

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

AB-7677

File: 20-295718 Reg: 00048291

CIRCLE K STORES, INC. dba Circle K Store #5213
1061 West El Norte Parkway, Escondido, CA 92026,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 6, 2001
Los Angeles, CA

ISSUED OCTOBER 30, 2001

Circle K Stores, Inc., doing business as Circle K Store #5213 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for appellant's clerk 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).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Joseph R. Budesky, and the Department of Alcoholic Beverage Control, appearing through its counsel, Michele L. Wong.

¹The decision of the Department, dated July 20, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 15, 1994.

Thereafter, the Department instituted an accusation against appellant charging the unlawful sale of an alcoholic beverage to a minor. The minor was working as a police decoy at the time of the sale.

Appellant filed a discovery request pursuant to the Administrative Procedure Act. The Department refused to provide the requested police reports regarding the two prior disciplinary matters alleged in the accusation. Appellant filed a Motion to Compel Discovery, the matter was heard, and the ALJ issued an order sustaining the refusal of the Department to provide the requested documents.

An administrative hearing was held on May 31, 2000, at which time documentary evidence was received and testimony was presented by Angie Reyes, the minor decoy ("the decoy"); Richard Callister, an Escondido police officer involved in the decoy operation; and by Karl Knight, the premises' store manager.

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

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) appellant's rights to discovery and to a reporter for the motion proceeding were violated, and (2) Rule 141(b)(2) was violated.

DISCUSSION

I

Appellant contends that the Department's refusal to provide requested police reports regarding appellant's prior violations of Business and Professions Code

§25658, subdivision (a), denied it the opportunity to formulate an argument that little or no weight should be accorded those prior violations in determining the appropriate penalty in the instant matter. It also contends that the Department violated Government Code §11512, subdivision (d), when it failed to provide a court reporter to record the hearing on appellant's motion to compel discovery.

Government Code §11507.5 provides: "The provisions of Section 11507.6 provide the exclusive right to and method of discovery" in administrative adjudicatory proceedings under the Administrative Procedure Act (APA; Gov. Code §§11370-11529).

Government Code §11507.6 contains a specific list of material discoverable in an administrative proceeding. That statute provides that a party is entitled to, among other things, the following materials "in the custody and control of the other party":

"(d) All writings, including, but not limited to, reports of mental, physical and blood examinations and things which the party then proposes to offer in evidence;

"(e) Any other writing or thing which is relevant and which would be admissible in evidence;

"(f) Investigative reports made by or on behalf of the agency or other party pertaining to the subject matter of the proceeding, to the extent that these reports (1) contain the names and addresses of witnesses or of persons having personal knowledge of the acts, omissions or events which are the basis for the proceeding, or (2) reflect matters perceived by the investigator in the course of his or her investigation, or (3) contain or include by attachment any statement or writing described in (a) to (e), inclusive, or summary thereof. . . ."

We believe appellant was entitled to the requested police reports pertaining to the prior disciplinary actions, because the Department alleged the existence of the prior discipline in the accusation for purposes of penalty enhancement. In this situation, the police reports are discoverable under both subdivisions (e) and (f) of Government Code §11507.6. Without the police reports, appellant may not have access to facts

surrounding the prior violations. This could well hamper appellant in arguing what weight should be given the prior discipline. We fail to see how the Department can argue that this information is not relevant, when the Department itself has, on more than one occasion, brought up the facts and circumstances of prior violations when justifying a penalty recommendation both to ALJ's and to this Board.

In addition, the police reports are clearly made "on behalf of the [Department]." A police report is frequently the basis for the initiation of disciplinary action against a licensee. Local police and sheriffs' departments conduct the minor decoy operations which are the bases for a large percentage of the sale-to-minor violations charged by the Department. Law enforcement agencies are also required to "immediately notify the department of any arrests made by them for violations over which the department has jurisdiction which involve a licensee or licensed premises." (Bus. & Prof. Code §24202.)

The police reports regarding prior disciplinary action are also "pertaining to the subject matter of the proceeding" because the prior actions they deal with are being used in determining the penalty to be imposed in the present proceeding.

We wish to emphasize that, by this determination, we are not allowing licensees to relitigate prior disciplinary matters that are now final. This does not give licensees *carte blanche* to bring up arguments or defenses that they did not make before the prior decision became final.

Our decision is limited to circumstances where the accusation in a present case includes an allegation of one or more prior violations for purposes of enhancing the penalty in the present case. It is also limited to discovery of those police reports that

were available to the Department at the time of the prior disciplinary action and that will provide the licensee with factual information about the prior violation.

This decision is intended to do no more than provide the licensee with the same information that the Department has, so that the parties have equal opportunities to argue the effect the prior violations should have on the present penalty to be imposed. By this decision, we make no assertion that an ALJ or the Department will, or should, find the circumstances of prior violations to be appropriate or significant considerations in fixing a penalty.

We have consistently rejected counsel's argument regarding the necessity of a court reporter for the motion to compel (see, e.g., Equilon Enterprises, LLC (4/11/01) AB-7477; The Southland Corporation and Francisco (3/23/01) AB-7533), and we find the present matter to merit no different treatment.

II

Appellant contends the decoy in this matter violated the directive of Rule 141(b)(2) that a decoy must display the appearance which could generally be expected of a person under the age of 21, because the decoy was "heavily made-up."

Appellant asserts that, since the clerk sees the decoy for only a few minutes, at most, the decoy's physical appearance is what the clerk notices most, and heavy make-up creates "an intrinsic unfairness" in the decoy operation because it "has a significant impact on the apparent age of the minor decoy."

The decoy did *not* testify, as alleged by appellant, that she was "heavily made-up." Rather, she testified that, during the decoy operation, she had on powder, mascara, eyeliner, and lip gloss [RT 19-22]. She was wearing the same make-up at the

hearing, except that she was wearing chapstick at the hearing instead of lip gloss [RT 14-15]. The ALJ said, in Finding II-F, that "After observing the decoy closely, the decoy's make-up was found to be very natural looking." The ALJ had the opportunity, which this Board has not, of seeing the decoy in person. Under the circumstances, the Board is not in a position to second-guess the finding of the ALJ on this matter.

Appellant appears to assert that a decoy violates the rule by the mere fact of wearing make-up during a decoy operation. Make-up only has significance in this context, however, if it makes the decoy appear to be older, specifically, over the age of 21. Whether it is light or heavy is really irrelevant. It is the impact on a decoy's apparent age that matters. Appellant has made no showing that this decoy's make-up made her appear older than 21.

Appellant also asserts that "The intent of the decoy operation should not be to entice clerks to sell to female decoys who are significantly made-up."

The implications of appellant's statement that heavily made-up decoys will entice clerks to sell to them verges on the absurd. Appellant has no basis for implying that heavy make-up on female decoys in general would be enticing to clerks or that the intent of a decoy operation is to use heavily made-up female decoys to "entice" (presumably, male) clerks. Appellant's innuendo certainly does not establish that this clerk was "enticed," by the make-up on this decoy or otherwise, to sell an alcoholic beverage to her.

ORDER

The decision of the Department is affirmed with respect to the issue of the decoy's appearance, but reversed with respect to the discovery of police reports and

remanded to allow the Department to provide appropriate discovery and for such other proceedings as may be necessary.²

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.