

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

AB-7762

File: 20-207685 Reg: 99047799

CIRCLE K STORES, INC. dba Circle K #8688
10520 Camino Ruiz, San Diego, CA 92126,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria
Appeals Board Hearing: October 4, 2001
Los Angeles, CA

ISSUED DECEMBER 28, 2001

Circle K Stores, Inc., doing business as Circle K #8688 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a minor decoy, 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 B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

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

¹The decision of the Department, dated January 11, 2001, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellant charging that, on August 28, 1999, appellant's clerk, Hillary S. King ("the clerk"), sold a 12-pack of Miller Genuine Draft beer to 18-year-old Leslie Weber. Weber was acting as a minor decoy for the San Diego Police Department (SDPD) at the time of the sale.

An administrative hearing was held on September 6, 2000, at which time documentary evidence was received and testimony was presented by the minor decoy and by San Diego police detective Jana Beard concerning the transaction. Subsequent to the hearing, the Department issued its decision which determined that the violation had been proven and that no defense had been established.

Appellant thereafter filed a timely appeal in which it contends that Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)) was violated.

DISCUSSION

Appellant contends the Administrative Law Judge (ALJ) erred in finding that the decoy's appearance complied with the requirement of Rule 141(b)(2) that the decoy must display the appearance which could generally be expected of a person under the age of 21, under the actual circumstances presented to the seller of the alcoholic beverages at the time of the sale. Specifically, appellant argues that the decoy's appearance changed so much between the time of the sale and the time of the administrative hearing that it was impossible for the ALJ to analyze the decoy's apparent age as of the time of the sale.

The decoy, who was 5' 5" tall, weighed 160 pounds at the time of the decoy operation, August 28, 1999, and her hair at that time was down to the middle of her back. Between August 28, 1999, and the date of the administrative hearing, September

6, 2000, the decoy entered the United States Army. In the course of her basic training, the decoy lost 15 pounds, making her weight at the time of the hearing about 145 pounds. [RT 14.] Her mid-back-length hair was cut to about 3 inches above her shoulders and was curly at the time of the hearing, where it had been straight before when it was long. [RT 15.] In addition, the decoy testified that her fidgeting, which was obvious at the hearing, was a habit she had acquired since going into the Army; she was not nervous or fidgety on August 28, 1999, during the decoy operation. [RT 16.]

According to appellant, the ALJ's task of determining the decoy's apparent age, already made difficult by the drastic change in the appearance of the decoy, was made even more difficult by the presence of another decoy, Christi Rodriguez, who accompanied Weber during the decoy operation, and the lack of a full-length photograph of the decoy as she appeared at the time of the decoy operation.

The ALJ discussed the decoy's appearance in Finding II, paragraphs E and F:

"E. The overall appearance of Weber including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of an eighteen year old and her appearance at the time of the hearing was substantially the same as her appearance on the day of the decoy operation except that her hair was shorter and curlier and she was fifteen pounds lighter as of the date of the hearing. Weber who is five feet five inches in height weighed approximately one hundred sixty pounds, as of August 28 and was wearing jeans, a blue and green shirt, a white jacket and tennis shoes on that date. The photograph depicted in Exhibit 2 was taken on the night of the sale and it depicts what Weber was wearing and what she looked like when she entered the premises on August 28, 1999. Although Weber testified that her hair was down to the middle of her back when she was at the premises on August 28, Exhibit 2 indicates that her hair was pulled back in such a fashion that the length of the hair is not visible in the photograph and the hair did not cover her face.

"F. August 28, 1999 was the first time that Weber had acted as a decoy, but she testified that she was not nervous when she was in the premises. After considering the photograph ([Exhibit] 2), the overall appearance of the decoy when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be

expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense."

This Board said, in Circle K Stores, Inc. (5/25/2000) AB-7265:

"We are well aware that the rule requires the ALJ to undertake the difficult task of assessing [the] appearance [of a decoy] many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date. A specific finding by the ALJ to the effect that the minor's appearance was substantially the same at both times shows that the ALJ was aware of, and took into consideration, the rule's requirement that the minor's apparent age must be judged as of the time, and under the actual circumstances, of the alleged sale."

