

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

AB-9313

File: 20-142233 Reg: 12076455

CIRCLE K STORES, INC., dba Circle K Store 1197
6930 Morro Road, Atascadero, CA 93422,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: November 7, 2013
Los Angeles, CA

ISSUED DECEMBER 18, 2013

Circle K Stores, Inc., doing business as Circle K Store 1197 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for appellant's 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 Barat Saltsman and Jennifer Carr, and the Department of Alcoholic Beverage Control, appearing through its counsel, Kerry Winters.

¹The decision of the Department, dated September 19, 2012, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on June 30, 1983. On February 8, 2012, the Department filed an accusation against appellant charging that, on December 14, 2011, appellant's clerk, Helen Salazar (the clerk), sold an alcoholic beverage to 19-year-old Lauren Starke. Although not noted in the accusation, Starke was working as a minor decoy for the Atascadero Police Department and the Department of Alcoholic Beverage Control at the time.

At the administrative hearing held on July 17, 2012, documentary evidence was received, and testimony concerning the sale was presented by Starke (the decoy) and by Department agent Robert Root.

Agent Root testified that, from outside in his vehicle, he watched the decoy enter appellant's store, go to the beer cooler, remove a 12-pack of Bud Light beer, and take it to the front counter. The decoy and the clerk had a short conversation, which he could not hear, after which the decoy gave the clerk money, received change, and left the store. She told Root that she had not been asked her age or for identification. Root then entered the store, accompanied by the decoy and by Atascadero Police Detective Keith Falerios. Root identified himself as a police officer, and told the clerk she sold beer to a minor. He asked the decoy to identify the person who sold her the alcohol; the decoy identified Salazar as the seller. The clerk began to cry, and turned her back as Root was taking a photograph of her and the decoy. On cross-examination, Root testified that four of thirteen stores visited sold alcoholic beverages to the decoy, and that Salazar had not asked her age or for identification. He said he did not know if the

decoy had been compensated for this decoy operation, but believed she had been given gift cards on prior occasions.

Stark testified her date of birth was March 10, 1992; she had previously served as a decoy between ten and fifteen times. She became a decoy through a high school club. She testified that she was not asked for identification or for her date of birth. On cross-examination, the decoy said she did not recall any conversation with the clerk, but conceded she could have made a remark about the weather being cold that day. She admitted that in a separate decoy operation that same day, she had made a comment about the weather as she approached the counter.

Subsequent to the hearing, the Department issued its decision which determined that the violation charged had been proven, and no defense had been established.

Appellant has filed an appeal making the following contentions: (1) There was no compliance with rule 141(a)² and 141(b)(2) because the decoy did not display the appearance of a person under the age of 21; and (2) there was no compliance with rule 141(b)(5) because the identification process was unduly suggestive.

DISCUSSION

I

Rule 141(a) recites that a law enforcement agency may only use a person under the age of 21 (a minor decoy) to attempt to purchase alcoholic beverages to apprehend licensees who sell to minors “in a fashion that promotes fairness.” Rule 141(b)(2) requires a decoy to display “the appearance which could generally be expected of a

²Reference to rule 141 and its various subdivisions are to section 141 of title 4 of the California Code of Regulations.

person under 21 years of age under the actual circumstances presented to the seller of alcoholic beverages at the time of the alleged offense.” And, rule 141(c) provides that the failure to comply with the rule affords a complete defense to any action under Business and Professions Code section 25658, subdivision (a).

Appellant contends that the ALJ ignored its arguments and evidence that the decoy did not display the appearance required by the rule. It asserts that it presented evidence that the decoy had participated in at least ten prior decoy operations, visiting from five to fifteen stores each time; that she was five feet six inches in height and weighed 168 pounds; that she was not nervous on this particular decoy operation or when she visited appellant’s store, and that she “likely” initiated a conversation with the clerk regarding the weather in order to gain a rapport with the clerk prior to the sale. (App.Br. at p. 5.)

