

CAUTION - THE ORDER AS IT APPEARS IN THIS DOCUMENT IS INCORRECT. A CORRECTED ORDER WAS ISSUED JANUARY 14, 2010.

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

**AB-8919**

File: 21-267521 Reg: 07066412

CIRCLE K STORES, INC., dba Circle K Store 1940  
1600 West Main Street, Turlock, CA 94380,  
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,  
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 1, 2009  
San Francisco, CA

**ISSUED JANUARY 11, 2010**

Circle K Stores, Inc., doing business as Circle K Store 1940 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which suspended its off-sale general license for 15 days for its clerk having sold a six-pack of Bud Light beer to Amber Gray, a 19-year-old Department 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, Dean Lueders.

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<sup>1</sup>The decision of the Department, dated August 7, 2008, is set forth in the appendix.

## FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on May 12, 1992. Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a person under the age of 21.

An administrative hearing was held on June 18, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Amber Gray, the decoy. The evidence established that the beer was sold to the decoy after she displayed her California driver's license, bearing her true date of birth. Appellant presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been established.

Appellant filed a timely notice of appeal in which it raises the following issues: (1) there was no compliance with Rule 141(b)(2); and (2) the decision improperly refused to mitigate the penalty.

## DISCUSSION

This case should be remanded to the Department for two reasons: appellant is correct that the decision contains no facts regarding the decoy's appearance other than her age and the number of decoy operations in which she has participated, and is also correct that the refusal to mitigate the penalty was improper.

While it is true that the burden of establishing a defense under Rule 141(b)(2) is on appellant, it is also true that the Board has made it clear that the decision should contain enough of a description of the decoy's overall appearance to assure the Board that the administrative law judge (ALJ) has considered the decoy's overall appearance and has not focused on only a single facet of that appearance and ignored others that

might support the appellant's burden of proof. The decision in this case does not give us that assurance.

The Department cites *The Southland Corporation* (2000) AB-7391 for the proposition that the ALJ "is not required to set forth facts regarding [the decoy's] age and the absence of such facts will not per se invalidate a decision." (Dept. Br., p. 3.) However, the actual language of that decision does not lend itself to such a definitive assertion:

The Department argues that the rule does not require that the decision set forth facts regarding the decoy's age - presumably meaning her apparent age. To that extent, the Department is correct. However, in the Board's decisions, the Board has stressed the desirability of more detailed findings in order better to illustrate the reasoning behind the decision. Although the absence of such detail may not per se invalidate a decision, it can make the Board's job more difficult.

Since this case is to be remanded on the mitigation issue (see below), we think it would be helpful at that time for the ALJ to inform the Board of the facets of the decoy's overall appearance he considered in reaching his opinion of the decoy's apparent age.

Appellant argued at the administrative hearing that its 12-year history without discipline warranted a mitigated penalty, and suggested a 10-day suspension with all 10 days stayed, would be appropriate if the ALJ otherwise found a violation. The ALJ said that appellant had not met its burden of proof. His statement that "the fact that there has not been any final disciplinary action against Respondent since 1995 is not evidence that Respondent has been without discipline or problems since that time" suggests that he took into account a pending disciplinary matter that is not yet final.

Absent the pending matter, it is clear that appellant demonstrated a 12-year discipline-free history, one that would ordinarily be accorded some mitigation in any penalty being imposed.

While Business and Professions Code section 25658.1 has no direct application to the facts of this case, we think that its statement, in subdivision (c) that "for purposes of this section, no violation may be considered for the purpose of determination of the penalty until it has become final," reflects a policy the Department has consistently followed in its application of Rule 144, and should have in this case. While the Department is correct that Rule 144 does not deprive it of discretion with respect to mitigation, that discretion is abused if it relies upon an improper factor, as it did here.

There was no need, and the Department is mistaken in asserting there was such a need, for appellant to introduce evidence of its discipline-free record. The stipulation relieved appellant of that obligation. The colloquy regarding the stipulation [RT 13-14] shows rather clearly that Department counsel was party to it, agreeing that there had been only a single disciplinary action in 1995 and the pending non-final matter.

#### ORDER

The decision of the Department is affirmed.<sup>2</sup>

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

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<sup>2</sup> 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.