

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

AB-9272

File: 21-203761 Reg: 11076007

CIRCLE K STORES, INC., dba Circle K Store 8734
247 East Olive Avenue, Fresno, CA 93728,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: April 4, 2013
Sacramento, CA

ISSUED MAY 20, 2013

Circle K Stores, Inc., doing business as Circle K Store 8734 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days, with 10 days stayed for its clerk selling an alcoholic beverage to a 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 Autumn M. Renshaw, and the Department of Alcoholic Beverage Control, appearing through its counsel, Dean Lueders.

¹The decision of the Department, dated May 16, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on January 29, 2002. On December 29, 2011, the Department filed an accusation charging that appellant's clerk, Karl Frederick Klensch (the clerk), sold an alcoholic beverage to 18-year-old Andrew DeLaFuente on September 9, 2011. Although not noted in the accusation, DeLaFuente was working as a minor decoy for the Fresno Police Department at the time.

At the administrative hearing held on February 28, 2012, documentary evidence was received, and testimony concerning the sale was presented by DeLaFuente (the decoy) and by John Herring, a Fresno Police Department detective. Appellant presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged was proved and no defense was established.

On the date of the operation, the decoy entered the premises, retrieved a cellophane-wrapped 3-pack of Bud Light beer from the coolers, and took the beer to the checkout area. The decoy waited in line for approximately five minutes before being served. There were two clerks behind the counter: Klensch and an unidentified female. Klensch conducted the decoy's transaction. Klensch did not request the decoy's identification, and did not ask any age-related questions. Klensch completed the sale, and the decoy left the premises.

Officer Lars Oakander entered the premises, followed by the decoy and two other officers. The decoy and the officers approached the sales counter. Klensch was standing behind the counter. When the decoy was about five feet away from Klensch, one of the officers asked, "Do you recognize who sold you beer?" The decoy responded by pointing to Klensch and saying either "He did" or "He sold." The decoy

was looking at the clerk at the moment of identification, and the clerk was either looking at the decoy, or in his general direction.

Officer John Herring then asked Klensch if he knew he was being identified. Klensch said “Yes.”

The decoy, the officers, and Klensch then proceeded to the back of the store, where Klensch was issued a citation. The female clerk stayed behind at the counter. After the citation was issued, a photograph was taken of the decoy with Klensch.

Appellant filed an appeal contending: (1) rule 141(b)(2) violates both federal and state due process requirements, and is therefore unconstitutional; and (2) rule 141(b)(5)² was violated.

DISCUSSION

I

Appellants contend that rule 141(b)(2) unconstitutionally violates both federal and state due process requirements by presenting a standard that is impossible for the ALJ to meet.

As an initial matter, this Board has jurisdiction to hear constitutional challenges to administrative regulations issued by the Department, including rule 141, as part of its authority to determine whether the Department has proceeded according to law. (Bus. & Prof. Code §23804(b).)

This Board has recently faced a surge of challenges to the constitutionality of rule 141(b)(2). (See, e.g., *7-Eleven Inc.* (2013) AB-9248; *Circle K Stores* (2013) AB-9274). Though the facts in these cases vary, the arguments presented are

²References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

indistinguishable, if not identical.

As noted in those cases, rule 141(b)(2) complies with both state and federal constitutional requirements. In short, apparent age is a determination that eludes concrete definition; therefore, the rule need only be sufficiently definite to provide directives of conduct to the administrative officers. Taken in its regulatory context, rule 141(b)(2) provides sufficient guidance.

As the arguments in this case do not differ significantly from those presented in *7-Eleven, Inc.* (2013) AB-9248, we refer appellants to that opinion for a complete analysis.

II

Appellant contends that the Department failed to make a prima facie showing that the face-to-face identification complied with rule 141(b)(5).

Rule 141, subdivision (b)(5), requires that a prompt face-to-face identification of the clerk occur following a decoy sale:

Following any completed sale, but not later than the time a citation, if any, is issued, the peace officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy who purchased alcoholic beverages make a face-to-face identification of the alleged seller of the alcoholic beverages.

Appellant cites *Acapulco Restaurants*, which requires strict adherence to Department rules. (*Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board* (1998) 67 Cal.App.4th 575, 581 [79 Cal.Rptr.2d 126].) Appellant also refers this Board to *Chun* (1999) AB-7287, as support for the assertion that a face-to-face identification is achieved by ‘the seller’s presence such that the seller is, or reasonably ought to be, knowledgeable that he or she is being accused and pointed out as the seller.’”

Appellant then contends that “[i]n this case, the Department failed to present any admissible evidence that the clerk was aware she³ was being identified as the person who had sold the minor the alcohol during the face-to-face identification.” (App.Br. at p.

12.) Appellant then asserts that

“[a]t the time the minor identified the clerk, neither the officers nor the minor had approached the clerk or told her [sic] who they were and why they were there. The face to face identification took place before the clerk was aware of the decoy and officers [sic] presence, in violation of Rule 141(b)(5).”

(*Ibid.*)

Appellant’s assertions are more than misleading: they directly contradict the evidence. Based on the testimony of Detective Herring, the Department established a prima facie case that, at the time of identification, the decoy was standing five feet away from Klensch, the clerk who served him, and that Klensch was looking at the decoy or at the officers accompanying him. [RT 32.] Moreover, immediately following the identification, Detective Herring verified that the clerk was aware of what was happening:

- Q. Do you know whether or not the clerk was aware that he was being identified as the individual who sold the alcohol to a minor?
- A. Yes.
- Q. And how do you know that?
- A. I followed up with a question, “Do you understand that you’ve been identified as being – or as selling alcohol to a minor?”
- Q. And did the clerk respond to that question?
- A. He did. He stated, “Yes.” “Yeah” or “Yes.”

³Appellant consistently uses the pronoun “she” in reference to the clerk. While there were indeed two clerks behind the counter – Klensch, who is, based on photographs and testimony, male, along with an unidentified female clerk – there is no dispute in the record or the testimony that Klensch was the clerk who served the decoy, was identified following the sale, and received the citation. [RT 16, 21-22, 33.] We can only blame the error on counsel’s inattention to detail.

[RT 34.] Based on the testimony of Detective Herring, the Department made a prima facie showing Klensch was properly identified, and knew he was being identified as the seller. We see no reason to upset the ALJ's detailed findings on this matter.

Appellant, on the other hand, supplied no testimony or other evidence to contradict the Department's prima facie case. It is the appellant, and not the Department, that has failed to carry its burden of proof.

ORDER

The decision of the Department is affirmed.⁴

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁴This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.