

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

CIRCLE K STORES, INC.	)	AB-7080
dba Circle K	)	
981 Greenfield Drive	)	File: 20-284699
El Cajon, California 92021,	)	Reg: 97041075
Appellant/Licensee,	)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	Rodolfo Echeverria
	)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	February 3, 1999
	)	Los Angeles, CA
	)	

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Circle K Stores, Inc., doing business as Circle K (appellant), appeals from a decision of the Department of Alcoholic Beverage Control<sup>1</sup> which ordered its off-sale beer and wine license suspended for 25 days, for its clerk, Anthony M. Middleton, having sold an alcoholic beverage (a six-pack of Bud Light Beer) to Jeffrey W. Hobson, a minor participating in a decoy operation being conducted by the San Diego County Sheriff's Department, such sale being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

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<sup>1</sup>The decision of the Department, dated March 19, 1998, is set forth in the appendix.

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, Jonathon E. Logan.

#### FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on December 9, 1993. Thereafter, the Department instituted an accusation against appellant charging the sale described above.

An administrative hearing was held on January 15, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction in question.

Subsequent to the hearing, the Department issued its decision sustaining the charge of the accusation and ordering the suspension from which this timely appeal is taken.

Appellant contends that the Department has misinterpreted and misapplied Rule 141(b)(2), and, consequently, erroneously determined that the decoy presented the appearance required by the rule.

#### DISCUSSION

This is one of several cases in which appellants contend that the Department has misapplied Rule 141(b)(2). All were initially decided by the same Administrative Law Judge (ALJ), whose proposed decisions were adopted by the Department

Rule 141(b)(2) (4 Cal.Code Regs. §141, subd. (b)(2)), requires that a 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 of alcoholic beverages at the time of the alleged offense.” The ALJ found (Finding III-1):

“Although [the decoy] was 6 feet in height and weighed between 165 and 170 pounds as of June 20, 1997, he is a youthful looking male, whose physical appearance is such as to reasonably be considered as being under twenty-one years of age and who could reasonably be asked for identification to verify that he could legally purchase alcoholic beverages.”

The ALJ also found (Finding III-8) that it had not been established that any aspect of the decoy operation had rendered it unfair.

Appellant now contends that the Department, as a result of its lack of understanding of the rule, misinterpreted and misapplied it. Appellant argues that the Department discounts all other indicia of age than physical appearance, and by doing so, reaches a conclusion contrary to fact.

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.

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.

It is not the Appeals Board’s expectation that the Department, and the 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.

Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department's concern, and the concern of the general public, regarding underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).

#### ORDER

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

TED HUNT, CHAIRMAN  
RAY T. BLAIR, JR., MEMBER  
JOHN B. TSU, MEMBER  
ALCOHOLIC BEVERAGE CONTROL

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<sup>2</sup> This final order is filed in accordance with Business and Professions Code §23088, and shall become effective 30 days following the date of the filing of this order as provided by §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 §23090 et seq.

APPEALS BOARD