ISSUED DECEMBER 27, 1999

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

CIRCLE K STORES, INC. dba Circle K 981 Greenfield Drive El Cajon, CA 92021, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)	AB-7080a File: 20-284699 Reg: 97041075 Administrative Law Judge at the Dept. Hearing: none Date and Place of the Appeals Board Hearing: September 2, 1999 Los Angeles, CA Re-deliberation: November 5, 1999 December 2, 1999

Circle K Stores, Inc., doing business as Circle K (appellant), appeals from a Department of Alcoholic Beverage Control "Decision Following Appeals Board Decision"[1] in which the Department ordered a remand to the Administrative Law Judge (Rodolfo Echeverria) for "decision and clarification," including, in his exclusive discretion, the submission of further evidence, of a matter which was the subject of an Appeals Board reversal of a Department order suspending

[1] The "Decision Following Appeals Board Decision," dated May 26, 1999, is set forth in the appendix.

appellant's license.[2]

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, 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 that appellant violated Business and Professions Code §25658, subdivision (a), by having sold an alcoholic beverage to a minor participating in a decoy operation conducted by the San Diego County Sheriff's Department. Following an administrative hearing, the Department concluded that the violation had occurred as alleged, and ordered appellant's license suspended for 25 days.

The Appeals Board reversed the decision of the Department on the ground the Administrative Law Judge appeared to have used an improper legal standard in determining whether there had been compliance with Rule 141(b)(2). Thereafter, the Department entered the decision which is the subject of appellant's present appeal.

Appellant contends that the Department lacked jurisdiction to take any further action in this matter, by having failed to seek review of the Appeals Board's decision by way of petition for writ of review to the Court of Appeal or to the Supreme Court. Pointing out that the Appeals Board did not order the case remanded to the Department, which was within its power to do, appellant states

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[2] *Circle K Stores, Inc.* (April 14, 1999) AB-7080.

that the Department's sole recourse from the Appeals Board's order of reversal is as provided for in Business and Professions Code §§23089 and 23090, i.e., by petition for a writ of review to the Court of Appeal or the Supreme Court. Since the Department did not seek review as provided for in those sections of the Code, appellant contends, the Appeals Board's decision is final, and the Department's order beyond its jurisdiction.

DISCUSSION

The issue presented by the action of the Department appears to be one of first impression for this Board. That is, when the Board enters an order which reverses a decision of the Department and does not provide that the case is remanded to the Department for reconsideration, does the Department have no alternative other than to petition for a writ of review of the Board's decision or to dismiss the accusation?

Appellant suggests that this Board resolved this question in Koo & Hong Entertainment, Inc. (July 19, 1999) AB-6670a , when it dismissed, for lack of jurisdiction, an appeal from an order entered by the Department after the Board had affirmed, in part, and reversed, in part, the original order of the Department. Because the Board had already affirmed that part of the Department's original order which the Department restated in its new order, it ruled that the new order was a nullity. Although the Board stated that, in the absence of a remand, the Department had no jurisdictional basis to revisit its original order, the Board was not saying that an express remand was a sine qua non for any ability of the Department to revisit a matter following an appeal to the Board.

Koo & Hong Entertainment, Inc. did not present the issue that the Board is presently addressing, nor was the issue briefed in that matter. Consequently, that

decision does not offer any real guidance to the question we are addressing.

Heretofore, our opinions have focused on what we understood the Board's prerogatives to have been by virtue of its appellate mandate in Business and Professions Code §23085. Section 23085 provides, in pertinent part, that, except when it finds there was relevant evidence which, in the exercise of reasonable diligence, could not be produced or was improperly excluded, the Board shall enter an order affirming or reversing the decision of the Department. When its order reverses the decision of the Department, the Board may direct the Department to reconsider the matter in light of its order, and may direct the Department to take such further action as specifically enjoined upon it by law, so long as the Board does not limit or control the discretion vested in the Department by law.

