BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

CIRCLE K FOOD STORES, INC. dba Circle K Store #2988
2604 B Street, San Diego, CA 92102,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7539

File: 20-284721 Reg: 99046206

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 12, 2000
Los Angeles, CA

ISSUED: MARCH 5, 2001

Circle K Stores, Inc., doing business as Circle K Store #2988 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which revoked its license for its clerk, Gene Elliot Thompson ("Thompson") having sold an alcoholic beverage (a six-pack of Budweiser beer) to Sarah Poole, then 18 years of age, the sale 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 through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

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[1]The decision of the Department, dated November 18, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1993. Thereafter, on April 9, 1999, the Department instituted an accusation against appellant charging a violation of Business and Professions Code §25658, subdivision (a), and alleging further that appellant had committed four prior violations of that section.

An administrative hearing was held on July 22 and October 6, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction alleged in the accusation.

Subsequent to the hearing, the Department issued its decision, which determined that the charge of the accusation had been sustained, and ordered the suspension .

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) The penalty constitutes an abuse of discretion; [2] (2) the Department called a key witness in violation of the discovery statute; and (3) Rule 141(b)(5) was violated. Issues (1) and (2) overlap, and will be discussed together.

DISCUSSION

I

Appellant's challenge to the order of revocation as an abuse of discretion is

[2] Appellant has raised several subsidiary issues with respect to its contention that the penalty constitutes an abuse of discretion. It contends that Exhibit 2, evidence of prior violations, was improperly admitted into evidence; that the decision fails to state a proper basis for revocation; and that a change of ownership makes it unfair to charge the present licensee with the prior violations.

principally based on three underlying contentions: the erroneous admission of the documents purporting to show prior violations (Exhibit 2); the failure of those documents to evidence the prior violations; and the absence of a connection between the prior violations and the present ownership of the license. In addition, appellant's contention that the Department called a key witness in violation of the discovery statutes to testify about the considerations which led to the penalty recommendation, also bears on the penalty issue.

Exhibit 2 consists of a compilation of decisions and accusations from prior proceedings involving alleged violations of Business and Profession Code §25658, subdivision (a). There are four separate decisions. Each of the four decisions recites that the appellant has filed a stipulation and waiver of its right to hearing, reconsideration and appeal. Each of the four decisions is accompanied by an accusation bearing corresponding license and registration numbers. The license number - 20-284721 - is identical on all of the decisions and accusations. The registration numbers, dates of decisions, and dates of alleged violations are as follows:

Registration No. 94030339
Date of Decision: August 18, 1994
Date of violation alleged: June 11, 1994

Registration No. 94030999
Date of Decision: December 1, 1994
Date of violation alleged: July 30, 1994

Registration No. 94031201
Date of Decision: December 1, 1994
Date of violation alleged: September 25, 1994

Registration No. 94033102

Date of Decision: June 26, 1995
Date of violation alleged: April 21, 1995

Appellant contends the documents comprising Exhibit 2 were not properly certified, stating that the certification stamp does not indicate where the document was signed, that the identity of the signator is unknown, and that it is unknown whether the signator is an authorized custodian of records. As a consequence, appellant asserts (App.Br., at page 11), "the Department had no competent evidence upon which to base any findings of the dates of the violations."

The Department states in its brief that the signature of the person certifying the documents is that of Acting District Administrator M. Hibsch. Assuming the Department's representation to be factual, it seems reasonable to assume that Mr. Hibsch certified the documents in his office in San Diego. Further, as the person in charge of the office, it seems reasonable to assume that he has the capacity to act as a records custodian.

In any event, appellant's counsel did not raise the issue of the adequacy of the certification at the hearing.

Appellant also contends (App.Br., at pages 14-15) that the copies of the accusations lack a file stamp which would show that they were actually filed, and that the dates August 8, 1994; November 10, 1994; November 30, 1994; and June 21, 1995, set forth in Finding of Fact I, do not appear in the respective "numbered elements to the exhibit," and "lead nowhere."

Appellant is correct that the accusations do not state on their face that they were filed. However, the fact that each bears a registration number, albeit hand-

written, that corresponds with the same registration number on the accompanying decision, tends to prove that it was, in fact, filed. Also, a review of the decisions and accusations as a whole reveals a consistency of date, registration number and license number that would not be expected if the documents were not what they purport to be.

The dates in Finding of Fact I are set forth in count 1 of the accusation. All but one of the dates - the exception being April 21, 1995 - are listed as the dates of prior violations in the accusation. They do not appear to be violation dates, but, more probably, were we to engage in conjecture, were the filing dates of the accusations.

In any event, the exact dates of the accusations on which the four decisions are presumably based are not critical. Appellant was first licensed on December 9, 1993, so the earliest violation could not have been before that date.

What is more, the record indicates that appellant's counsel did not object to the admission of Exhibit 2 on any ground other than that the decisions and accusations in that exhibit pertained to a licensee other than the current holder of the license, which brings us to the third ground of appeal asserted by appellant.

Appellant contends that the prior violations should not be considered by the Department, and that any penalty be only what would be appropriate for a first violation. Appellant contends that as result of a change of ownership involving Circle K, the present licensee is really a new owner.

The only evidence relating to a change of ownership is found in the testimony of Cheryl Mitchell, a district manager for Circle K, that the shares of

Circle K were purchased by Tosco Marketing Company.

The Board can take official notice of its decision in The Circle K Corporation (December 20, 1999) AB-7187. In that case, the details of the transaction referred to by Mitchell were examined by the Department, which concluded that the transfer of shares to Tosco did not affect the ownership of the license in question. The Board affirmed the Department and agreed with its analysis of the corporate restructuring which had taken place.

