

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

AB-7700

File: 20-295702 Reg: 00048763

CIRCLE K STORES, INC. dba Circle K Store #5202
4555 W. Pacific Coast Highway, Newport Beach, CA 92660,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: August 16, 2001
Los Angeles, CA

ISSUED OCTOBER 15, 2001

Circle K Stores, Inc., doing business as Circle K Store #5202 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 14 days for its clerk, Juan Martinez ("Martinez"), having sold an alcoholic beverage (a six-pack of Budweiser beer) to Heidi Bentz ("Bentz"), 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 through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Kim.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated September 7, 2000, is set forth in the appendix.

Appellant's off-sale beer and wine license was issued on July 15, 1994.

Thereafter, the Department instituted an accusation against appellant charging a sale on March 23, 2000, of an alcoholic beverage to Bentz. At the time of the sale, Bentz was acting as a police decoy for the Newport Beach Police Department.

An administrative hearing was held on July 13, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Bentz and by William Hartford, a Newport Beach police officer who accompanied Bentz on the day in question. Appellant did not present any witnesses on its behalf.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and imposed a 14-day suspension.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant was denied a continuance to permit its counsel to decipher an audio tape which had been subpoenaed but not produced until the commencement of the hearing; and (2) the Department erred in its application of Rule 141(b)(2).

DISCUSSION

I

Appellant contends it was prejudiced in its ability to defend because its request for a continuance was improperly denied.

When Bentz purchased the beer, she was wearing a transmitter. The conversation between Bentz and Martinez was recorded on a tape recorder in the police vehicle. Appellants subpoenaed the audio tape, calling for its production by the

Newport Beach Police Department one day before the hearing. However, the tape was not produced until the commencement of the hearing. Appellant, through its counsel, requested a continuance to permit review of the tape. The Administrative Law Judge (ALJ) denied the request as untimely, but delayed the commencement of the hearing to permit appellant's counsel and counsel for the Department jointly to review the tape. After a 15-minute review, appellant's counsel stated that, had the tape been given to him in timely fashion, he would have taken the tape to a facility with recording equipment to filter out background noise and make the tape more audible.

Thereafter, following Bentz's direct and cross-examination, the tape was played while off the record, and Bentz was asked about what she had heard on the tape. She was unable to identify any of the content of the tape with any particularity. The ALJ commented that, to him, it "sounded just like a whole lot of background noise." Appellant's counsel said he could make out "one voice that stands out," and again expressed his desire to take the tape somewhere to have the background noise removed. Appellant's counsel later renewed his request for a continuance during his cross-examination of officer Hartford, and, during closing argument, contended he had possibly been prevented from establishing a violation of Rule 141(b)(4), pursuant to which a decoy is obligated to answer truthfully any questions about his or her age.

Appellant correctly sets forth the law applicable to the grant or denial of continuances. An appellant has no absolute right to a continuance; they are granted or denied at the discretion of the ALJ and a refusal to grant a continuance will not be disturbed on appeal unless it is shown to be an abuse of discretion. (Givens v.

Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446].)

We think that the ALJ was acting within his discretion in the manner in which he handled the problem presented by the untimely production of the audio tape. Absent a convincing reason for an indeterminate delay, his choice to go forward was a reasonable exercise of discretion. This is especially so considering that appellant itself contributed to the problem by setting the initial production date for the tape so close to the scheduled date for the hearing.

If appellant could have demonstrated to this Board any reasonable possibility how its defense had been prejudiced by its inability to better review the contents of the tape, there might well be merit in its contention that the ALJ abused his discretion when he denied appellant's request for a continuance. However, almost a year to the day later, we have been offered no evidence of any attempt by appellant to obtain a clarification of the content of the tape such that it might lend support to its claim of prejudice. For all we know, the tape, if rendered intelligible, could demonstrate that the decoy operation proceeded exactly as the Department's witnesses testified it had. For this Board to grant appellant relief in such circumstances would be ludicrous.

II

Appellant also contends that the Department erred in its application of Rule 141(b)(2) by failing to consider the photograph of the decoy displayed on her California driver's license (Exhibit 3) when it concluded that she presented the appearance which could generally be expected of a person under 21 years of age.

The ALJ stated, with respect to the decoy's appearance:

"The Court has observed the decoy's overall appearance, considered her physical appearance, her dress, poise, demeanor, maturity and mannerisms, as shown at the hearing. The Court has considered the photographs, Exhibits 2 & 4, and the other evidence concerning Bentz's overall appearance and conduct at Respondent's store on March 23, 2000. In the Court's informed judgment, decoy Bentz gave the appearance at the hearing and before Respondent's clerk which could generally be expected of a person under the age of twenty-one years."

Appellant suggests (App.Br., page 15) that both of the Department's witnesses testified that the photo on the driver's license shows a person "significantly different than that described by the ALJ,"² and contends that "the circumstances presented to the seller included the photograph on the driver's license."

The Board has not heretofore considered the clerk's opportunity to review the decoy's driver's license as one of the circumstances to be considered in assessing the decoy's appearance. Up until this case, it has been the Department which has urged the Board to do so, its position being that the clerk has been put on notice of the actual age of the decoy.

Probably the principal reason the Board has declined to do so is its desire not to discourage the practice of requesting proof of age or identification. Additionally, it is questionable that the age shown on a driver's license, or the driver's photo, are of any real assistance to an ALJ in assessing whether a decoy "could generally be considered" to have displayed the requisite appearance under the rule. We believe, and have often said, it is the overall appearance of the decoy which is controlling.

In any event, we do not think that the ALJ's failure to mention the driver's license

² We are unable to confirm appellant's suggestion. Indeed, officer Hartford's testimony is devoid of any reference to the decoy's appearance.

photo as one of the elements he considered in assessing the decoy's appearance can be said to be error, given his opportunity to view the decoy when she testified.

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ This 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.