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

AB-8870
File: 20-197895 Reg: 07065579

CIRCLE K STORES, INC., dba Circle K Store 8843
1640 Carpenter Road, Modesto, CA 95351,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: April 2, 2009
San Francisco, CA

ISSUED JUNE 17, 2009

Circle K Stores, Inc., doing business as Circle K Store 8843 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for its clerk, Anthony Dallas, having sold a six-pack of Bud Light beer, an alcoholic beverage, to Gricelda Thomson, an 18-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 Michael Akopyan, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

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[1]The decision of the Department, dated April 4, 2008, is set forth in the appendix.

PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 21, 1987. On April 25, 2007, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a minor. Although not set forth in the accusation, the minor was working as a decoy for the Modesto Police Department.

An administrative hearing was held on March 4, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Gricelda Thomson. Terrence Mutt, a Circle K District Manager, described the training provided to Circle K employees, including the clerk in question.

Subsequent to the hearing, the Department issued its decision which determined that the violation had been proved, and appellant had failed to establish a defense under Rule 141(b)(2).

Appellant filed a timely notice of appeal in which it raises the following issues: (1) The decision lacks findings regarding the appearance of the decoy; (2) the decision alludes to a prior violation for which there is no evidence; and (3) the Department supplied an incomplete administrative record to the Appeals Board. Appellant has also filed a motion to augment the record with the inclusion of the complete administrative record as considered by the Department's decision maker.

DISCUSSION

I

Appellant contends that the decision lacks essential findings regarding the appearance of the decoy, and whether that appearance complies with the requirement

of Department Rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2)).[2]

Rule 141(b)(2) is set out in the text, and the decoy's appearance is discussed in Finding of Fact III (FF III) and Determination of Issues II (DI II):

> FF III: The decoy had been a police explorer since June 2006. From June 2006 to February 16, 2007, she had participated in approximately forty decoy operations, visiting approximately fifteen to twenty licensed premises on each operation. As a result of this experience, the decoy felt more "comfortable" in Respondent store than how she would have felt without it. Contrary to Respondent's argument, there is no evidence that the decoy's experience and / or her "comfort" in Respondent store made the decoy appear at least twenty-one years old.
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> DI II: Respondent did not meet its burden of proving a violation of Rule 141(b)(2).

Early in its experience with Rule 141(b)(2), the Appeals Board wrestled with the extent to which an administrative law judge's findings should indicate that he had considered the overall appearance of a decoy. In *Circle K Stores, Inc*. (2001) AB-7080, the Board explained its concerns:

> Appellant argues that the Department's use of the term "physical appearance" is a departure from, and violation of Rule 141(b)(2), because the rule uses only the term "appearance." While it is true that the ALJ and the Department employ words and terms that are not expressly in the rule, the issue is not so simplistic.
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> Nonetheless, while an argument might be made that when the ALJ uses the term "physical appearance," he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what he did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.
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> It is not the Appeals Board's expectation that the Department, and the

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[2] Rule 141(b)(2) states: "The decoy shall display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances presented to the seller at the time of the alleged offense."

> ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.

Circle K Stores, Inc., supra, was a case where the ALJ considered only the physical appearance of the decoy. In the present case, the ALJ necessarily considered the physical appearance of the decoy from the very fact that she appeared before him, but also considered her prior experience as a decoy, as well as her comfort level, and expressly noted that he was dealing with an issue concerning Rule 141(b)(2).

In numerous decisions since *Circle K, supra*, this Board has accorded substantial deference to an ALJ's assessment of a decoy's appearance, acknowledging that it is a factual finding rarely within this Board's review authority. (See, e.g., *Chevron Stations, Inc*. (2007) AB-8516; *The Vons Companies* (2001) AB-7568.)

Appellant has not pointed to any aspect of the decoy's appearance that it believes is violative of Rule 141(b)(2), other than her comfort level. Without this further assistance, we are not persuaded that the ALJ's treatment of this issue warrants reversal. If there was anything about the decoy's physical appearance worthy of note from a 141(b)(2) point of view, it was appellant's duty to point it out.

II

Appellant asserts that there is no evidence to support the ALJ's finding that appellant had incurred a prior violation of section 25658, subdivision (a) in July 2001.

This is a specious issue.[3] Although the ALJ did state at one point that there was

[3] Appellant's brief states, with a certain amount of sarcasm, "one wonders where in the world that information came from other than the allegations made in the accusation." (App. Br., p. 8.) The transcript is only 37 pages in length, and had appellant read all 37 pages, it would never have included the issue in its brief.

no evidence of a prior violation, that statement was immediately followed by a colloquy which concluded with counsel for appellant acknowledging the prior violation, and the parties stipulating that appellant incurred a previous violation on July 11, 2001. A stipulation is, of course, a substitute for evidence.

III

Appellant argues that, because the certified record is incomplete, this Board is unable to determine what the Director reviewed before adopting the proposed decision as the decision of the Department

The accusation is the only document specifically mentioned by appellant as missing. Appellant argues that "[i]t is inconceivable that the Director decided to accept the Proposed Decision without a review of the Accusation." (App. Br., p. 11).

We first note that the Director need only review the proposed decision itself before whether deciding to adopt or reject it. Contrary to appellants' assertion that the Department is legally obligated to review the record before making its decision, it has long been the rule under section 11517 of the Administrative Procedure Act (Gov. Code, §§ 11340-11529) "that where the hearing officer acts alone the agency may adopt his decision without reading or otherwise familiarizing itself with the record." (*Hohreiter v. Garrison* (1947) 81 Cal.App.2d 384, 399 [184 P.2d 323].) This principle was most recently affirmed in *Ventimiglia v. Board of Behavioral Sciences* (2008) 168 Cal.App.4th 296, 309 [85 Cal.Rptr.3d 423].

We see no particular reason why it would have been of any interest to the Director to review the accusation in this case. What was involved was a typical sale-to minor charge, and although there was reference during the hearing to the accusation with respect to its charge of a prior violation, no issue was raised concerning the accusation itself.

We can envisage a case where issues are preserved at the administrative hearing level that might warrant special attention to the accusation as a pleading, but this case is not one of them.

ORDER

The decision of the Department is affirmed.[4]

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

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[4] 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.