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

AB-8567
File: 20-284709 Reg: 05060284

CIRCLE K STORES, INC. dba Circle K
704 Main Street, Ramona, CA 92065,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 3, 2003
Los Angeles, CA

ISSUED SEPTEMBER 19, 2007

Circle K Stores, Inc., doing business as Circle K (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for five days for its clerk having sold a six-pack of Budweiser beer to William Spilman, a 16-year-old police minor decoy, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1993. On

[1]The decision of the Department, dated May 25, 2006, is set forth in the appendix.

July 25, 2005, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor on May 20, 2005.

An administrative hearing was held on February 17, 2006, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established and appellant had not proved any affirmative defense.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Department Rule 141(a) was violated; (2) Rule 141(b)(5) was violated; (3) the Department submitted an ex parte communication to its decision maker in violation of the APA; and (4) the administrative law judge erred in denying appellant's motion to compel discovery.

DISCUSSION

Minor decoy programs conducted by the Department of Alcoholic Beverage Control and various law enforcement agencies throughout the State of California have as their goal encouraging licensees to be more diligent in preventing the sale of alcoholic beverages to minors. Licensees who, intentionally or through neglect, sell to underage customers incur discipline, and their experience works as a deterrent to others. A particular decoy operation is just as successful, perhaps even more so, when no sale to a decoy occurs as when one does. In either case, there is sent the message that vigilance on the part of licensees and their employees, fortified by solid training and sound business policies, will prove to be of value in the lawful operation of their business.

At the same time, the decoy program in the State of California is obligated by law to operate in a manner "which promotes fairness." By and large, this general obligation has been met. In the infrequent instance where this has not been the case, the Appeals Board has had the opportunity to provide appropriate relief. In some of those instances, the line between what may promote fairness and what may not is thin.

In the two cases we decide today,[2] that line was crossed, albeit innocently, by the decoy in each case when responding to questions concerning his age. In this case, the clerk stated to the decoy, after scanning the decoy's driver's license, "You're not 21." The decoy replied, "Yeah." The administrative law judge found this to be a truthful reply - "The decoy did not remain silent, he was not evasive, and he was not untruthful." (Finding of Fact D).

The difficulty this Board has with the ALJ's finding is that it ignores the latent ambiguity in the decoy's response. The cryptic "Yeah" could well have conveyed to the clerk an assertion by the decoy that he was in fact 21, thus prompting her comment, "Whatever," and resulting in the sale.

This is not to say the decoy was silent, untruthful, or evasive, but simply that his potentially ambiguous response fell short of the standard this Board believes must be applied in order to ensure compliance with Rule 141.

This standard has evolved from a series of cases in which the Board has addressed issues similar to, although not identical with, the issue in this case.

In *Thrifty Payless, Inc*. (1998) AB-7050, the Board reversed a Department decision which rejected a proposed decision finding non-compliance with Rule

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[2] See *7-Eleven, Inc./Aziz* (AB-8533).

141(b)(4) when the decoy, asked if she was 21, simply offered the clerk her driver's license. The Department deemed the offer a "truthful answer" within the meaning of the rule. The Board described the response, "illuminated by her hearing testimony," as "borderline misleading." "[Her] explanation for her non-responsive offer of her driver's license suggests that her objective was not to test whether the clerk would sell to a minor, but, instead, actually to make a purchase of an alcoholic beverage."

> The offer of a driver's license instead of an answer to the question which was asked had the potential of creating a distraction. The clerk could well have thought, as appellant contends, that she was being told, in substance, "of course I'm old enough to purchase liquor; go ahead and check my identification. By analogy, a person attempting to cash a check who tenders a driver's license which would show he is not the payee must believe he will fool the merchant to whom the check is presented. Not that he or she will necessarily succeed, but certainly the possibility of confusion or distraction has been created.
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> The experienced ALJ saw this as a case of first impression, and we do also. For that reason, and because of the views we have expressed in the text preceding, we invite the Department to reassess its approach to what will satisfy the Rule's requirement regarding what is a truthful answer. In this case, we think the decoy's response fell short, invited confusion, and led to unfairness.

(*Thrifty Payless, Inc., supra*.)

