicant were supported by substantial evidence); Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

In Southland and Samra (Jan. 5, 2000) AB-7320, the Board was presented with another appeal involving a decoy with a goatee. The Board reversed the Department in that appeal, but not solely because of the goatee. There the Board said, "This case, at the very least, presses the limits of what is acceptable in the appearance of a decoy." The Board noted that it had looked with disfavor on the cases in which decoys had "five o'clock shadows" and had reversed in one case where the decoy had a mustache.

In AB-7320, the Board said:

> "The 'goatee' worn by the decoy, while it did not extend all the way to his sideburns, was very obvious, as shown in the photograph taken of him immediately following the sale. We would be inclined to call it a beard that simply is not very dense on the sides as it goes up towards the sideburns. This is surely as egregious as a mustache, especially when combined with the decoy's 6'1" height."

Beyond the goatee itself, the Board also found "disturbing" the ALJ's treatment of

the appearance issue. The ALJ made no affirmative finding that the decoy's appearance complied with Rule 141(b)(2) and said the decoy's "height, hair, and appearance are nonissues."

The present case is distinguishable from AB-7320. The goatee in the present case amounted to hair ⅛" long, or less, on the tip of the decoy's chin. In the photograph of the decoy taken on the night of the transaction, it is difficult to tell if there is any hair on his chin or just a shadow. This is not at all comparable to the thin beard in AB-7320. In addition, there were other important factors in that case which affected the result, such as the lack of any finding regarding the decoy's appearance and ALJ's treatment of the decoy's appearance as a "nonissue."

Here, we have a specific finding by the ALJ regarding the decoy's appearance and it is clear that the ALJ considered all the evidence presented to him on that issue. This Board is not in a position to second-guess the ALJ's determination on this issue.

B. **The Decoy's Appearance at the Hearing**

It is clear from the findings that the ALJ was well aware of the differences in the decoy's appearance on the night of the decoy operation and at the administrative hearing. It is also clear that he took those differences into consideration when evaluating the decoy's apparent age at the time of the decoy operation.

Appellant's assertions that the difference in appearance was so great that "there were figuratively two decoys employed," one at the premises and one at the hearing, and that "there is no realistic way to connect the appearance of the two,"

are dramatic, but are contradicted by the ALJ's reasonable conclusion that he could judge the decoy's apparent age, in spite of the differences.

The ALJ saw the decoy in person and had the best opportunity to weigh the effect of the differences in his appearance. Under the circumstances, this Board is not in a position to say that the ALJ's conclusion was clearly erroneous.

II

Appellant contends the Department did not show that the identification of the seller by the decoy took place after the sale, but before the citation was issued. In addition, appellant argues, the rule was violated because it the decoy did not make the identification; it was the officer who made the identification and the decoy merely affirmed the officer's identification.

Rule 141(b)(5) (4 Cal. Code Regs. §141, subd. (b)(5)) states:

> "Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages."

There is no evidence that a citation was issued to the clerk in this case. Therefore, appellant's argument regarding the timing of the identification is moot and the Board does not need to address it.

Appellant's other argument fails as well. There is nothing in the rule that specifies how the identification of the clerk is to be done, other than that it must be "face-to-face." The decoy's affirmative answer to the officer's question whether St. Romain was the lady who sold him the beer was a sufficient identification by the decoy under the rule.

III

Appellant claims it was denied discovery rights under Government Code §11507.6 when the Department refused its request for the names and addresses of licensees whose clerks, during the 30 days preceding and following, had sold to the decoy who purchased an alcoholic beverage at appellant's premises. It also claims error in the Department's unwillingness to provide a court reporter for the hearing on its motion to compel discovery, which was denied in relevant part following the Department's refusal to produce the requested information. Appellant cites Government Code §11512, subdivision (d), which provides, in pertinent part, that "the proceedings at the hearing shall be reported by a stenographic reporter." The Department contends that this reference is only to the evidentiary hearing, and not to a hearing on a motion where no evidence is taken.

The Board has issued a number of decisions directly addressing this issue. (See, e.g., The Circle K Corporation (Jan. 2000) AB-7031a; The Southland Corporation and Mouannes (Jan. 2000) AB-7077a; Circle K Stores, Inc. (Jan. 2000) AB-7091a; Prestige Stations, Inc. (Jan. 2000) AB-7248; The Southland Corporation and Pooni (Jan. 2000) AB-7264.)

In these cases, and many others, the Board reviewed the discovery provisions of the Civil Discovery Act (Code of Civ. Proc., §§2016-2036) and the Administrative Procedure Act (Gov. Code, §§11507.5-11507.7). The Board determined that appellants were limited to the discovery provided in Government Code §11507.6, but that "witnesses" in subdivision (a) of that section was not restricted to percipient witnesses. The Board concluded that:

"We believe that a reasonable interpretation of the term "witnesses" in §11507.6 would entitle appellant to the names and addresses of the other licensees, if any, who sold to the same decoy as in this case, in the course of the same decoy operation conducted during the same work shift as in this case. This limitation will help keep the number of intervening variables at a minimum and prevent a 'fishing expedition' while ensuring fairness to the parties in preparing their cases."

The issue concerning the court reporter has also been decided in the cases mentioned above. The Board has held that a court reporter is not required for the hearing on the discovery motion. No reason has been advanced here that would make the result different in the present appeal.

ORDER

The decision of the Department is affirmed with respect to its determinations regarding Rule 141(b)(2) and Rule 141(b)(5). The case is remanded to the Department for such further proceedings as may be necessary and appropriate following compliance with appellant's discovery request, as limited by this Board's earlier opinions.[3]

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

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[3]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.