Appellant's argument is premised on the fact that the Appeals Board decision reversed the Department but contained no directive to the Department to reconsider the matter or take any other action of any kind. Under §23088, the Board's decision became final when it was filed. Section 23089 provides that final orders of the Board may be reviewed by the courts specified in §23090 (the Supreme Court or the court of appeal for the appellate district in which the proceeding arose) "in the manner specified and not otherwise."

Section 23090, in addition to specifying the courts from which any review must be sought, sets forth a time limit upon the seeking of any review. In appellant's view, then, the case was over once that time expired and the Department had not sought appellate review.

Although the Department vigorously opposed appellant's contention, the focus of its initial brief appeared to be directed more at its displeasure with the Board's action in the original appeal than on any legal basis for its own action; the

Department criticized the Board's decision as erroneously instructing an ALJ how to write a proposed decision, but cited no case authority for the Board's guidance with regard to the Department's jurisdiction after an unqualified reversal. Similarly, appellant's initial brief relied principally upon the constitutional and statutory provisions describing the Board's powers; the case authorities it cited turned on other considerations.

In what is generally considered the leading treatise on California law, the authors state the following:

> "The effect of an unqualified reversal ('The judgment is reversed') is to *vacate* the judgment, and to leave the case 'at large' for further proceedings as if it had never been tried, and as if no judgment had ever been rendered. ... An unqualified reversal ordinarily has the effect of remanding the cause for a new trial on all of the issues presented by the pleadings. It is unnecessary to add specific directions for this purpose in the judgment."

9 Witkin, Procedure (4th ed. 1997) Appeal, §§758, 759, p. 784 (4th ed.) (citing numerous cases).

Since we felt the initial briefs of the parties had not focused on this issue, we invited further briefs, calling the Witkin material to their attention and asking for additional authorities in support of the parties' contentions and analyses.

We have now considered the additional briefs filed by the parties, as well as our own research, and are led to conclude that the Department, in appropriate circumstances, does possess the ability to revisit a matter after a Board reversal even in the absence of any direction from the Board by way of remand.

The Department, in its supplemental brief, has cited Regents of University of California v. Public Employment Relations Board (1990) 220 Cal.App.3d 346 [269 Cal.Rptr. 563], a case which quotes the Witkin treatise in support of its reasoning that a prior court ruling did not constitute a binding precedent. Unsurprisingly, the Department now argues, in accordance with the "unqualified reversal" rule stated

above, that the effect of the Board's decision is to set the case for further hearing before an administrative law judge.

Numerous other California cases disclosed by our research are in essential accord with Regents of University of California v. Public Employment Relations Board, supra, and the position now espoused by the Department.

In Odlum v. Duffy (1950) 35 Cal.2d 562, 564 [219 P.2d 785, 786], the appellant had pleaded guilty to a charge of issuing checks without sufficient funds. He later moved to vacate his guilty plea, upon an apparently valid ground. The superior court erroneously refused to hear the motion, disclaiming any jurisdiction to do so. The court of appeal declared itself without power to order the guilty plea vacated, saying that was up to the superior court, after a hearing on the merits, to determine whether the judgment and plea of guilty should be vacated; "'if the plea of guilty is in fact and in law void it should be vacated, and both the people and [appellant] should be restored to their original positions ... as [they were] immediately before the plea.'" The court of appeal's order said simply "Order reversed," without any further express direction. The superior court then conducted a hearing on the merits, denied the motion, and appellant filed an untimely notice of appeal. Appellant thereafter sought a writ of mandate to compel the trial court to vacate the judgment of conviction and set aside the guilty plea, contending that, as a result of the court of appeal ruling, the superior court had no jurisdiction but to grant his motion, regardless of its merit. The Supreme Court rejected his contention, stating it to be well settled that the reversal of a judgment or order ordinarily leaves the proceeding in the same situation in which it stood before the judgment or order was made. According to the decision, upon the reversal of the trial court's order refusing to vacate the judgment of conviction, the parties were restored to the position that they had before the reversed order was made and with the same rights they originally had, "with the exception that the opinion of the court on appeal must be followed as far as

applicable." Since the superior court acted within its jurisdiction in conducting the hearing, and appellant failed to appeal in timely fashion, he was bound by the superior court's ruling.

