

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

AB-8860

File: 21-295713 Reg: 07066763

CIRCLE K STORES, INC., dba Circle K 5211
3506 East Main Street, Ventura, CA 93003,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John W. Lewis

Appeals Board Hearing: September 3, 2009
Los Angeles, CA

ISSUED: DECEMBER 1, 2009

Circle K Stores, Inc., doing business as Circle K 5211 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its off-sale general license for ten days, five of which were conditionally stayed for one year, for its clerk, Robert Rowland, having sold a six-pack of Bud Light beer, an alcoholic beverage, to Elizabeth Hernandez, a 19-year-old police minor decoy, in 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, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

¹The decision of the Department, dated March 17, 2008, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 15, 1994. On August 31, 2007, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage on July 6, 2007, to Elizabeth Hernandez, a person under the age of 21. Although not stated in the accusation, Hernandez was acting as a decoy for the Ventura Police Department.

An administrative hearing was held on January 10, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented. The evidence established that the beer was sold to Hernandez without her having been asked her age or for identification.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established, and appellant had failed to establish an affirmative defense.

Appellant filed a timely notice of appeal in which it contends that the Department failed to proceed in the manner required by law, by not considering evidence of mitigation.

DISCUSSION

Appellant contends that the administrative law judge (ALJ) failed to consider as evidence of mitigation the testimony of its Market Manager concerning the action taken by appellant to correct the problem and the training it provides to its employees. Thus, appellant argues, the absence of any findings based on his unrefuted testimony equates with a failure to consider all the evidence in the record.

The Department challenges the persuasiveness of appellant's mitigation evidence at the same time that it points out that the ALJ acknowledged appellant's

arguments that mitigation was warranted. That he did not express this acknowledgment by way of findings of fact, the Department asserts, is immaterial.

Department Rule 144 (4 Code Cal. Regs., §144), which sets forth the Department's penalty guidelines, provides that higher or lower penalties from the schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances. Mitigating factors may include, but are not limited to, the length of licensure without prior discipline or problems, positive action by the licensee to correct the problem, documented training of licensee and employees, and cooperation by the licensee in the investigation,

Appellant's brief summarizes the evidence it contends was ignored:

- a computer-based alcohol training program with a 10-question quiz at end of program to ensure compliance with ABC regulations;
- store policy of requiring customer to show identification to purchase alcohol if customer appears 30 years of age or younger;
- ID scanner to assist clerk in checking identification;
- a secret shopper program that requires asking for identification of customer for age-sensitive item in order to receive a "Green Card" and avoid getting a "Red Card;"
- Failure to pass the Secret Shopper Program (i.e., getting a "Red Card") results in termination of the employee.

The Department points out that it was questionable whether the clerk in this case had taken the alcohol training program, and that, although he scanned the decoy's identification, he ignored the scanner prompts to ask for her identification or to otherwise verify her age. Instead, the clerk cleared the register with an override key, and completed the transaction.

The only evidence of mitigation that survived intact - the secret shopper program

- was considered by the ALJ, along with appellant's 12 (or 13) years of discipline-free activity. The scanner override, the failure to ask for identification of a person obviously under 30 years of age, and the absence of any evidence that the clerk in question received the computer training, or, if he did, that it was effective, in combination tarnish the persuasiveness of appellant's mitigation evidence.

In fact, appellant did receive a mitigated penalty, a ten-day suspension with five days of the suspension stayed for a probationary period of one year. The ALJ wrote, in the penalty section of the proposed decision:

2. ... Counsel suggests that the long license history is discipline free and when combined with the training program provided to all employees and the company's secret shopper program is evidence of mitigation

3. ... The penalty recommended here takes into account Rule 144 and Respondent's 12 years of discipline free licensure.

We are not prepared to hold that an ALJ must articulate as findings of fact all of the individual elements of mitigation put forth by a licensee. It is enough that he or she acknowledges generally that mitigation evidence was presented and the recommended penalty reflects that acknowledgment, if otherwise justified. In this case, some of the mitigation evidence was flawed, and entitled to little or no weight.

Rule 144 itself addresses the discretion necessarily involved in an ALJ's recognition of aggravating or mitigating evidence:

Penalty Policy Guidelines:

The California Constitution authorizes the Department, in its discretion[,] to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive,

comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

We are satisfied that the ALJ in this case acted well within the discretion provided to him by Rule 144.

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.