

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

AB-7108b

File: 20-207685 Reg: 97040874

CIRCLE K STORES, INC. dba Circle K
10520 Camino Ruiz, San Diego, CA 92126,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: October 4, 2001 Redeliberation: February 7, 2002
Los Angeles, CA

ISSUED MAY 7, 2002

Circle K Stores, Inc., doing business as Circle K (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for its clerk, Homayoun M. Taheb, having sold an alcoholic beverage (a six-pack of Budweiser beer) to Jennifer L. Saber, a nineteen-year-old minor, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a). Saber was acting as a minor decoy for the San Diego Police Department.

This is the third appeal involving this matter.

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, Jonathon E. Logan.

¹The decision of the Department, dated October 12, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 22, 1989.

Thereafter, the Department instituted an accusation against appellant charging that, on April 25, 1997, its clerk sold an alcoholic beverage to a minor.

An administrative hearing was held on January 14, 1998, following which the Department, on April 16, 1998, entered its decision sustaining the charge of the accusation and ordering a 25-day suspension. That decision was appealed. The Appeals Board, in a decision dated May 25, 1999, reversed the Department, stating:

“This is one of several cases in which appellants contend that the Department has misapplied Rule 141(b)(2). All were initially decided by the same Administrative Law Judge (ALJ), whose proposed decisions were adopted by the Department.

“Rule 141(b)(2) (4 Cal. Code Regs. § 141, subd. (b)(2)), requires that a decoy ‘shall 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’s attack on the decision of the Department is directed at findings with respect to the decoy that:

‘[The decoy] is a youthful looking female whose physical appearance is such as to reasonably be considered as being under twenty-one years of age and who would reasonably be asked for identification to verify that she could legally purchase alcoholic beverages. [The decoy’s] appearance at the time of her testimony was substantially the same as her appearance at the time of the sale ... ’

“Appellant now contends that the Department, as a result of its lack of understanding of the rule, misinterpreted and misapplied it. Appellant argues that the Department discounts all other indicia of age than physical appearance, and by doing so, reaches a conclusion contrary to fact.

“Appellant argues that the Department’s use of the term ‘physical appearance’ is a departure from, and violation of Rule 141(b)(2), because the rule uses only the term ‘appearance.’ While it is true that the ALJ and the Department employ words and terms that are not expressly in the rule, the

issue is not so simplistic.

“Nonetheless, while an argument might be made that when the ALJ uses the term ‘physical appearance,’ he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what he did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy’s appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.

“It is not the Appeals Board’s expectation that the Department, and the ALJ’s, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ’s are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.

“Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department’s concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).”

Following the decision of the Appeals Board, the Department, on July 16, 1999, in a Decision Following Appeals Board Decision, ordered the matter remanded to the ALJ who presided over the initial hearing “for findings and decision which he deems appropriate, based upon the record. He may, but need not, order additional hearing to allow the parties to present additional evidence, if in his discretion he deems it appropriate or necessary.”

That decision was the subject of a second appeal to the Appeals Board by

Circle K. In a decision dated July 3, 2000, the Appeals Board rejected Circle K's contention that the Department lacked jurisdiction to order the matter returned to the ALJ for further proceedings, stating, in part:

“The Board addressed this issue at considerable length in Circle K Stores, Inc. (December 27, 1999) AB-7080a, and concluded that the Department possessed the requisite jurisdiction to enter the order it did. That decision discussed the pertinent case law considering the effect of an unqualified order of reversal, and concluded that it was the equivalent of an automatic remand for further proceedings not inconsistent with the Board's decision.

“We believe the same result must prevail in this case.”