The same rule was applied even earlier in Sichterman v. R.M. Hollingshead Co. (1931) 117 Cal.App. 181 [4 P.2d 181]:

> "The judgment on the former appeal was an unqualified reversal. This left the case at large, and the parties were placed in the same position as if it had never been tried, and the plaintiff was afforded the right to introduce any additional or new evidence upon the issues raised."

In Central Savings Bank v. Lake (1927) 201 Cal. 438, 443 [257 P. 521, 523], the California Supreme Court rejected the contention that an order, reversing a judgment for plaintiff which stated only "The judgment is reversed," and not, in specific terms, remanding the cause for a new trial, required the trial court to enter judgment in defendant's favor. The unsuccessful defendant argued that the judgment of reversal was a final judgment amounting to res judicata as between the parties because the court of appeal did not specifically order a new trial. Said the Court:

> "There is no merit in this contention. It has long been the law of this state that an unqualified reversal remands the cause for a new trial ... [citation omitted] and places the parties in the trial court in the same position as if the cause had never been tried, with the exception that the opinion of the court on appeal must be followed so far as applicable."

This same rule was applied in Atchison, T. & S.F. Ry. v. Superior Court (1939) 12 Cal.2d 549 [86 P.2d 85, 87-88]. In that case, plaintiff had sued and won a judgment on a claim based upon the Federal Safety Appliance Act, and his judgment was affirmed on appeal to the California Supreme Court. The United States Supreme Court reversed the judgment, and remanded the case for further proceedings not inconsistent with its opinion. In its opinion, the Supreme Court stated that plaintiff, in abandoning his claim under common law negligence had abandoned the only possible ground for recovery. Upon receipt of the mandate from the United States Supreme Court, the California

Supreme Court held that plaintiff could only proceed by way of common law negligence, and entered a judgment stating that the judgment appealed from was reversed. The plaintiff then sought a new trial on common law negligence grounds, and the railroad sought a writ of prohibition. In deciding in favor of the plaintiff, the Supreme Court cited the rule that a retrial in civil actions may be had following a reversal which does not expressly provide for a new trial, and interpreted both its reversal order and that of the United States Supreme Court as not to preclude a new trial, noting that:

> "it is the general rule that a retrial in civil actions may be had following a reversal without express provision therefor in the judgment of the appellate court. ... Said judgment, in the circumstances, neither affirms nor denies the right to retry the action. ... The effect in general of a reversal is to set the case at large as if it had never been tried." (Atchison, T. & S.F. Ry. v. Superior Court, supra, 86 P.2d at 87-88.)

This rule has also been cited in decisions reviewing orders of administrative agencies. In Winthrop v. Industrial Accident Commission (1934) 220 Cal. 114 [29 P.2d 850], the California Supreme Court addressed the question as to the powers and jurisdiction of the commission when a court has annulled its order denying an award on the ground that the finding that no portion of the petitioner's disability was caused by injury arising out of the employment was not supported by the evidence, and said (29 P.2d at 851):

> "An extended discussion will not be required to set forth our views leading to the conclusion that the commission has jurisdiction to receive any further evidence and pursue any inquiry on any issue of fact which was before it on the prior hearing. Broad powers are conferred upon the commission by the act to the end that its objects and purposes may be accomplished. The commission is not bound by common-law or statutory rules of evidence or procedure. The path of the commission toward a free and full inquiry to ascertain the substantial rights of the parties is made clear by the framework of the act. The spirit of this legislation forbids a limitation upon the commission's power to inquire into the facts within narrower confines than those which define the jurisdiction of a trial court in a similar situation. There, upon an unqualified reversal of its judgment, issues of fact may be retried, and the lower court is bound by the law of the case, unless the evidence on the second trial supplies the additional and necessary proof

