ISSUED JULY 13, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CIRCLE K STORES, INC. dba Circle K Store # 3087 1535 Aviation Boulevard Redondo Beach, CA 90278, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7378 File: 21-284739 Reg: 98044779 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: June 6, 2000 Los Angeles, CA

Circle K Stores, Inc., doing business as Circle K Store #3087 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 25 days for its clerk having sold an alcoholic beverage to a 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).

[1]The decision of the Department, dated March 11, 1999, is set forth in the appendix.

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, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on December 10, 1993. Thereafter, the Department instituted an accusation against appellant charging that appellant's clerk, Shafique Ubaray ("the clerk"), sold an alcoholic beverage to Lilian Guzman ("the minor"), a 19-year-old minor working as a decoy with the Redondo Beach Police Department.

An administrative hearing was held on January 19, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Redondo Beach police officer Scott Weibel ("the officer"), the minor, and the clerk.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation, and determined that no defense had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: 1) Rule 141(b)(2) was violated; (2) Rule 141(b)(5) was violated; (3) expert testimony was improperly excluded; (4) the penalty is excessive; (5) appellant was denied its discovery rights; and (6) the Department violated Government Code §11512 by failing to provide a court reporter for the hearing on appellant's motion to compel discovery.

DISCUSSION

I

Appellant contends that the Administrative Law Judge (ALJ) violated Rule 141(b)(2) by failing to conduct an analysis of the apparent age of the minor in order to determine whether she presented the appearance which could generally be expected of a person under 21 years of age. Appellant asserts that the ALJ simply determined, by looking at a photograph of the minor, that it depicted a person under the age of 21 on the day of the transaction.

The only factual finding by the ALJ regarding the appearance of the decoy is Finding V, which states: "Photographs of the decoy taken on August 13, 1998, clearly show that she looked under twenty-one years old."

It is apparent from the determinations of law in the decision that the ALJ was cognizant of the requirements of Rule 141, since he quoted (in Determination II-A) the crucial language of the rule that "the decoy shall display the appearance which could generally be expected of a person under 21 years of age." It is also apparent that he thought he was correctly applying the rule from his reference to and quotation from the decision of the Fourth District Court of Appeal in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126] ("Acapulco"). Despite doing so, and despite the fact that the minor had appeared before him as a witness, he relied only on a photo of the minor, leaving this Board with no other explanation how he believed the rule had been satisfied.

Although this finding is not like the findings held defective in other appeals, it

also 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." Even though the ALJ had the opportunity to see the decoy at the hearing, he 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, the Board 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.

This conclusion, however, does not require outright reversal of the Department's decision, but the matter should be remanded to allow a proper analysis of the decoy's appearance, assuming that is still possible.

II

Appellant contends that there was no compliance with Rule 141(b)(5), which requires that the minor decoy make a face-to-face identification of the seller of the alcoholic beverage prior to the issuance of any citation.

This was at issue in Acapulco, supra, in which the court said the Department must be held to strict compliance with Rule 141(b)(5). The Board's decisions since Acapulco have heeded the court's admonition, and, indeed, the decisions of the Department in the time following Acapulco which have reached the Board indicate

that the Department and the police agencies have also, at least in most cases, done so as well.

Here, appellant contends that because of the inconsistencies between the testimony of the police officer and the minor as to whether the decoy pointed to the clerk while identifying him, and whether she said anything, and the conflict with the testimony of the clerk, who claimed she did neither, demonstrate that there was no face-to-face identification.

The officer initially testified that the minor pointed to the clerk and said "he's the one that sold me the beer" [RT 11]. On cross-examination, although unwavering in his testimony that the minor identified the clerk as the seller, he conceded that he could not recall whether she pointed to the clerk or simply said words to the effect "that's him" [RT 15-20]. According to the officer, the minor and the clerk were three to four feet apart (the width of the counter) when she identified him as the seller.

The minor testified that she left the store after making the purchase, and then reentered the store for the purpose of identifying the seller. She did so, she recalled, by pointing to him with her fingers, but not saying anything, while she and the clerk stood on opposite sides of the counter facing each other [RT 31].

The ALJ concluded that, despite the disagreement as to whether the identification was made verbally or by pointing, the consistent testimony of the officer and the minor was sufficient to establish that the requisite identification took place.

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]; Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (Kirby v. Alcoholic Beverage Control Appeals Board (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; Kruse v. Bank of America (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and Gore v. Harris (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

We believe appellant's complaint that there was no compliance with Rule 141(b)(5) lacks merit. It was the duty of the ALJ, as the initial trier of fact, to determine the weight to be given the evidence and the credibility of the witnesses, and to resolve any conflicts therein. We believe he performed this function properly.

III

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.

Evidence Code §801 states that an expert may testify as to his or her opinion if the opinion is on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."

Staff agrees with the ALJ that the determination of the decoy's apparent age is not an issue that requires the opinion of an expert, but is made "from common knowledge, common experience" [RT 35]. The ALJ appropriately denied appellant's request.

IV

Appellant contends the penalty is excessive, and an abuse of the Department's discretion, because it is based upon a prior violation the date of which, appellant asserts, was not proven.

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].)

As appellant points out, the decision cites as evidence of prior discipline an order of suspension entered in March 1997. Appellant claims it is the date of the violation which governs its use as the basis for a penalty enhancement, and, appellant asserts, that date was not established. Admitting that a date of violation is set forth in the accusation which is part of Exhibit 5, appellant argues that because the registration number is written on the accusation rather than stamped, as in the usual case, it is "deficient."

We think appellant's focus on the accusation and its hand-written registration number ignores the picture presented by the three documents which

make up Exhibit 5 when viewed in the aggregate. What they show is (1) an accusation dated January 14, 1997, bearing the file number allocated to the license in question, a handwritten registration number, and the allegation of an unlawful sale to a minor on December 18, 1996; (2) a declaration of service for the decision in that case, referring to the same license number and the same registration number as are on the accusation; and (3) a decision entered on March 6, 1997, pursuant to stipulation and waiver, which also bears the corresponding license and registration numbers. Additionally, both the accusation and the decision show the same address of the licensee: 1535 Aviation Boulevard in Redondo Beach.

The likelihood that the prior violation related to some other licensee or happened on some other date is, in our thinking, too remote to contemplate. Appellant cannot deny that it had a prior violation. The decision in Exhibit 5 is conclusive on that point.

We also note that the violation could not have occurred prior to December, 1993, since that is when appellant's license issued. Thus, even in the worst case scenario, which we think most unlikely, the prior violation was within five years, a period which seems reasonable to warrant the consideration of an identical violation as a basis for an enhanced penalty. The inferences implicitly drawn in the decision of the Department, under such circumstances, do not appear to be unreasonable.

V

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 its 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 has 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," as used 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.

However, in this case, the denial of appellant's discovery request cannot be said to have been prejudicial to its defense. The record shows (at RT 39) that appellant was the only licensee where the minor decoy was able to make a purchase during that decoy operation. That being the case, there would have been nothing to produce.

For the same reason, the issue regarding the court reporter is moot.

ORDER

The decision of the Department is reversed and remanded to the Department for reconsideration in light of the Board's comments with respect to the issue concerning Rule 141(b)(2).[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.