ISSUED JULY 10, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CIRCLE K STORES, INC. dba Circle K 8575 Los Coches Road El Cajon, CA 92021 Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7421 File: 20-183244 Reg: 98045368 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: May 4, 2000 Los Angeles, CA

Circle K Stores, Inc., doing business as Circle K (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its off-sale beer and wine license for 25 days for its clerk, Larry McDaniel, having sold an alcoholic beverage (a six-pack of Budweiser beer) to Kristina Keatts, an 18-year-old minor acting as a decoy for the San Diego County Sheriff's Department, 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

[1]The decision of the Department, dated May 27, 1999, is set forth in the appendix.

and Professions Code §25658, subdivision (a).

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, Matthew G. Ainley.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1993. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to Kristina Keatts, a minor.

An administrative hearing was held on April 6, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by the decoy, Keatts, and by Roy Mayne, a sheriff's deputy who was supervising the decoy. Appellant presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as alleged, and that appellant had not established any defenses.

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) appellant was denied its right to discovery; and (4) the Department erred in failing to provide a court reporter for the hearing on the discovery motion.[2]

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[2] At oral argument, appellant contended that the Department's use of a standard penalty amounted to an "underground regulation," in violation of the Administrative Procedure Act. In view of the fact that the issue was not timely raised, and the Board has not had the benefit of briefs on what appears to be an important issue, we decline to consider it at this time.

DISCUSSION

I

Appellant contends that the minor decoy did not display the appearance which could generally be expected of a person under 21 years of age, which is required by Rule 141(b)(2). Appellant contends that the Department's analysis is conducted in a vacuum as to what is considered reasonable, while the correct standard requires a comparison in that it anticipates general expectations.

Appellant's argument seems to be little more than a play on words. It is clear from the decision that the Administrative Law Judge (ALJ) took pains to consider the appearance of the decoy against the standard contained in Rule 141.

We do not think there is any more than a semantic difference between the ALJ's use of the phrase "whose appearance is such as to reasonably be considered as being under twenty-one years of age," and the language of the rule that "the decoy shall display the appearance which could generally be expected of a person under 21 years of age." Both involve a measure of the appearance of the decoy against that of a hypothetical person under the age of 21.

The ALJ's further determination, that the decoy would reasonably have been asked for identification to verify that she could legally purchase alcoholic beverages, does not detract from his finding that a Rule 141 defense had not been established. The added language is merely surplusage. It certainly does not lower the standard contained in Rule 141 - if anything, it raises that standard to a higher level.

The contention that Rule 141 was violated has no merit.

II

Appellant contends the Department abused its discretion by imposing an enhanced penalty on the premise that a prior discipline constituted a factor in aggravation, because there was no evidence establishing that the date of the prior violation was within three years of the current violation. Appellant cites Business and Professions Code §25658.1, suggesting that it sets an outside limit of three years on the Department's use of a prior violation as an aggravating factor.

We think appellant reads more into §25658.1 than is there.

The statute provides, in pertinent part:

> "... no licensee may petition the department for an offer in compromise... for a second or any subsequent violation of Section 25658 that occurs within 36 months of the initial violation."

There is nothing in the language of §25658.1 that prohibits the Department from enhancing a penalty because of a prior violation that occurred more than three years from the date of the initial violation. We do hold the view that the prior violation must not be so distant as to be considered remote, and must not be so dissimilar as to render its use unfair or abusive.

The decision which is part of Exhibit 2, is sufficient proof of a prior violation. Appellant does have a point, however, with respect to its contention that the reliance upon the accusation attached to that decision for the date of the prior violation was improper. The accusation which is attached to Exhibit 2 bears no registration number, and an address which is not that of appellant, so would not support the decision to which it is attached. It follows that we have no way of knowing when the previous violation occurred, so as to determine whether it could

be considered too remote to warrant its use as an enhancement factor.

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. 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 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.

ORDER

The decision of the Department is affirmed with respect to its determination that there was no violation of Rule 141(b)(2), but the matter is remanded to the Department for reconsideration of the penalty, compliance with appellant's discovery request as limited by the Board's prior decisions, and such further proceedings as may thereafter be necessary or appropriate.[3]

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

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[3] 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.