

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

AB-8151

File: 20-063168 Reg: 02053691

CIRCLE K STORES, INC. and ROBERT S. FIELD, Jr. dba Circle K Store No. 1012
10069 Folsom Boulevard, Rancho Cordova, CA 95670,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ann Elizabeth Sarli

Appeals Board Hearing: March 11, 2004
San Francisco, CA

ISSUED MAY 12, 2004

Circle K Stores, Inc., and Robert S. Field, Jr., doing business as Circle K Store No. 1012 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 10 days for their clerk, David Lavezzo, having sold a six-pack of Budweiser beer to Dennis Daly, a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a). Daly was 18 years and 8 months old at the time of the sale.

Appearances on appeal include appellants Circle K Stores, Inc., and Robert S. Field, Jr., appearing through their counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and R. Bruce Evans, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

¹The decision of the Department, dated May 29, 2003, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on August 1, 1978.

Thereafter, on September 5, 2002, the Department instituted an accusation against appellants charging the unlawful sale of an alcoholic beverage to a minor.

An administrative hearing was held on January 17, 2003, at which time oral and documentary evidence was received. At that hearing, the Department presented the testimony of Dennis Daly, the minor decoy, and that of Kevin Warren, a Sacramento County sheriff's deputy who accompanied Daly on the decoy operation. Warren testified that he had entered the store before the decoy entered. He observed the decoy select the six-pack of Budweiser from the cooler and approach the counter. Before the decoy reached the counter, he was stopped by the clerk, Lavezzo. Warren initially testified that the clerk asked the decoy if he was 21, but in later testimony said he did not recall whether Lavezzo asked the decoy if he was 21, or asked for his identification. The decoy pulled out his wallet and showed the clerk his driver's license. The clerk looked at it, said "okay, 1984, You're good to go." After the decoy went to the counter, the clerk looked at an "age cheat-sheet," repeated "Okay, 84, Okay, 84," and sold the beer to the decoy. Warren further testified that a female clerk advised Lavezzo to scan the decoy's I.D., but Lavezzo did not do so. Asked on cross-examination if a second decoy had been in the store, Warren said he did not think she was.

The decoy testified that after he had selected the beer from the cooler, he was stopped by a male employee who asked "Do you have I.D. for that?" The clerk looked at the decoy's driver's license, then said "Okay, you're good to go." The clerk rang up the sale, the decoy left the store, and then returned and identified Lavezzo as the person who sold him the beer by pointing at him and saying "That's the man right there."

Lavezzo was looking directly at him when he did this.

Sheriff's deputy Robert Williams was called as a witness for the licensees. He confirmed the testimony of the decoy that the clerk had asked the decoy for his I.D. He also testified that a second decoy, Guisela Queseda, had also been in the store at the time of the sale. Steven Spellman testified about the training provided to Circle K employees with respect to the sale of alcoholic beverages, and that a scanner and other materials were provided to assist in checking the age of purchasers of alcoholic beverages. He further testified that it was Circle K's policy to ask for identification from anyone appearing to be younger than 30 years of age.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven, and appellants had failed to establish any affirmative defense to the charge.

Appellants thereafter filed a timely appeal in which they raise the following issues: (1) Rule 141(a) and 141(b)(4) were violated by the decoy's failure to respond to the clerk's statement regarding his age; (2) Rule 141(a) and Rule 141(b)(5) were violated by the commencement of the citation process before the face to face identification occurred.

DISCUSSION

I

Appellants contend that the fairness provision of Rule 141² was violated, and Rule 141(b)(4) as well, because the decoy failed to respond to the clerk's question regarding the age of the decoy.

² Rule 141(a) provides, in part, that a decoy operation be conducted in a manner which "promotes fairness."

Appellants premise their argument that Rule 141(a) and 141(b)(5) were violated on the testimony of sheriff's deputy Kevin Warren, given during direct examination, that the clerk had asked the decoy if he was 21. However, when recalled as a witness by the attorney for appellants, Warren testified that he had been attempting to state that the clerk was trying to inquire about the decoy's age, and other than the statement in his report that the clerk had asked the decoy for his I.D., he had no independent recollection of the clerk asking the decoy his age.

The decoy, on the other hand, testified on both direct and cross examination that the clerk asked him for identification, both when he intercepted him on his way from the beer cooler to the counter, and again at the counter.

The administrative law judge's (ALJ) findings indicate that she accepted the decoy's testimony as to what he had been asked, disregarding Warren's less than consistent testimony about what he heard. 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, 185 [67 Cal.Rptr. 734]; *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

Nor do we agree with appellants that the decoy was expected to volunteer his age when the clerk apparently vocalized the decisional process that led him to make

the sale, any more than the decoy might have been required to volunteer a correction of the clerk's misreading of the identification provided to him. Rule 141(b)(4) spells out what the decoy is required to do. It is not a general mandate that the decoy assist the clerk in complying with the law if he thinks the clerk needs any assistance.

II

Appellants also contend that Rule 141(a)'s fairness provisions, and Rule 141(b)(5)'s requirement that the face to face identification be conducted prior to the issuance of an citation, were violated by the *commencement* of the issuance of the citation prior to the face to face identification. They argue that the citation should be considered to have issued once the officer began filling out the citation form. Appellants also assert that this resulted in an unduly suggestive identification. Since the officer had already begun the process of issuing the citation, appellants theorize, "an impermissibly suggestive one-person line up" took place.

The contention that there was an unduly suggestive identification is utterly without merit. Appellants acknowledge that there were two clerks on duty on the night in question, *one male and the other female*. Since the decoy's testimony described in considerable detail his dealings with the male clerk, and also described the interchange between the male clerk and the female clerk, it seems somewhat ludicrous to suggest that anything the officer did while filling out a citation form could have been suggestive.

The suggestion that the issuance of the citation preceded the face-to-face identification also lacks merit. Appellants say that the decoy and sheriff's deputy Robert Williams both testified that the citation process occurred simultaneously with the face to face identification. They never squarely claim that the issuance of the citation preceded the face to face identification, but only imply that it is a violation of the rule if

the process of filling out the citation form begins prior to the face to face identification.

We think that deputy Williams' explanation of when the citation was issued answers appellants' objections:

I was – as I know my habits in these things – entering information into my citation book. But, as this states here, starting with – on line 24, I did not issue it to this suspect until after I had been advised that they're face to face or one-on-one, whatever it is called.

[RT 78-79.]

ORDER

The decision of the Department is affirmed.³

TED HUNT, CHAIRMAN
KAREN GETMAN, 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.