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

AB-7906
File: 20-192146 Reg: 01050723

CIRCLE K STORES, INC. dba Circle K
315 South Jackson Street, Red Bluff, CA 96080,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: October 24, 2002
San Francisco, CA

ISSUED JANUARY 24, 2003

Circle K Stores, Inc., doing business as Circle K (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for its clerk having sold an alcoholic beverage (a 24-ounce can of Coors beer) to a 17-year old minor acting as a police decoy, contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, section 22, arising from a violation of Business and Professions Code section 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, Thomas M. Allen.

FACTS AND PROCEDURAL HISTORY

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[1]The decision of the Department, dated November 1, 2001, is set forth in the appendix.

Appellant's off-sale beer and wine license was issued on September 3, 1986. Thereafter, on April 30, 2001, the Department instituted an accusation against appellant charging that its clerk, Danny Cregan, sold, furnished, or gave, or caused to be sold, furnished or given, an alcoholic beverage (beer) to Chris Pflager, who was then approximately 17 years of age.

An administrative hearing was held on August 29, 2001, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction by Pflager ("the decoy"), Cregan ("the clerk"), and Eric Magrini, a Red Bluff police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged in the accusation had been established, and that appellant had failed to establish any defense to the charge.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the decoy's failure to respond to the clerk was a violation of Rule 141(b)(4); and (2) the decoy did not display the appearance required by Rule 141(b)(2).

DISCUSSION

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

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]

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 Bev. Control App. Bd.* (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. Dept. of Alcoholic Bev. Control* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

These general principles govern our consideration of this case, one which turns on its own unique set of facts and the treatment given them by the Administrative Law Judge (ALJ).

I

Rule 141(b)(4) provides that a decoy must answer truthfully any questions about his age. Appellant contends this rule was violated when the decoy failed to respond to a question by the clerk concerning his age. The Department contends the remark in question was a statement rather than a question.

The Administrative Law Judge (ALJ) resolved the issue in favor of the

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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].

Department, and wrote as follows (Finding of Fact VIII-C):

> "Respondent also argues that the minor decoy violated subdivision (b)(4) of Rule 141 because he failed to truthfully answer any questions about his age. At the outset, it is noted that the clerk did not ask questions about the minor's age; he merely read the minor's date of birth. The minor testified that the clerk read the date of birth from the driver's license – that it was a statement and not a question and that he, the minor, did not say anything in response. Thus, there was no violation of subdivision (b)(4) of Rule 141 since there was no question for the minor to respond.
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> However, even if the clerk's statement is viewed as a question, the audiotape indicates that a response, "Yeah," was received within a split second of the question. Had the response, "Yeah," not been received instantly, and had the clerk looked in an inquiring manner at the decoy, the decoy may have understood that there was a question pending. Under the circumstances, there was no opportunity for the decoy to respond. The clerk had testified that the minor was standing about two to three feet away from the counter and there were two customers at the counter playing scratchoffs and these customers were closer to the clerk. Although the evidence on this matter is not clear, the rapidity of the "Yeah" on the audiotape (State's Exhibit No. 7) in response to the clerk's reading the date of birth suggest that, because of his vision problem (farsightedness), he may have held out the decoy's driver's license to one of the customer's playing scratchoffs to confirm his reading of the date of birth and the person responded, "Yeah." In any event, there was no time or opportunity for the decoy to respond to what the decoy perceived as a statement. Therefore, there was no violation of subdivision (b)(4) of Rule 141." (Emphasis in original.)

The clerk actually testified he was nearsighted. Thus, one would think he was holding the license closer to be able to read the date, rather than away from him and close enough for one of the other patrons to read the license at the same time he was reading it. However, the ALJ appears to have accepted the clerk's explanation that it was one of the patron's who uttered the "Yeah."

Nonetheless, what is controlling, in our view, is the ALJ's determination that the recitation by the clerk of the date of birth on the license was not in the form of a question. It is clear from the decoy's testimony that he did not think he was being asked a question, or that a response was required. There is nothing in his testimony that suggests he was trying to hide his true age.

In this case, the clerk was holding a driver's license which, by the prominent legend on the red stripe on the face of the license, informed him that the patron was a minor, and would not be 21 until the year 2004.

