

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

AB-7752

File: 20-206891 Reg: 00049003

CIRCLE K STORES, INC. dba Circle K Store #8686
2220 Westwood Avenue, Redding, CA 96001,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Jeevan S. Ahuja

Appeals Board Hearing: February 14, 2002
San Francisco, CA

ISSUED APRIL 18, 2002

Circle K Stores, Inc., doing business as Circle K Store #8686 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk having sold an alcoholic beverage to a minor acting as a police decoy, such 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, Robert Wieworka.

¹The decision of the Department, dated December 21, 2000, 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, the Department instituted an accusation against appellant charging that, on February 12, 2000, appellant's clerk, Carmella Conley ("the clerk") sold an alcoholic beverage (beer) to Amber Stevenson, a nineteen-year-old minor. Although not stated in the accusation, Stevenson was acting as a decoy for the Redding Police Department.

An administrative hearing was held on October 19, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Stevenson ("the decoy") and by Rob Wilson, a Redding police officer, concerning the transaction at issue.

The decoy testified that the clerk asked for her identification, which she produced, and if the decoy had gone to high school with her [RT 17]: "You look familiar. Did we go to high school together" [RT 42.]. The decoy said "yes." The clerk then made the sale.

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation. This timely appeal followed.

Appellant contends that the decoy violated Rule 141(b)(4)² when she answered affirmatively the clerk's question whether the decoy had gone to high school with her. As a consequence, the clerk was misled into believing the decoy was over 21 years of age.

² Rule 141 (b)(4) provides:

"A decoy shall answer truthfully any questions about his or her age."

Appellant asserts the decoy's answer was untrue - appellant contends that while the two may have been in school at the same time, that would have been before high school, when the decoy was in sixth grade. Appellant does not contend that the decoy purposely lied. Instead, appellant asserts that, because she did not know with certainty whether the two were in high school together, the decoy engaged in assumptions and speculation, as a result of which the clerk was given inaccurate and misleading information which, in turn, led to the sale of beer.

The Department, on the other hand, asserts that the decoy reasonably assumed that since the two had classes together in junior high school, they went to high school together. The Department further argues that there is no evidence that the clerk had not attended the same high school as the decoy. The record is silent as to whether the answer was actually correct or incorrect.³ The Department also argues that, since the record is silent as to the clerk's age (the clerk did not testify), it is equally possible that the clerk was herself only 19 years of age, and her perception that she had gone to school with the decoy was the reason she asked for the decoy's identification.⁴

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the

³ The decoy testified that she attended Shasta High School. The record does not disclose which of the high schools in the area the clerk attended, if not Shasta High School.

⁴ The Department also contends that appellant should be barred from raising this issue because it did not raise it below. Our review of the record reveals that appellant's counsel sufficiently raised the issue during his closing argument. Even had he not, we think that the fact that the ALJ addressed the issue in his proposed decision would entitle appellant to address it on appeal.

Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to public welfare or morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.⁵

The ALJ concluded that appellant had not established a defense under Rule 141, finding that there was no evidence that the clerk and the decoy had not gone to the same high school, and that the decoy's reply to the clerk's question about high school did not distract the clerk.

The burden was on appellant to establish the elements of a Rule 141 affirmative defense - that, in this case, the decoy answered untruthfully a question about her age. However, the question she was asked was only indirectly about her age, and we have found nothing to suggest her answer was untruthful, or even incorrect. Had the clerk testified, these mysteries could have been cleared up.

We would be remiss if we did not point out that, even if the clerk may have

⁵ California Constitution, article XX, § 22; Business and Professions Code §§23084 and 23085; Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

believed she and the decoy attended the same high school, it was unreasonable for her to assume she and the decoy were the same age, if the clerk were over 21, and even more unreasonable to make an assumption about the decoy's age if she, the clerk, were younger than 21, especially since she had been provided a driver's license disclosing the decoy's actual age.

ORDER

The decision of the Department is affirmed.⁶

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

⁶ 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.