

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

AB-7877

File: 20-329242 Reg: 01050468

CIRCLE K STORES, INC. dba B P Oil
133 South Auburn Street, Grass Valley, CA 95945,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

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

Appeals Board Hearing: July 11, 2002
San Francisco, CA

ISSUED SEPTEMBER 12, 2002

Circle K Stores, Inc., doing business as B P Oil (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for its clerk, Christopher Hoyt ("Hoyt"), having sold an alcoholic beverage (a 12-pack of beer) to Jacob Boeckx ("Boeckx"), 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 through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the

¹The decision of the Department, dated August 30, 2001, is set forth in the appendix.

Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on May 16, 1997.

Thereafter, on March 12, 2001, the Department instituted an accusation charging the sale of an alcoholic beverage to a minor by appellant's clerk.

An administrative hearing was held on July 6, 2001, at which time oral and documentary evidence was received.

Nevada County deputy sheriff Sherry Wood testified that in the early morning of November 10, 2000, while in the course of a search accompanying a traffic stop, she discovered a sealed 12-pack of beer in a van driven by Jason Layshot ("Layshot"). Layshot told her the beer had been purchased from the Circle K store in Grass Valley by his companion, Jacob Boeckx, and that Boeckx had not been carded. Deputy Wood contacted the Grass Valley Police Department and asked to have it determine who was on duty at the Circle K store that evening. She was advised that Christopher Hoyt was on duty. She did not know manner in which Hoyt was identified.

Daniel Layshot gave his date of birth as May 14, 1982. He testified that he drove Boeckx's van to the Circle K store, and remained in the van while Boeckx went inside. When Boeckx came out of the store, he was carrying a 12-pack of Miller beer. Layshot did not see the clerk on duty that night. On cross-examination, Layshot admitted he had been drinking earlier that evening. Layshot could not recall where that beer had been purchased, or who purchased it. He drank it at a friend's house. He believed he

and Boeckx had brought the beer to the friend's house. Layshot testified he was driving because Boeckx was not in a condition to drive. Boeckx had more to drink than Layshot; he believes Boeckx drank three or four beers.

Jacob Boeckx testified that he drove his van to the Circle K Store. He went to the cooler, pulled out a 12-pack, and took it to the counter. The clerk asked for his identification, and when Boeckx told him he did not have any, asked for Boeckx's date of birth. Boeckx told him 1973. His actual date of birth was April 18, 1983. Boeckx claimed that, despite the fact he had been drinking, he remembered the important details of the event quite clearly. Several months after the incident, an investigator showed Boeckx a photo of Hoyt, and Boeckx identified Hoyt as the person who sold him the beer. Boeckx said he had seen Hoyt in the store on one or two previous occasions.

Hoyt was brought into the hearing room while Boeckx was testifying, and identified by name, following which Boeckx identified him as the seller.

Hoyt testified that, while employed by Circle K, he worked the graveyard shift, from 10 p.m. to 6 a.m. Hoyt denied seeing Boeckx, the minor, prior to the date of the hearing. He said he had been trained in the selling of alcoholic beverages, and knew to card anyone who did not look old enough. He would card someone who looked under 40. If that person did not have identification, he would not sell to him. Hoyt testified that about 50 to 75 customers entered the store on the night in question, and that, if he saw their face, he could recognize almost every one of them, even after the lapse of eight months. Hoyt did not recall any instance of police officers talking to him about

sales to minors, nor was he ever asked by police if he had sold to Boeckx.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained and no defenses had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the process used to identify the clerk violated due process; (2) the process used to identify the clerk was unfair; and (3) the Administrative Law Judge erred in his assessment of witness credibility. Issues 1 and 2 will be discussed together.

DISCUSSION

I

Appellant contends that the process used to identify the clerk as the seller of the 12-pack of beer was unfair and violated due process. Appellant asserts:

“Since the identification by the minor of the seller and thereby the selling location is a necessary element to this case, the Department woefully failed to adhere to fundamental concepts of due process, failed in its burden of proof, and effectively manufactured the necessary nexus between the twelve-(12)-pack of beer and this licensee.” (App. Br., at page 2.)

If this were a criminal prosecution of the clerk, with the burden of proof beyond a reasonable doubt, appellant’s argument might well have merit. The identification process was skewed to such an extent that Boeckx was virtually certain to identify Hoyt as the seller.

