**ISSUED MAY 25, 2000**

# BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

# OF THE STATE OF CALIFORNIA

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| CIRCLE K STORES, INC.<br>dba Circle K Store #5059<br>28410 Front Street, #100<br>Temecula, CA 92590,<br>Appellant/Licensee,<br><br>v.<br><br>DEPARTMENT OF ALCOHOLIC<br>BEVERAGE CONTROL,<br>Respondent. | ) | AB-7337<br><br>File: 20-211558<br>Reg: 98043758<br><br>Administrative Law Judge<br>at the Dept. Hearing:<br>Rodolfo Echeverria<br><br>Date and Place of the<br>Appeals Board Hearing:<br>February 3, 2000<br>Los Angeles, CA |

Circle K Stores, Inc., doing business as Circle K Store #5059 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 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 XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

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[1]The decision of the Department, dated December 31, 1998, is set forth in the appendix.

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 beer and wine license was issued on March 31, 1989. Thereafter, the Department instituted an accusation against appellant charging that, on February 26, 1998, appellant's clerk, Betty Macedo ("the clerk"), sold a bottle of Coors Light beer to Anthony Jaeger, an 18-year-old police decoy ("the decoy").

An administrative hearing was held on November 13, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Riverside County deputy sheriff Stephen Mike and by the decoy.

Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as charged in the accusation and that no defenses had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department did not apply the correct legal standard in evaluating the apparent age of the decoy under Rule 141(b)(2); (2) Rule 141(b)(5) was violated; (3) the Department violated appellant's right to discovery; and (4) 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 ALJ improperly limited his consideration of the decoy's appearance to his physical appearance alone.

Rule 141(b)(2) provides:

> "The 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; . . ."

In Finding III. 1., the ALJ stated, in pertinent part:

> "Anthony Jaeger (hereinafter the "minor") is a youthful looking male, whose physical appearance is such as to be reasonably considered as being under twenty-one years of age and who would reasonably be asked for identification to verify that he could legally purchase alcoholic beverages. The minor's appearance at the time of his testimony was substantially the same as his appearance at the time of the sale . . . ."

This raises an all too frequently recurring issue on appeal. In Circle K Stores, Inc. (1999) AB-7080, the Board stated:

> "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.
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> "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])."

The Board's position finds its support in the teachings of the California Supreme Court in Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836] that "the 'accepted ideal is that the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.'"

We believe that this case must be reversed for the same reasons as expressed in the earlier Board reversals, such as Circle K Stores, Inc. (1998) AB-7080, and Circle K Stores, Inc. (1999) AB-7122, where this issue was presented.

II

Appellant contends the Department violated Rule 141(b)(5), which requires that the decoy make a face to face identification of the seller prior to the issuance of any citation. Appellant appears to concede the decoy identified the seller, but asserts it was not face to face, as the rule requires. Appellant's argument is based upon its interpretation of the deputy's testimony, which, appellant asserts, was more credible than the testimony of the decoy that was relied upon by the ALJ.

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (Brice v. Department of Alcoholic Beverage Control (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].) This Board is not in a position to challenge the ALJ's determination of which version of the facts should be believed.

The ALJ found (Finding III.3.):

> "The minor subsequently reentered the premises with Deputy Kubel and while the minor was in close proximity to the clerk, the minor identified Macedo as the clerk who had sold him the beer. Because the clerk did not believe that the minor's driver's license stated 'AGE 21 IN 2000[,]' the minor's driver's license was shown to the clerk again."

The decoy testified that he identified the clerk when standing "[a] little more than arm's distance" away from her [RT 44], which he agreed was about three or four feet away [RT 45]. The decoy also testified that when the clerk expressed disbelief, the decoy pulled his driver's license from his pocket, and gave it to the deputy while facing the clerk. The deputy gave the license to the clerk, who examined it for about a minute before it was returned to the decoy. [RT 44-46.]

Deputy Mike testified that the decoy re-entered the store with Deputy Kubel and, from about 10 feet away, pointed to the clerk, apparently in response to a question from Deputy Kubel that Deputy Mike could not hear. [RT 22-24, 34.] During that time, Deputy Mike testified, he was talking to the clerk, whose attention was directed to him. [RT 24, 33-34.]

Appellant states: "If Deputy Mike was unsure as to the question posed by Deputy Kubel from a distance of 10 feet, one wonders how the clerk and the decoy

were face-to-face, as is required by the rule." (App. Opening Br. at 7.) It appears that appellant is arguing that the clerk was not aware that the identification was taking place and therefore the identification was not face-to-face.

The proximity of the decoy to the clerk during the identification and the giving of the license to the clerk both show that the clerk was aware, or should reasonably have been aware, of the decoy's identification of her. The testimony of the decoy amply supports the conclusion that the decoy made a face-to-face identification within the meaning of the rule. In addition, the clerk did not testify, so we have no way of knowing whether or not she would assert that she was unaware of the identification.

III

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.

This is but one of a number of cases which this Board has heard and decided in recent months. (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 appellant was 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:

> "We believe 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."

We believe the "discovery issue" in the present appeal must be disposed of in accordance with the cases listed above.

IV

Appellant also contends that the decision of the ALJ to conduct the hearing on its discovery motion without a court reporter present also constituted error, citing 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 the evidentiary hearing, and not to a hearing on a motion where no evidence is taken.

This issue has also been decided in the cases mentioned in III, above. The Board held in those cases that a court reporter was not required for the hearing on the discovery motion. We have not been persuaded to change our mind.

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 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.