The Board also considered, and rejected, the claim in that case that the Department was not entitled to take prior disciplines into account in assessing a penalty. We see no reason why this case should be treated any differently, especially where there is no evidence of any change in the management of Circle K after Tosco acquired its stock.

Finally, appellant contends that Eugene Barnes, a district administrator, should not have been permitted to testify because he had not been disclosed as a potential witness. Appellant argues that the ALJ erred in permitting Barnes to testify as a rebuttal witness when appellant had presented no evidence to rebut.

Barnes' name first surfaced in the hearing when appellant's counsel said he had not received copies of the records relating to appellant's prior disciplinary history. The documents in question were supposed to have been sent to appellant's counsel along with a cover letter signed by Barnes. After some discussion, and after it appeared that the problem concerning these records had been resolved, Department counsel then stated he intended to have Barnes appear in connection with the penalty.

The ALJ overruled appellant's objections to Barnes' appearance as a witness, stating that he would permit Barnes to testify in rebuttal of objections and arguments of appellant's counsel that he had not received the prior decisions and that, in light of the changes in Circle K stores over the years, the prior decisions should not be considered.

Over appellant's objection, Barnes was permitted to explain why he had recommended revocation as the penalty in the event the charge of the accusation was sustained. He testified that he formulated his penalty recommendation based upon three violations in 1994 and a violation in 1995. In his opinion, the four priors did not fall within the purview of Business and Professions Code §25658.1 (the "three strikes law".) He further testified that, despite name changes, the licensee was the same in all the decisions.

Appellant asserts that "one could only assume that without Gene Barnes' testimony, revocation would not have been ordered. There are not three 'prior violations' with [sic] the preceding 36 months even alleged in this case" (App. Cl. Br., at page 6), and "it is clear from the decision that the Administrative Law Judge relied on Barnes' opinion in imposing the ultimate penalty of revocation." (App. Br., at page 24.)

The decision makes no direct reference to Barnes. It states the following considerations regarding the penalty:

> "Even though none of the four prior sales to a minor occurred within three years of the present violation, the sale of January 29, 1999 is the fifth sale of an alcoholic beverage to a minor within a period of less than five years. The fact that this many sales to a minor have occurred at the same premises within a relatively short period of time was considered as an aggravating

> factor in the imposition of a penalty herein. The fact that the Respondent was able to successfully complete its three year 'probationary period' after its last violation was considered as a mitigating factor."

It can be said that the ALJ would have reached exactly the same decision regarding penalty if Barnes had not testified. A record of five sales to minors in five years invites serious discipline.

It can also be said that appellant could not really have been surprised by any of Barnes' testimony. Appellant's counsel acknowledged that he had known Barnes for a number of years, and the Board can take notice of the fact that counsel's extensive practice in the area of alcoholic beverage control has brought him into contact with Barnes on numerous occasions.

Further, there is nothing in Barnes' testimony that could have come as any surprise to appellant's counsel. As an experienced practitioner, appellant's counsel is thoroughly familiar with the role of a licensee's prior disciplinary history in the assessment of a penalty, and in the Department's formulation of its penalty recommendations based upon that history. Indeed, it was appellant's interjection of the new claim that it was not responsible for the prior violations that was partially responsible for the ALJ's decision to allow Barnes to be called.

That being said, then how was appellant really prejudiced? The hearing was continued for three months after Barnes testified, and appellant was permitted to present the testimony of a witness to respond to the points made by Barnes, and to present testimony in support of appellant's claim that it was not the licensee involved in the prior proceedings, an issue not even raised until mid-stream of the

hearings.[3]

While we might think it somewhat unusual for an ALJ to permit the calling of a witness not previously designated to rebut objections and arguments made by opposing counsel, we are not prepared to say, in the absence of any demonstrable prejudice, that it was an abuse of his discretion to do so. At worst, he was guilty of harmless error.

II

Appellant contends that Rule 141(b)(5) was violated. Rule 141(b)(5) requires the officer directing the decoy to have the decoy make a face to face identification of the seller. Appellant concedes that a face to face identification was made, but contends that it was not made by the officer directing the decoy, but, instead, by the officer who was directing that officer.

Appellant's contention is premised on the assumption that there can be only one police officer in charge of the decoy and that officer must be the one who conducts the identification process.

We think such an argument ignores the dynamics involved once a sale to a decoy has occurred. In some operations, only one peace officer may be involved; in such a case, that peace officer is necessarily the officer directing the decoy. In others, such as the decoy operation in this case, multiple officers may be involved.

When multiple officers are involved, a decoy must be prepared to follow the direction of any one of them, depending upon the circumstances. Thus, a decoy

[3] Although appellant filed a special notice of defense, setting forth fourteen defenses, a change in ownership was not one of them.

may be directed by one officer to attempt a purchase at a particular establishment, and, if there is a sale, directed by another officer to identify the seller.

There is nothing in Rule 141(b)(5) that locks a particular peace officer into a particular role in a decoy operation. Every decoy operation is different; unless the peace officers are afforded the flexibility to move with the situation, the potential for loss of control is enhanced. The requirement that a chain of command for a decoy operation be created as a condition of compliance with Rule 141(b)(5) is simply unrealistic.

We believe the only realistic interpretation of Rule 141(b)(5) is that the peace officer who conducts the identification process is deemed the officer directing the decoy. Any more rigid interpretation would go beyond the obvious intent of the rule - to ensure that an innocent clerk not be cited for another's violation - and well beyond even the "strict adherence" standard enunciated in Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126].

ORDER

The decision of the Department is affirmed.[4]

TED HUNT, CHAIRMAN

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[4] 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.

E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD