ISSUED JULY 3, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CIRCLE K STORES, INC. dba Circle K Store #3003 500 West Orangewood Avenue Anaheim, CA 92802, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)))))))))))	AB-7258 File: 21-284745 Reg: 98042419 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: March 2, 2000 Los Angeles, CA

Circle K Stores, Inc., doing business as Circle K Store #3003 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 45 days for appellant's employee selling an alcoholic beverage to a person under the age of 21, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article

[1]The decision of the Department, dated October 22, 1998, is set forth in the appendix.

XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 16, 1993. Thereafter, the Department instituted an accusation against appellant charging that, on October 4, 1997, its clerk sold a six-pack of Miller Genuine Draft beer to Michael Hedgpeth, who was then 18 years old.

An administrative hearing was held on August 25, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged in the Accusation.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department violated Rule 141(b)(2); (2) the penalty constitutes an abuse of discretion; (3) the ALJ erroneously precluded expert testimony offered by appellant; (4) the Department violated appellant's right to discovery; and (5) the Department violated Government Code §11512, subdivision (d), when a court reporter was not provided to record the hearing on appellant's Motion to Compel.

DISCUSSION

I

Appellant contends the decoy, Hedgpeth, did not display the appearance that could generally be expected of a person under the age of 21. Additionally, the ALJ considered only the physical attributes of the decoy in determining the decoy's apparent age.

Finding IV states:

> "On October 4, 1997, the decoy was 6'2" tall and weighed approximately 170 pounds. A photograph of the decoy taken that day (State's Exhibit 4) shows that the decoy appeared to be under 21 years old. Respondent's argument that the Department violated its (the Department's) Rule 141(b)(2) is rejected."

This finding falls short of giving any assurance that the ALJ considered more than just the decoy's physical appearance when he stated that the decoy "appeared to be under 21 years old." The Department argues that the ALJ had the opportunity to see the decoy at the hearing, interacted with him by asking him a number of questions, looked at a photograph of him as of the date of the decoy operation, and made a specific finding that the decoy appeared to be under 21. The ALJ, however, never mentions the decoy's appearance at the hearing but, relied for his finding entirely on the photograph taken of the decoy the night of the decoy operation. It is hard to see how he could have considered anything other than physical appearance under these circumstances.

In Circle K Stores, Inc. (2000) AB-7265, we rejected the same wording as was used in this case, and reiterated the reasoning expressed in Circle K Stores, Inc. (1999) AB-7080 and numerous similar cases, that led to our conclusion that

such an analysis is insufficient. We see no reason in the present appeal to deviate from what we expressed in AB-7265 or to reach a different result.

II

Appellant contends the ALJ improperly denied appellant's request to call Edward Ritvo, M.D., a psychiatrist, as an expert witness. Appellant proposed to have Dr. Ritvo called as a witness to testify as to indicia of the decoy's age.

The Board has affirmed the Department's exclusion of the proposed testimony in a number of cases. (See, e.g., Prestige Stations, Inc. (January 4, 2000) AB-7248.) This case raises no issue concerning such testimony not previously considered and rejected by this Board.

III

Appellant contends the penalty imposed, a 45-day suspension, was based on the existence of prior sale-to-minor violations and is an abuse of discretion because ownership of the licensed premises had changed since the alleged priors and evidence of two priors was not properly received.

The Appeals Board will not disturb the Department's penalty orders in the absence of an abuse of the Department's discretion. (Martin v. Alcoholic Beverage Control Appeals Board & Haley (1959) 52 Cal.2d 287 [341 P.2d 296].) However, where an appellant raises the issue of an excessive penalty, the Appeals Board will examine that issue. (Joseph's of Calif. v. Alcoholic Beverage Control Appeals Board (1971) 19 Cal.App.3d 785 [97 Cal.Rptr. 183].)

Without evidence of an actual change in the ownership of appellant, we assume that nothing more was involved than a name change from The Circle K

Corporation to Circle K Stores, Inc. In The Circle K Corporation (Dec. 20, 1999) AB-7187, this same issue was raised, and extensive information was provided indicating that, in 1995, The Circle K Corporation did change its name, with no change of ownership, to Circle K Stores, Inc.

There was no objection raised to the admission of the documents at the hearing, so the objection is considered waived. In any case, appellant does not deny that there were two prior sale-to-minor violations, one in 1994 and one in 1995. The 1995 violation would make the present violation a "second strike," usually resulting in a 25-day suspension. The 1994 violation was within a year of the 1995 violation, and all three violations occurred within a 37-month period. The Department did not abuse its discretion in considering the prior violations as factors in aggravation.

IV

Appellant claims it was prejudiced in its ability to defend against the accusation by the Department's refusal and failure to provide it discovery with respect to the identities of other licensees alleged to have sold, through employees, representatives or agents, alcoholic beverages to the decoy involved in this case, during the 30 days preceding and following the sale in this case. It also claims error in the Department's failure to provide a court reporter for the hearing on their motion to compel discovery. Appellant cites Government Code § 11512, subdivision (d), which provides, in pertinent part, that "the proceedings at the hearing shall be reported by a stenographic reporter." The Department contends

that this reference is only to an evidentiary hearing, and not to a hearing on a motion where no evidence is taken.

The Board has issued a number of decisions directly addressing these issues. (See, e.g., The Circle K Corporation (Jan. 2000) AB-7031a; The Southland Corporation and Mouannes (Jan. 2000) AB-7077a; Circle K Stores, Inc. (Jan. 2000) AB-7091a; Prestige Stations, Inc. (Jan. 2000) AB-7248; The Southland Corporation and Pooni (Jan. 2000) AB-7264.)

In these cases, and many others, the Board reviewed the discovery provisions of the Civil Discovery Act (Code of Civ. Proc., §§2016-2036) and the Administrative Procedure Act (Gov. Code §§11507.5-11507.7). The Board determined that the appellants were limited to the discovery provided in Government Code §11506.6, but that "witnesses" in subdivision (a) of that section was not restricted to percipient witnesses. We concluded that:

> "a reasonable interpretation of the term "witnesses" in §11507.6 would entitle appellant to the names and addresses of the other licensees, if any, who sold to the same decoy as in this case, in the course of the same decoy operation conducted during the same work shift as in this case. This limitation will help keep the number of intervening variables at a minimum and prevent a "fishing expedition" while ensuring fairness to the parties in preparing their cases."

The Board also held in the cases mentioned above that a court reporter was not required for the hearing on the discovery motion. We continue to adhere to that position.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration in light of the comments herein with respect to Rule 141(b)(2), for compliance with appellant's discovery request as limited by this opinion, and for such other and further proceedings as are appropriate and necessary.[2]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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