> which was lacking in the formal record ... That such a limitation was not intended follows under the liberal construction enjoined upon the courts by the provisions of the act. This becomes more apparent when the situation is reversed and an award granting compensation in a particular case is annulled because the commission has exceeded its jurisdiction in finding, in the absence of competent evidence, that the injury arose out of and in the course of employment. In our opinion, it would be a violation of the spirit and intent of this legislation were its provisions to be construed as precluding the commission thereafter from allowing the employee to make a different record, if possible, which would support a finding in his favor on that issue. Inasmuch as the substantial rights of all parties are the subject-matter for determination by the commission ... there is no basis for a holding that a different and narrower jurisdiction must be exercised by the commission in one case than in the other."

Other decisions reviewing actions of administrative agencies which have referred to the rule that the effect of an unqualified reversal is to vacate the earlier judgment and leave the record open for further proceedings include the following: Regents of the University of California v. Public Employment Relations Board, supra; Department of Industrial Relations v. Nielsen Construction Company (1996) 51 Cal.App.4th 1016, 1031 [59 Cal.Rptr.2d 785]. See also 2 Cal.Jur.3d, Administrative Law, §341, pages 637-638:

> "Except as limited by the court's directions, the judgment of the court does not affect the continuing administrative power of the agency, and the effect of a court decision annulling an administrative determination is ordinarily to set the matter at large for further proceedings not inconsistent with the court's judgment. Thus, an order annulling an administrative decision for incompetent or insufficient evidence does not preclude the agency from receiving further evidence and pursuing inquiry as to any issue of fact that was before it on the former hearing."

La Prade v. Department of Water & Power of City of Los Angeles (1945) 27 Cal.2d 47 [162 P.2d 13] was an appeal from a trial court order directing the reinstatement of a civil service employee who had been discharged without having been afforded a hearing. Although the Supreme Court agreed with the lower court that the employee had been entitled to a hearing at which he might dispute the charges against him, it nonetheless held that the order of the lower court, which had ordered reinstatement, should be modified to accord the employee a full and fair

hearing. The court's reasoning bears on the issue presently before the Board:

> "Where a local administrative tribunal exercises quasi judicial powers its actions may be reviewed by either mandamus or certiorari. ... And in such a review the chief issues are whether the person affected has been accorded a hearing, and if so, whether there is any evidence to support its determination. ... In the review proceedings the court should confine itself to the showing made before the administrative tribunal with regard to the sufficiency of the evidence. ... The board is vested with the power to make the determination of whether or not there is a basis for discharge. ... If a hearing has been denied, or if the evidence is insufficient to sustain the action of the board, and it is still possible for the board to hold a hearing or exercise its discretion, then the matter should be remanded to the board for further consideration rather than having a trial de novo in the superior court and requiring that court to exercise judgment on the facts which should be determined by the board."[3]

Indeed, in cases involving the Department of Alcoholic Beverage Control and its predecessor, the Board of Equalization, the Supreme Court, without specific reference to the nature of the reversal order, has made it clear that a remand is the norm.

In Covert v. Board of Equalization (1946) 29 Cal.2d 125 [173 P.2d 545, 548], the La Prade decision was cited as authority for the proposition that "the functions of the board are thus similar to those of a local administrative tribunal, a decision of which will be sustained if it has committed no errors of law and if the evidence, although conflicting, is sufficient to support its findings of fact," and that" even if there has been error, the evidence will not be weighed by the court but the matter will be remanded to the board for further consideration." The court reversed a decision of the superior court which, in response to a petition for writ of mandate brought by a private citizen, had ordered the revocation of an on-sale license. Covert, in turn, is cited in Macfarlane v. Department of Alcoholic Beverage Control (1958) 51 Cal.2d 84 [330 P.2d 769, 770], for the proposition that where there is error, the matter ordinarily should be remanded to the Department.

