

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

AB-9299

File: 21-195875 Reg: 11076014

CIRCLE K STORES, INC., dba Circle K #7836
2413 South Fairview Street, Suite A, Santa Ana, CA 92704,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: June 6, 2013
Los Angeles, CA

ISSUED JULY 29, 2013

Circle K Stores, Inc., doing business as Circle K #7836 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, with all 10 days stayed for a period of one year provided no cause for disciplinary action occurs within the stay period, for its employee having sold an alcoholic beverage to an individual under 21 years of age, 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 Barat Saltsman, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry K. Winters.

¹The decision of the Department, dated August 8, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 11, 1987. On November 4, 2011, the Department instituted an accusation against appellant charging that on July 15, 2011, appellant's employee, Salvador Bernal (the clerk), sold an alcoholic beverage to Bryan Alaman, an individual under 21 years of age.

At the administrative hearing held on June 12, 2012, documentary evidence was received and testimony concerning the violation charged was presented by Alaman and by a Department investigator/agent, Jennifer Gardea. Appellant presented no witnesses.

Testimony established that on July 15, 2011, Agent Gardea observed Alaman in the licensed premises as he purchased a 40-ounce bottle of Mickey's Malt Liquor from appellant's clerk. The clerk did not ask Alaman for identification or any age-related questions, but proceeded to scan the malt liquor and complete the sale. Once Alaman exited the premises, he was contacted by Agent Gardea, who asked him his age and date of birth. He initially stated that he was 21 years old and was born on May 14, 1989, but when Gardea pointed out that this would make him 22 years old he admitted that he was only 20.

Subsequent to the hearing, the Department issued its decision which determined that the charge had been proved and no defense had been established.

Appellant filed a timely appeal raising the following issue: The Department's decision fails to explain its basis for finding Alaman to be a credible witness.

DISCUSSION

Appellant contends the administrative law judge (ALJ) erred by failing to provide a clear explanation in his proposed decision as to why Alaman was determined to be a

credible witness "in the face of credibility issues." (App.Br. at pp. 1-2.) Appellant also maintains that the ALJ failed to consider "any of the glaring motivating factors for this minor decoy [*sic*] to be untruthful in his testimony." (*Id.* at p. 4.)

It is the province of the ALJ, as trier of fact, to make determinations as to witness credibility. (*Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 [42 Cal.Rptr. 640]; *Brice v. Dept. of Alcoholic Bev. Control* (1957) 153 Cal.App.2d 315, 323 [314 P.2d 807].) The Appeals Board will not interfere with those determinations in the absence of a clear showing of an abuse of discretion.

Appellant argues that the ALJ failed to consider the factors set out in Evidence Code section 780, which lists factors which may be considered in determining the credibility of a witness:

§ 780. General rule as to credibility.

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- (a) His demeanor while testifying and the manner in which he testifies.
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.
- (f) The existence or nonexistence of a bias, interest, or other motive.
- (g) A statement previously made by him that is consistent with his testimony at the hearing.
- (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
- (i) The existence or nonexistence of any fact testified to by him.
- (j) His attitude toward the action in which he testifies or toward the giving of testimony.
- (k) His admission of untruthfulness.

In the present case, however, appellant fails to explain why it believes Alaman

was not credible, except to focus on the fact that Alaman, when initially confronted by the agent, lied about his age. Indeed, the entire credibility issue is a red herring - a false issue that does not reach the merits. Even if Alaman lied, it does not create a defense because there is no claim that he displayed, or that the clerk reasonably relied on, a false ID on this or any other occasion.

The ALJ made the following finding in Findings of Fact III-E:

Although Aleman [*sic*] initially lied to Agent Gardea about his age and date of birth, he ultimately admitted his true age. Aleman testified at the hearing under oath and he was found to be a credible witness. Aleman testified that he had never shown any identification at the premises.

At the administrative hearing, appellant's counsel did not impeach Alaman, and no inconsistencies or contradictions were pointed out in Alaman's testimony.

Furthermore, appellant completely ignores the fact that Alaman's testimony was corroborated by the testimony of Agent Gardea. Alaman's credibility is irrelevant.

Appellant cites *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195 (*Holohan*), a case involving the termination of federal disability benefits, for the proposition that "agency courts must clearly provide a reasoned basis for any decision to accept or reject evidence undercut by credibility concerns." (App.Br. at p. 3.) However, this Board has previously found the *Holohan* holding inapplicable to California administrative hearings. In *Vuy Enterprises, Inc.* (2007) AB-8504 the Board said:

The Board has considered, and rejected, many times over, the authority cited by appellant, finding that the court's view expressed in *Holohan* "is peculiarly related to federal Social Security disability claims, and does not reflect the law of the State of California." (*7-Eleven, Inc./ Huh* (2001) AB-7680; accord *7-Eleven & Singh* (2002) AB-7792, *Lewis Salem, Inc.* (2003) AB-8054, *Chevron Stations, Inc.* (2005) AB-8223.) There is no reason for us to decide the issue differently in the present appeal.

We likewise see no reason to decide the issue differently in this matter. We

have carefully reviewed the record, and are satisfied that the decision and the ALJ's findings are supported by substantial evidence.

ORDER

The decision of the Department is affirmed.²

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

²This 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.