

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

AB-9153

File: 21-295713 Reg: 10073315

CIRCLE K STORES, INC. dba Circle K 5211
3506 East Main Street, Ventura, CA 93003,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Matthew G. Ainley

Appeals Board Hearing: November 3, 2011
Los Angeles, CA

ISSUED DECEMBER 8, 2011

Circle K Stores, Inc., doing business as Circle K 5211 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for its clerk selling an alcoholic beverage to a police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated January 26, 2011, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 15, 1994. On July 22, 2010, the Department filed an accusation charging that appellant's clerk, Matthew Dole (the clerk), sold an alcoholic beverage to 18-year-old Matthew Galvan on May 16, 2010. Although not noted in the accusation, Galvan was working as a minor decoy for the Ventura Police Department at the time.

At the administrative hearing held on November 17, 2010, documentary evidence was received, and testimony concerning the sale was presented by Galvan (the decoy) and by David Ruggiero, a Ventura police officer.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established. Appellant filed an appeal contending that Department rules 141(b)(2) and 141(b)(5)² were violated.

DISCUSSION

I

Department rule 141(b)(2) 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 seller of alcoholic beverages at the time of the alleged offense." Appellant contends that this decoy did not comply with the rule because he had experience as a police Explorer and he was less nervous by the time he visited appellant's premises (the seventh premises visited during that decoy operation) than he was when the decoy operation began. Appellant argues that the decoy's experience and training "undoubtedly enhanced" his appearance. (App. Br. at p. 8.)

² References to rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

Whatever enhancement the decoy's experience brought to his appearance, it apparently did not cause him to appear to be older than his actual age of 18. After considering the decoy's physical appearance and demeanor, including his experience as a police Explorer and a decoy, the ALJ found that the decoy "appeared his age at the time of the decoy operation." (Find. of Fact 11.)

In his Conclusion of Law 5, the ALJ rejected appellant's argument at the hearing that the decoy's appearance violated rule 141(b)(2), saying that the decoy "had the appearance generally expected of a person under the age of 21."

As this Board has said innumerable times in the past, it will sustain the finding of the ALJ as to the decoy's apparent age unless the appellant provides some compelling reason to believe that the ALJ abused his discretion in making that determination. Appellant's assertion that the decoy's experience "undoubtedly enhanced" his appearance is so vague that it is almost meaningless, certainly not a sufficient basis to show an abuse of discretion.

II

Rule 141(b)(5) provides:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face to face identification of the alleged seller of the alcoholic beverages.

Appellant contends that the Department did not prove at the hearing that the citation was issued to the clerk after the face-to-face identification occurred.

The proof that was not presented at the hearing was *appellant's* evidence that the citation was issued *before* the face-to-face identification. Rule 141 creates the opportunity for a licensee to establish an affirmative defense. It was appellant's

responsibility to present at least some evidence to establish that the rule was violated. In the absence of such evidence, it was not the Department's burden to prove that it complied with the provisions of the rule.

ORDER

The decision of the Department is affirmed.³

FRED ARMENDARIZ, CHAIRMAN
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.