In *Bhanot* & *Shukla* (1999) AB-6993, decided in January 1999, the ALJ found more credible a police officer's testimony that he heard the decoy answer "No" to a question whether he was 21, than the testimony of the seller that the decoy had failed to answer when asked. The Board affirmed, based on the ALJ's findings, but, in dicta, ventured that were the facts of the case as appellants cast them, it would agree with their contention that a failure to answer a question about age would entitle them to a defense just as much as an affirmatively false answer would.

In *The Southland Corp.*/*Dandona* (1999) AB-7099, decided in April 1999, the Board reversed a decision of the Department where the decoy did not respond to the

clerk's remark "1978. You're 21." The decoy testified she understood the clerk's remark to be a statement rather than a question, but also testified that she had been instructed by the police that if she presented her driver's license, she did not have to answer a question about her age. The Board stated:

> It is clear from the testimony of the decoy that it would have meant little to her whether [the clerk's] remark was a question or a statement. ... Consequently, to accept her after-the-fact characterization of the clerk's remark as a mere statement is too charitable. There can be a very fine line between a remark that is a mere statement and a remark that is really a question. Delegating that determination to one who believed she should not have answered in either case tacitly ignores the requirement of fairness.

In *Lucky Stores, Inc.* (1999) AB-7227, decided in October of the same year, the Board reversed a decision of the Department where the decoy made no response when the clerk said "1978. You are just 21" (per the decoy) or "1978. You are 21" (per the clerk). The clerk testified he intended what he said to be a question, and got only a grin in response, while the decoy testified he understood it to be a statement, to which no reply was necessary. The Board stated:

> Our concern is that it is asking too much of a decoy to leave it to him or to her to make that critical judgment whether a remark about age is intended to elicit from them either a confirmation or a correction, or is simply conversation. If fairness of the decoy operation is an important goal, as the Rule proclaims, then, in its implementation, it ought to be the case that where the clerk's remark about age is such that an honest clarification from the decoy may prevent a sale from occurring, the decoy has the obligation to offer such clarification by saying "No, I am not 21," or words to that effect.

In *Equilon Enterprises, LLC* (2002) AB-7845, the Board again reversed a decision of the Department where the decoy remained silent after the clerk examined the decoy's driver's license, which showed he would be 21 in 2003, and said "Born in 1981. You check out okay."

The Board explained why it thought the decision must be reversed:

> Rule 141 requires that a decoy shall answer truthfully questions about his or her age. There is nothing in the rule that requires a decoy to volunteer

> information about his or her age, or to clear up what may be a misconception about age where a seller is silent and simply goes ahead with the sale either without having requested proof of age or, upon request, having been provided identification. Since a decoy is engaged in a law enforcement process to determine the extent to which sellers are complying with the law regarding sales of alcoholic beverages to minors, it would seem unreasonable to expect that process to function if the decoy was obligated to clear up what might be a mistake or misconception on the part of the seller.
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> For example, many transactions involve a seller who requested identification, was furnished identification which showed the decoy to be a minor, yet proceeded with the sale. It could reasonably be assumed the seller was careless, or unable to interpret the information provided. It might also be assumed the seller really did not care, although this is undoubtedly much less frequent.
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> However, where there has been a verbalization of the seller's thought processes such as that in this case, a decoy may be expected to respond. Rule 141 says that a decoy is required to respond to a question. As the Board has said in an earlier case, there may be a thin line between what is a statement and what is a question. And when that line blurs, and the verbalization borders on the ambiguous, it may well be that a response is required.

The Board then quoted the same passage from its decision in *Lucky Stores, Inc., supra*, that we have quoted above.

This brings us back to the present case. It is apparent from our discussion of past cases that the Board considers an appropriate response to a statement or question by a clerk one which is free of ambiguity, and unlikely to cause confusion or distraction. A response which leads a clerk to guess at what the decoy intended to say is not in the spirit of the rule and will not suffice.

We are satisfied that the result we reach here will not only yield justice in this case, but will at the same time guide the Department and law enforcement generally in the conduct their future decoy operations, fairly and within the spirit and intent of Rule 141.

In light of our position on this issue, we do not address the remaining issues raised by appellant.

ORDER

The decision of the Department is reversed.[3]

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, 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.