The Department is authorized by the California Constitution to exercise its discretion whether to deny, suspend, or revoke an alcoholic beverage license, if the Department shall reasonably determine for "good cause" that the granting or the continuance of such license would be contrary to welfare and morals.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings. The Appeals Board is also authorized to

determine whether the Department has proceeded in the manner required by law, proceeded in excess of its jurisdiction (or without jurisdiction), or improperly excluded relevant evidence at the evidentiary hearing.³ Where there are conflicts in the evidence, the Appeals Board is bound to resolve them in favor of the Department's decision, and must accept all reasonable inferences which support the Department's findings. (*Kirby v. Alcoholic Beverage Control Appeals Board* (1972) 7 Cal.3d 433, 439 [102 Cal.Rptr. 857]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38 [248 Cal.Rptr. 271]; *Lacabanne Properties, Inc. v. Department of Alcoholic Beverage Control* (1968) 261 Cal.App.2d 181 [67 Cal.Rptr. 734, 737]; and *Gore v. Harris* (1964) 29 Cal.App.2d 821 [40 Cal.Rptr. 666].)

The ALJ's findings and determinations regarding the decoy's appearance (Findings of Fact D, D-1-5, and E, and Determination of Issues II) seem to us to address in every respect, and refute, the appellant's contentions:

FF D: The decoy's overall appearance including her demeanor, her poise, her mannerisms, her maturity, her size and her physical appearance were consistent with that of a person under the age of twenty-one and her appearance at the time of the hearing was similar to her appearance on the day of the decoy operation except that the decoy was approximately twenty pounds lighter on the day of the hearing.

D-1: The decoy is a very youthful looking young lady. On the day of the sale, the decoy was five feet six inches in height and she weighed one hundred sixty-eight pounds. Her hair was worn in a bun similar to how she wore it at the hearing and she wore no make-up. Her clothes consisted of blue jeans, a gray sweater, a jacket with a zippered front and tennis shoes. The photographs depicted in Exhibits 2-A and 2-B were taken prior to starting the decoy operation and the photograph depicted in

³ California Constitution, article XX, § 22; Business and Professions Code §§ 23084 and 23085; *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Exhibit 3 was taken at the premises on the day of the sale. All three of the photographs depict how the decoy looked and what the (sic) she was wearing that day.

D-2: The decoy had participated in ten to fifteen prior decoy operations and she visited between five and fifteen locations per operation. The decoy could not recall if she received any compensation for acting as a minor decoy on December 14, 2011. Although she sometimes received a gift card on prior decoy operations, whether or not she received a gift card did not depend on whether she was able to purchase any alcoholic beverages.

D-3: The decoy testified that she did not recall whether she had told the clerk that it was cold outside, but it is possible that she made such a statement because it was cold outside that night. The decoy further testified that she was nervous when she first started acting as a decoy and that she was less nervous when she was at the premises since she was more confident with her role as a decoy.

D-4: After considering the photographs depicted in Exhibits 2-A, 2-B and 3, the decoy's overall appearance when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense.

E: The evidence did not establish that the decoy operation was conducted in an unfair manner as argued by the Respondent's attorney.

DI II: ... Furthermore, the preponderance of evidence did not establish that the decoy operation was conducted in an unfair manner.

In a strategy not uncommon in appeals to this Board, appellant wants it to reweigh the evidence and reach a conclusion contrary to the one reached by the ALJ. The strategy is not sound, and we reject it.

As the Board stated in *Spirit Enterprises, Inc.* (2000) AB-7604:

The ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as she testifies, and making the determination that the decoy's appearance met the requirement of Rule 141, that she possessed the appearance which could generally be

expected of a person under 21 years of age under the actual circumstances presented to the seller of alcoholic beverages. We are not in a position to second-guess the trier of fact, especially where all we have to go on is a partisan appeal that the decoy lacked the appearance required by the rule, and an equally partisan response that she did not.

In *Shazzam* (2001) AB-7631, the Board said “[t]here is no justification for contending that the mere fact of the decoy’s experience violates rule 141(b)(2) without evidence that the experience actually resulted in the decoy displaying the appearance of a person 21 years of age or older.”

II

Appellant argues that, because the decoy stood near the Department agent when he identified himself and told the clerk she had sold an alcoholic beverage to a minor, she “had no choice but to identify the clerk “ as the person who had sold an alcoholic beverage to a minor. (App.Br. at p. 7.) Thus, according to appellant, the identification was unduly suggestive, in violation of rule 141(b)(5).

Given that the sale transaction had occurred only moments earlier, and there being no evidence anyone else was present, the notion that the decoy could not have recognized who sold to her is absurd.

Having said that, we should add that appellant did not raise this issue at the administrative hearing, and, under established appellate precedents, waived the issue as one which could be asserted on appeal. For both these reasons, the contention is rejected.

ORDER

The decision of the Department is affirmed.⁴

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

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.