

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

AB-8907

File: 21-284741 Reg: 07067492

CIRCLE K STORES, INC., dba Circle K Store #3066
5202 Peck Road, El Monte, CA 91732-1123,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 3, 2009
Los Angeles, CA

ISSUED MARCH 18, 2010

Circle K Stores, Inc., doing business as Circle K Store #3066 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk, Natalie Enriquez, having sold a 32-ounce bottle of King Cobra beer to a minor, 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 B. Saltsman and Alicia R. Ekland, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jennifer Casey.

¹The decision of the Department, dated July 16, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 9, 1993.

Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a person under the age of 21 on September 12, 2007.

An administrative hearing was held on May 14, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Romero, the minor, and by Craig Montierth, a City of El Monte police officer.

Romero testified that he was 18 years of age on September 12, 2007, the day of the transaction at issue. He testified that he arrived at the store on a bike, went to the alcohol section and selected a bottle of King Cobra, which he knew was an alcoholic beverage, and took it to the counter. The clerk did not ask for ID or for his age, but simply sold him the beer. He left the store, carrying the beer in a Circle K bag, and was pulled over "down the street." The police officers took him back to the store, where he identified the clerk who sold him the beer. Romero testified the visit to the store was the first time he went there to buy beer, and denied ever possessing false identification.

On cross-examination, Romero testified that he went to the store with his 20-year-old brother, and had not talked with anyone from the El Monte Police Department or the Department of Alcoholic Beverage Control prior to testifying. Objections were sustained to questions asking whether he was testifying to get help with respect to any other criminal matter, and whether he was currently on probation or was on probation at the time of the incident (his affirmative answer was stricken in response to Department counsel's objection).

Officer Montierth testified that while watching the store, his attention was drawn

to two juveniles arriving at the store on bikes. One of the juveniles (later identified as Nicholas Romero) went into the store. Montierth could see into the store, and saw Romero select a 32-ounce bottle of amber liquid from the cooler. Romero took the bottle to the counter. A female employee was behind the cash register. Romero left the store carrying a white plastic grocery sack containing the 32-ounce bottle of amber liquid. When Romero was stopped by Officer Montierth, Montierth discovered that the amber liquid in the sack was King Cobra beer. Montierth took Romero back to the store, where he was photographed with the clerk, who Romero identified as the person who sold the beer to him.

On cross-examination, Montierth testified he stopped Romero approximately 30 seconds after he left the store with what turned out to be beer. He further testified he checked the beer cooler area, the store floor, the storage area, and the office of the store and found no other employee present. Montierth testified that the clerk told him Romero had on a previous occasion shown some sort of identification purporting to show him to be over 21. Montierth did not see Romero show any identification to the clerk.

Appellant presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proved and no affirmative defense established.

Appellant filed a timely notice of appeal in which it raises the following issues: (1) The decision fails to provide any factual basis for its finding that the minor was a credible witness; and (2) the administrative law judge (ALJ) improperly limited appellant's cross-examination.

These related issues will be addressed as a single issue.

DISCUSSION

The appeal in this case is remarkably similar to another case involving a different store owned by appellant Circle K on the Board's calendar,² in that appellant's brief attempts to create appealable issues where there is no basis for them.

In this case, as in the case referred to in the preceding paragraph, the violation was established by the undisputed testimony of a sworn police officer and the testimony of the minor. Appellant presented no witnesses.

The evidence established that Romero arrived at the store on his bicycle, entered the store, selected a 32-ounce bottle of King Cobra beer, took the beer to the counter, paid for the beer and left the store. All of this was witnessed by Craig Montierth, an El Monte police officer. Montierth confronted Romero shortly after he left the store, discovered that he was under 21 years of age, and took him back into the store, where Romero identified the clerk who made the sale.

Appellant contends that an analysis of Romero's credibility was required, citing *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195, and *McBail & Co. v. Solano County Local Agency Formation Commission* (1998) 62 Cal.App.4th 1223 [72 Cal.Rptr.2d 923].

Holohan v. Massanari, supra, dealt with a federal court rule requiring an ALJ who rejects a Social Security claimant's testimony to give clear and convincing reasons for doing so. Aside from the fact that this Board has concluded on numerous occasions

² *Circle K Stores, Inc.*, AB-8900.

that this case does not represent California law, the case deals with the *rejection* of testimony on credibility grounds. In the present appeal, no testimony was rejected, nor was any offered by appellant.

Similarly, the general admonition in *McBail & Co. v. Solano County Local Agency Formation Commission*, *supra*, that appellant cites, has no application here, where the undisputed factual findings are self-explanatory. Two witnesses testified without contradiction to facts that established that an alcoholic beverage was sold to a minor. No further explanation was necessary.

Appellant's attempts to determine whether Romero's testimony was intended to benefit him in some other criminal proceeding, or whether he was on probation for some other offense were properly ruled irrelevant. Appellant argued that its questions were an attempt to impeach Romero's credibility, asserting they went to such issues as "bias, intent, motive, all of these things." [RT 26.]

Romero's testimony was corroborated in all material respects by Officer Montierth's testimony, which was not, and is not now, challenged by appellant.

Appellant's argument that the Administrative Procedure Act requirement (Gov. Code §11425.50) that a decision substantially based upon the credibility of a witness must contain a statement which "shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination," misses the point. This case involved the entirely consistent undisputed testimony of *two* witnesses, and there was no challenge to any of the facts about which they testified.

We are satisfied that there is no merit to the appeal.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.