We have repeated many times that it is not in a position to second-guess the finding of the ALJ, who has the opportunity, which this Board does not, of observing the decoy in person, and we have deferred to the judgment and discretion of the ALJ's in most instances. Occasionally, however, we see a case that raises such doubts about that judgment that we are compelled to re-examine the ALJ's finding regarding the decoy's appearance. This is such a case.

Our deference to the ALJ's findings is due to their ability to see the decoy in person at the hearing and to extrapolate that appearance, which ordinarily has not changed in any significant way, back to the time of the decoy operation. A crucial factor in that deference is evidence that the appearance of the decoy had not changed substantially between the time of the decoy operation and the time of the hearing. In the excerpt from AB-7265 above, we recognized that a "discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing," might make it impossible for the ALJ reasonably to assume that

the minor would have displayed the same apparent age at the time of the decoy operation as he or she did in person at the hearing. Where the evidence clearly shows that there was a significant discernible change in the decoy's appearance, a finding that the decoy's appearance was substantially the same at both times is not entitled to the deference we would normally accord the ALJ's findings on appearance.

We have considered a number of cases where appellants contended that the appearance of the decoy had changed, allegedly making it impossible or unreasonable for the ALJ to determine with any accuracy the appearance of the decoy at the time of the decoy operation. Usually, we have rejected such contentions because they have been based on insignificant or unproven changes in the decoys' appearance.

In this case, however, the changes in the decoy's appearance in the year between the decoy operation and the hearing were not merely "discernible" changes, but dramatic ones. A 15-pound, or almost 10 per cent, weight loss is substantial, especially in someone only 5' 5" tall. Her hair was not just a little shorter, but drastically so, from the middle of her back to well above her shoulders. In addition, at the hearing it was curly, but a year before, in appellant's premises, it was straight.

The ALJ seemed to discount the change in the decoy's hair when he said, referring to the photograph of the decoy from the night of the decoy operation, "her hair was pulled back in such a fashion that the length of the hair is not visible in the photograph and the hair did not cover her face." This, however, merely points up the difference between the two hairstyles; the long hair, pulled back, would not be as obvious, or frame her face in the same way, as the shorter, curly hair would.

Beyond these physical differences, this decoy's behavior or demeanor had also

changed markedly in the intervening year. At the hearing, the decoy was obviously fidgety, a habit she said she had acquired during her basic training in the military. In contrast, during the decoy operation the decoy was not nervous and, not yet having acquired the habit of fidgeting, would have presented a very different, undoubtedly calmer, appearance. We find this change in behavior particularly significant because fidgeting while testifying is often noted in Department decisions as a factor contributing to a decoy appearing to be under 21 years of age.² The ALJ, however, did not even mention this significant factor in the proposed decision.

Also significant in determining whether the decoy's appearance had changed since the decoy operation, is the length of time between the violation and the time of hearing. There is commonly a lapse of several months between the violation and the hearing, but it is usually not long enough that any significant change in appearance occurs or would be likely to occur. In the present case, the hearing did not take place until slightly more than a year after the decoy operation because of the decoy's unavailability during basic training. A year often makes a dramatic difference in the appearance of young person, even without the weight loss and other changes present here.

Given the evidence of significant multiple discernible changes in the decoy's physical and non-physical appearance between the time of the decoy operation and that of the hearing, and the unusually long period of time intervening, we cannot accept

²Indeed, fidgeting is often the only item of behavior or demeanor that is specifically mentioned in decisions. This is not surprising, in a sense, because it is so noticeable and is so commonly seen as a behavior of very young, immature, or inexperienced youths.

the ALJ's finding that the decoy's appearance was substantially the same at both times. To say her appearance at the hearing was the same except for the changes in her physical appearance, when those changes are so drastic and accompanied by behavioral changes as well, is an implicit finding that her appearance was not substantially the same.

Since it cannot reasonably be concluded, on this record, that this decoy's appearance at the time of the hearing was substantially the same as her appearance at the time of the decoy operation, it cannot be reasonable to find that she displayed the appearance that could generally be expected of a person under the age of 21 under the circumstances presented to the seller at the time of the sale. We cannot sustain a finding of the ALJ where a critical basis for the finding crumbles away upon examination.

ORDER

The decision of the Department is reversed.³

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

³This 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.