ISSUED APRIL 11, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CIRCLE K STORES, INC. dba Circle K Store #514 14527 Slover Street Fontana, CA 92335, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7476 File: 20-112266 Reg: 99046094 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: October 5, 2000 Los Angeles, CA

Circle K Stores, Inc., doing business as Circle K Store #514 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 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).

Appearances on appeal include appellant Circle K Stores, Inc., appearing

[1]The decision of the Department, dated August 5, 1999, is set forth in the appendix.

through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on August 27, 1981. Thereafter, on April 1, 1999, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a 16-year-old minor on February 19, 1999.

An administrative hearing was held on June 30, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Jose Cervante, the minor, who was acting as a police decoy at the time of the transaction, and by Daniel Justin Gore, a Fontana police officer who accompanied the decoy when the sale occurred.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proven and no defenses 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) the decoy operation was conducted during "rush hour," in violation of Department guidelines; and (3) appellant was denied its right to discovery and to a transcript of the hearing on its motion to compel discovery.

DISCUSSION

I

Appellant contends that the decision violates Rule 141(b)(2) because it fails to contain a meaningful discussion concerning the apparent age of the decoy. Appellant refers specifically to the absence of any discussion of a "five o'clock shadow depicted in the photograph of the minor and the impact of that beard growth on the apparent age of the minor decoy." (App.Br., page 6.)

The Administrative Law Judge wrote that the decoy appeared youthful, and displayed the appearance and demeanor of a person which could generally be expected of a person under 21 years of age. In addition, he added that although the decoy looked more like an 18-year-old than a 16-year-old (his actual age), "he clearly has the appearance of someone younger than 21 years of age." (Findings of Fact C and E.)

Appellant's reliance upon the absence of any specific reference to "five o'clock shadow" is unpersuasive in light of the ALJ's broader discussion of the decoy's appearance and his acknowledgment that the decoy appeared to be 18 rather than 16. It cannot be said that he simply ignored the issue. It strikes us as simply a decision that enough had been said about the decoy's appearance.

II

Appellant contends that the evidence demonstrated that the decoy operation was conducted during rush hour, and the decision's failure to discuss the possible violation of a Department guideline mandates its reversal.

Officer Gore testified that there may have been two customers in line in front of the decoy, and one or two after him, but he did not think the store was crowded [RT 35].

The decoy operation was conducted on a Friday evening, at about 6:00 p.m.

Appellants cite the Board's decision in Saif Assaedi (1999) AB-7144, asserting the Board there ruled that it would be unfair for a law enforcement agency to engage in a decoy operation during a true rush hour circumstance.

Assaedi does contain broad language which suggests there may be circumstances when a violation of one of the Department's guidelines might render a particular decoy operation unfair when measured against Rule 141. We believe, however, that such an instance will be rare, because the guidelines are merely that, and are not written with sufficient precision to warrant their application as if they were rules of law.

The California Supreme Court, in Provigo Corp. v. Alcoholic Beverage Control Appeals Board (1994) 7 Cal.4th 561 [28 Cal.Rptr.2d 638], held that the Department's decoy guidelines are suggestions for police departments to follow, and failure to follow them does not provide a defense to a charge of sale to a minor.

The guideline at issue, which discourages the conduct of decoy operations during rush hour, is an example of imprecision. "Rush hour" is a term ordinarily used in connection with freeway traffic, and associated with commuters traveling to and from their workplace and residence. As applied to individual premises, the term has no practical meaning, and is of little use as a guideline.

The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy.

We believe it asks too much to require law enforcement to predict the time of day that, for a particular premises, would fairly be considered "rush hour."

It is conceivable that, where an unusual level of patron activity that truly interjects itself into a decoy operation to such an extent that a seller may be legitimately distracted or confused, and the law enforcement officials seek to take advantage of such distraction or confusion, relief might be appropriate. This does not appear to be such a situation.

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 §11507.6, 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.

The Department also contends that the Board's position with respect to discovery infringes upon the privacy rights of the individuals who have been cited for selling to minors. This contention is, at best, premature. The Board has required only the disclosure of the licensees where such sales have occurred, and

not the identity of any person who may have been cited.

ORDER

The decision of the Department is affirmed as to all issues except that involving discovery, and the case is remanded to the Department for such further proceedings as may be necessary and appropriate in light of our ruling on that issue.[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.