

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

AB-9210

File: 20-191922 Reg: 11074766

CIRCLE K STORES, INC., dba Circle K #1984
795 Shadowridge Drive, Vista, CA 92083,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 1, 2012
Los Angeles, CA

ISSUED DECEMBER 4, 2012

Circle K Stores, Inc., doing business as Circle K #1984 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all of which were stayed, subject to one year of discipline-free operation, for appellant's clerk, Cheryl Paster, selling an alcoholic beverage to Blake Valdez, an 18-year-old law enforcement 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, Ralph Barat Saltsman and Autumn Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kimberly J. Belvedere.

¹The decision of the Department, dated November 3, 2011, is set forth in the appendix.

PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on September 9, 1993. On April 5, 2011, the Department filed an accusation against appellant charging that, on October 7, 2010, appellant's clerk, Cheryl Paster (the clerk), sold an alcoholic beverage to 18-year-old Blake Valdez. Although not noted in the accusation, Valdez was working as a minor decoy for the San Diego County Sheriff's Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on August 25, 2011, documentary evidence was received, and testimony concerning the sale was presented by Matthew Hydar, a Department investigator, James Smith, a sheriff's deputy, and Blake Valdez (the decoy). Appellant presented no witnesses.

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

Appellant has filed a timely appeal, contending that there is no substantial evidence to support the ALJ's finding that the decoy possessed the appearance required by rule 141(b)(2).

DISCUSSION

Appellant contends that the ALJ's findings are not supported by substantial evidence in light of the whole record. Appellant argues that the ALJ discounted factors of appearance and maturity "by wrongly comparing the minor decoy's demeanor and mannerisms while testifying during the hearing," factors the decoy's own testimony "makes irrelevant." (App. Br., pp. 5-6.)

Rule 141(b)(2) (4 Cal. Code Regs., §141(b)(2)) requires a decoy to display the

appearance which could generally be expected of a person under 21 years of age. Appellant contends there was no compliance with that rule, and argues that the ALJ erred in ruling to the contrary. Appellant contends the decoy “had a fully mature appearance on the date of the operation – standing at 5 feet and 11 inches in height and weighing 150 pounds,” and the ALJ improperly discounted this appearance by using the decoy’s non-physical demeanor and mannerisms while testifying to make a finding about the decoy’s appearance at the time of the transaction. (App. Br., p. 3.)

Did the decoy’s weight gain over the ten months between the time of the decoy operation and the administrative hearing result in a “muscular” appearance, as appellant asserts? The ALJ did not seem to think so (see *infra*), the decoy, although acknowledging he had been working out, did not seem to think so (see RT 72-74), and one does not see a muscular appearance in the photos of the decoy (Exhibits 2, 3, and 4.)

Appellant’s approach is not new. In far too many decoy cases, appellant counsel seek to paint a picture of the decoy that gives them comfort, finding more in the record than is there, and ignoring the findings of the ALJ. This is an example of such. We have said many times that we will not substitute our view of the facts for that of the ALJ; indeed, we are admonished by law not to do so. The factual findings of the Department, when supported by substantial evidence, are binding on the Board, and all evidentiary conflicts must be resolved in the Department’s favor. (*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857].) The Board cannot disregard or overturn a finding of fact by the Department simply because a contrary finding would have been equally or more reasonable. (*Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85, 94 [84 Cal.Rptr.

113].

There is no evidence that the decoy had a fully mature appearance on the date of the operation, other than in appellant's imagination. It is true that the decoy weighed 150 pounds and was 5 feet 11 inches tall, but height and weight by themselves are probative of little. The ALJ watched and heard the decoy testify, and saw a "youthful looking male." The ALJ's findings (Finding of Fact D and paragraphs D 1-4) are much more complete and informative than is appellant's narrow reliance on the decoy's height, weight, and claimed muscularity:²

D. The decoy's overall appearance including his demeanor, his mannerisms, his maturity, his size and his physical appearance were consistent with that of a person under twenty-one years and his appearance at the time of the hearing was similar to his appearance on the day of the decoy operation except that he was about twenty pounds heavier and his hair was a little longer on the day of the hearing.

1. The decoy is a youthful looking male who was five feet eleven inches in height and who weighed one hundred fifty pounds on the day of the sale. On that day, the decoy had no facial hair and his clothing consisted of blue jeans, a green T-shirt and white Converse shoes. Exhibits 2 and 3 are two photographs of the decoy that were taken on the day of the sale before going out on the decoy operation. Exhibit 4 is a photograph that was taken at the premises. All three of these photographs depict how the decoy appeared and what he was wearing that day.

2. The decoy testified that he had not participated in any prior decoy operations, that he volunteered to be a decoy, that he was not paid to be a decoy and that he had been an Explorer with the California Highway Patrol.

3. There was nothing remarkable about the decoy's non-physical appearance and there was nothing about his speech, his mannerisms or his demeanor that made him look older than his actual age.

²The very first sentence in appellant's brief characterizes the decoy as possessing a "muscular mature physique." This, in spite of the fact that when appellant's counsel asked the decoy if he had a muscular build at the time of the decoy operation, the response he got was "I was toned. I wasn't big or anything." [RT 74]. The contemporary photos of the decoy (Exhibits 2, 3 and 4) do not suggest to this Board that the then 150-pound decoy displayed a "muscular mature physique."

4. After considering the photographs depicted in Exhibits 2, 3 and 4, the decoy's overall appearance when he testified, the way he conducted himself at the hearing and the fact that he did not say a word to the clerk while he was in the premises, 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. Even though the decoy had gained about twenty pounds at the time of the hearing, he still looked under the age of twenty-one.

We are satisfied that the ALJ's assessment of the decoy's appearance, seen from a far better vantage point than is available to this Board, must prevail.

ORDER

The decision of the Department is affirmed.³

BAXTER RICE, CHAIRMAN
FRED ARMENDARIZ, MEMBER
FRED HIESTAND, 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.