Thereafter, the Department, on October 12, 2000, adopted a proposed decision submitted to it by the ALJ in accordance with the Department's original order of remand. That decision again concluded that appellant, through its clerk, violated Business and Professions Code §25658, subdivision (a), and expressly found that appellant had failed to establish a defense under Business and Professions Code §25660 and Department Rule 141. (4 Cal. Code Regs. §141.) The decision included a statement by the ALJ that, after a careful review of the entire record, including the transcript of the hearing and his hearing notes, he had found it unnecessary to conduct any further hearing. Specifically, with respect to the appearance displayed by the decoy, he found (Finding of Fact II-D):

“This Administrative Law Judge did consider the decoy's overall appearance including her demeanor, her poise, her mannerisms, her maturity, her clothing, her size and her physical appearance in assessing whether the decoy displayed the appearance which could generally be expected of a person under the age of 21 years. The decoy's appearance at the time of the hearing was substantially the same as her appearance on the day of the decoy operation. The decoy is about five feet seven inches in height, she had short hair on the date of the sale and she did not do anything to make herself look older. After considering the decoy's photograph (Exhibit 3), her overall appearance when she testified and the way she conducted herself at

the hearing, 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.”

Appellant now contends (1) the Department lacked jurisdiction to order the remand to the ALJ; (2) the ALJ lacked jurisdiction to reconsider the matter; and (3) the ALJ relied on evidence (his hearing notes) never disclosed to appellant.

DISCUSSION

I

Appellant contends that the Department lacked jurisdiction to order the case remanded to the ALJ for further proceedings.

Appellant has not raised any issue regarding jurisdiction that has not already been considered and rejected by this Board. It did so in Circle K Stores, Inc. (1999) AB-7080a, where the issue was discussed and it was concluded that an unqualified order of reversal was the equivalent of an automatic remand for further proceedings.

II

Appellant attacks what it describes as the “farfical procedure” of the ALJ in entering a new proposed decision in which he concluded that the decoy possessed the appearance mandated by Rule 141(b)(2). Appellant’s principal contention appears to be that the ALJ could not possibly conduct a full and fair analysis of the apparent age of a decoy after the passage of such a considerable length of time, in this case, some two years and nine months.

As we have said on other occasions, Rule 141(b)(2) requires an ALJ to make a subjective judgment, on the evidence presented, whether the decoy displayed the

appearance which could generally be expected of a person under the age of 21. In our initial decision in this case, we acknowledged that for the Board to be assured that such a decision was not made arbitrarily, there be a showing that the ALJ applied the standard set forth in the rule, and not a truncated standard which failed to take into account indicia of age other than mere physical appearance.

When this Board upheld the action of the Department in ordering a remand to the ALJ, it did so because it believed such action consonant with the Board's earlier view, that the Department was not barred from reconsidering the matter following the Board's unqualified reversal of the Department's original decision. Nonetheless, the Board continued to entertain the doubts it originally expressed:

“Even though we may entertain doubts as to whether the Department can rectify the defects in its earlier decision, in part as a result of the passage of time, those doubts are not so conclusive as to persuade us that the Department's order providing the ALJ an opportunity to do so was not within its jurisdiction.”

With the benefit of hindsight, it is now apparent to this Board that the manner in which this case was resolved offends our sense of fairness.

We did not expect the Department, and more particularly the ALJ, to simply declare, without further hearing and input from appellant, that he had in fact done exactly what the Board had said should have been done, even though there is no hint in his original decisions that he had done so.

The Board, it can be said, envisaged something more, where the parties could have addressed the various indicia of age displayed by the decoy.

That did not happen. Instead, it may be said that the ALJ simply culled from the record evidence bearing on appearance, leaving all concerned with nothing more

to go on than his assertion that he had really considered the various factors with respect to which his original proposed decisions were lacking. While we do not question his good faith, we do feel that there are enough questions about his ability to isolate this particular decoy from all the decoys he may have seen before and since this case was heard, that the procedure which was utilized was flawed and inherently unfair.

Now even more time has elapsed. We think it is time for the Department to recognize that this has become a case in which, as a result of a procedural error early on, no fair result is ever likely to be attained. While we may lack the ability to compel a dismissal, we do believe the Department, in an appropriate exercise of its discretion, should dismiss the accusation in this matter.

ORDER

The decision of the Department is reversed.²

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

² 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.

II