Until he was assisted by leading questions, the clerk himself treated his remark as something less than a question [RT 77]:

> "Q. [By counsel for appellant] There was some testimony earlier about you reading out Chris's age. Do you recall whether you asked Chris any questions about his age or whether anything like that - -
>
> "A. I just read the license.
>
> "MR. ALLEN: Objection, leading.
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> " ADMINISTRATIVE LAW JUDGE: Go ahead. I will - -
>
> "THE WITNESS: I just read the license out loud.
>
> "MR. BUDESKY: Uh-huh.
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> "ADMINISTRATIVE LAW JUDGE: Overrule the objection."

Only after this transpired did the witness, when asked "When you read it out loud, was that in the form of a question?," claim that it was and that he was trying to confirm the birth date.

Appellant contends that "any inquiry or statement concerning age constitutes a question within the confines of the rule." (App.Br., at page 9.) We disagree. Rule 141(b)(4) is specifically limited to "questions" about his or her age.

Here, the clerk's recital of the decoy's date of birth was such that even he did not consider it a question until led into such a response. We have no difficulty in understanding why the ALJ, the decoy, and the police officer all could have perceived it to be something other than a question.

We do not overlook the fact that the physical condition of the license may have

prevented the clerk from scanning it on a device which would have disclosed the birth date. The fact that the license would not "scan" did not mislead the clerk. Instead, he did what he would have been expected to do; he read the license: "Any license that is bent back, part is shaved off, the scanner will not scan. Then you have to go by your eyesight." Then, by his own admission, he simply made a mistake as to whether the date of birth on the license qualified the decoy to purchase alcohol.

In any event, the decoy's failure to respond can not be said to have affected the clerk's actions. The clerk read aloud the date of birth which was on the license. Had the decoy said "yes, that's correct," the clerk would have learned nothing he did not already know.

The fact that the clerk's recitation of the date of birth evoked a response from another patron is really irrelevant. The "Yeah" could equally have been an acknowledgment of the patron's agreement with what the patron understood to be a statement as it might have been a response to something understood to be a question.

All this leads us to conclude that the ALJ's conclusion that there was no violation of Rule 141(b)(4) is supported by the evidence.

II

Appellant contends that the ALJ erred by requiring it to prove noncompliance with Rule 141(b)(2). This rule requires that a decoy display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the alleged seller of alcoholic beverages at the time of the alleged offense.

Appellant asserts that the ALJ "determined that the decoy did display that apparent age at the time of the hearing and then required the appellant to sustain a

burden of proof as to noncompliance with the Rule at the time of the sale." (App.Br., at page 2.)

The ALJ found as follows with respect to the issue under Rule 141(b)(2) (Finding of Fact VI):

> A. On the date of the decoy operation, the decoy was 6 feet 1 inch tall and weighed about 145 pounds, same as on the date of the hearing. On the date of the decoy operation, he was wearing loose cargo pants with a dark blue jacket; he had short hair and wore no jewelry. He was not wearing a hat or a cap at the time. State Exhibits Nos. 3, 4 and 5 depict the minor as he appeared on the date of the decoy operation, December 29, 2000. At the time of the hearing, and on the date of the decoy operation, as established by the evidence, the decoy presented a physical appearance which could generally be expected of a person under 21 years of age.
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> B. On the date of the hearing, the decoy appeared calm. He testified that on the date of the decoy operation, he was nervous prior to going into the above-captioned premises, but once he was inside he was pretty calm.
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> C. Mr. Pflager is a tall young man who is soft spoken. His manner of speaking and his mannerisms and poise are consistent with his age of 17 years. Although his height may make him appear somewhat older than his age, it is found that he displayed the appearance generally expected of a person under 21 years old. There is no evidence that the decoy presented a significantly different appearance to the clerk, Mr. Cregan, on December 29, 2000.

Appellants focus on the last sentence in Finding VI-C: "There is no evidence that the decoy presented a significantly different appearance to the clerk, Mr. Cregan, on December 29, 2000."

We think it reasonable to assume, in the absence of any evidence of a significant change in appearance between the time of the sale and the date of the hearing, usually a matter of months, that the appearance viewed by the ALJ is the same as that viewed by the seller of the alcoholic beverages. While the rule adds the phrase "under the actual circumstances presented to the alleged seller," we have in our application of the rule focused on the overall appearance of the decoy on each of the

two dates, and less on the context in which the clerk viewed the decoy.

Thus, we think it a normal application of the burden of proof to place upon the appellant the burden of demonstrating that, on the date of the sale, the decoy presented an appearance which could not be expected of a person under 21 years of age.

In this case, the Department's evidence consisted of the decoy himself, and photographs depicting his appearance on the date of the sale. We are not prepared to say the Department was obligated to prove more than it did.

ORDER

The decision of the Department is affirmed.[3]

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

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[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.