However, the real issue is whether the beer was purchased at appellant’s store. Both minors testified it was. Hoyt was identified as the clerk on duty during the time the

minors said the beer was purchased - near 1:00 a.m. Hoyt admitted that he regularly worked a “graveyard” shift that began at 10:00 p.m. and continued until 6:00 a.m.

Further, since there was no evidence there was more than one Circle K store in Grass Valley, and no evidence that any other clerk was on duty at the time, the Department was entitled to infer that Hoyt was the person who sold the beer to Boeckx.²

II

Appellant contends that the ALJ erroneously concluded that three witnesses’ testimony established a sale at the location in question, when, in reality, only one witness could establish the sale.

We read the decision of the Department as resting primarily on the testimony of Layshot and Boeckx that Boeckx purchased the beer at appellant’s store. The Special Findings of Fact and Argument, which we set out here in full, make that clear:

“A. Mr. Boeckx and Mr. Layshot testified that they had driven to the above-captioned premises and Mr. Boeckx had purchased a 12-pack of beer. Respondent argues that Mr. Boeckx and Mr. Layshot are lying.

“B. Mr. Boeckx had three or four beers during the few hours prior to the time Mr. Layshot drove to this business to obtain beer. Mr. Layshot had consumed only one or two beers. However, their testimony about the significant events that evening was consistent. To the extent Mr. Boeckx’s recollection of the events that evening may have been influenced by his consumption of the three or four beers, Mr. Layshot corroborated Mr. Boeckx’s testimony that Mr. Boeckx went to obtain the beer and did, in fact, obtain the beer.

² Allan Buresh, appellant’s district manager for Northern California, responsible for eleven stores between Grass Valley and Lake Tahoe, was called as a witness by appellant, but was not asked whether there was more than one store in Grass Valley, as appellant seems to suggest (see App.Br., at page 7), or whether another clerk shared Hoyt’s shift. Had there been either, Buresh would surely have known and so testified.

“C. When Deputy Woods stopped Mr. Layshot, she found an unopened package of beer in the vehicle. Therefore, credible evidence establishes that the beer was purchased, and Mr. Layshot and Mr. Boeckx have testified that the beer was obtained at the above-captioned premises. Mr. Christopher Hoyt has admitted that he was the clerk that evening at the above-captioned premises. Pursuant to Business and Professions Code Section 25660, proof that Respondent’s employee, Mr. Hoyt, acted in reliance on bona fide evidence of identity and majority, is a defense to this Accusation.

“D. The only proof offered by Respondent is Mr. Hoyt’s statement that he does not remember Mr. Boeckx coming into the store that evening. The basis for this assertion by Mr. Hoyt is that he remembers all the customers (according to Mr. Hoyt’s testimony, there were 50 to 75 customers) who came to the premises that evening (about eight months prior to this hearing); having viewed Mr. Boeckx at the hearing, Mr. Hoyt is certain Mr. Boeckx was not one of the customers at the premises that evening.

“E. As noted above, the testimony of Mr. Layshot and Mr. Boeckx about the significant events of that evening was consistent with each other; Mr. Boeckx’s testimony of his conversation with the clerk appeared candid and credible. Neither Mr. Boeckx nor Mr. Layshot has a motive to lie. Mr. Hoyt’s statement that he remembers every one of the 50 to 75 customers on the date of this incident and that Mr. Boeckx is not one of those customers is found not to be credible. Mr. Hoyt, who is no longer employed by Respondent, has a motive to avoid admitting responsibility for selling an alcoholic beverage to a minor since he may need a recommendation from Respondent in the future. Under these circumstances, the testimony of Mr. Boeckx is found to be more credible, and it is found that Respondent’s clerk, Christopher Hoyt, sold an alcoholic beverage to Jacob Boeckx.”

The credibility of a witness's testimony is determined within the reasonable discretion accorded to the trier of fact. (*Brice v. Department of Alcoholic Beverage Control* (1957) 153 Cal.2d 315 [314 P.2d 807, 812] and *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183 [42 Cal.Rptr. 640, 644].)

We see no reason to question the ALJ’s assessment of credibility. While there were inconsistencies in the testimony of the two minors, the inconsistencies related for the most part to the source of beer drunk earlier in the evening at a friend’s house, and

not to the purchase of the twelve-pack of beer at appellant's store.

ORDER

The decision of the Department is affirmed.³

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

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.