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[3] The internal case citations have been omitted.

It is important in this analysis to keep in mind that while the court in Covert was addressing a situation where a superior court had reviewed a decision of the Board of Equalization, its reasoning is just as applicable to the current procedure, in which the Appeals Board reviews a decision of the Department. (See Macfarlane, supra.)

Thus, we think that existing case law is persuasive that the Department does have the power to conduct further proceedings, so long as its action is not inconsistent with the Board's decision.[4]

Nor can we say in this case that the Department's action is inconsistent with the Board's decision. When this Board reversed the Department, it reasoned as follows:

> "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.
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> "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.
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> 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

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[4] *It is worth noting that the corresponding rule in criminal cases is that "if a judgment against the defendant is reversed, such reversal shall be deemed an order for a new trial, unless the appellate court shall otherwise direct." Pen. Code § 1262. This Penal Code section is cited in numerous cases, both civil and criminal, for the proposition that an unqualified reversal is treated as a remand to the trial court for a new trial. People v. Dorsey (1973) 34 Cal.App.3d 70 [109 Cal.Rptr. 712], is a typical criminal case. There the court said that "it is well settled law that the reversal of a judgment of conviction does not clothe the defendant with immunity from further prosecution of the offense for which he was convicted."*

> she could generally be expected to convey the appearance of a person under the age of 21 years.
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> 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])."

Rule 141(b)(2) does not lend itself to ease of application by any measure. But, if this Board is required to review cases of its application, it must have more to look at than a simple declaration that the rule has been satisfied. That is why it has required that the administrative law judges explain, in more than conclusory fashion, why they were satisfied the decoy presented the appearance which could generally be expected of a person under 21 years of age. Presumably, the Department's decision to remand the case to the ALJ for further consideration reflects its agreement with our view that the task of explaining why they were satisfied is not beyond the capabilities of its administrative law judges. Even though we may entertain doubts as to whether the Department can rectify the defects in its earlier decision, in part as a result of the passage of time, those doubts are not so conclusive as to persuade us that the Department's order providing the ALJ an opportunity to do so was not within its jurisdiction.

Appellant argues that the rule set forth in the Witkin treatise, and as reflected in the cases we have just discussed, applies only to acts of reversal by a court of appeal or the Supreme Court of rulings of a superior court, and not to a reversal by an administrative appellate authority, but cites no case authority that so holds.

Appellant also points to Rule of Court 25, which specifically requires the

court of appeal to remand the matter to the trial court by way of remittitur, and notes that there is nothing similar in the administrative appellate procedure set forth in Business and Professions Code §23801 et seq. Similarly, appellant stresses this Board's relatively unique statutory grant of appellate review of the decisions of another agency, and argues that the case was concluded when the Department failed to appeal the Board's April 14, 1999, order.

It is tempting to an administrative agency such as this Board to agree with arguments which, if accepted, would enlarge the powers already granted to it by the Constitution and the Legislature. But for this Board to do so, we think, would be for it to substitute itself for the Department as the agency ultimately responsible for whether or not a licensee has engaged in conduct deserving of discipline. For example, when the Board reverses a decision of the Department because it applied an incorrect standard, or incorrectly applied a correct standard, or erred on an evidentiary issue, acceptance of appellant's position would mean that, no matter how egregious the conduct of the licensee may have been, he or she would escape discipline simply because the Board did not include an express order of remand in its own decision. This, we think, would conflict with the admonition in the Board's constitutional and legislative charter that its order "shall not limit or control in any way the discretion vested by law in the department."

There are times, most frequently with respect to the penalty which the Department has imposed, where the Board has remanded the matter with instructions to reconsider the matter in light of the Board's comments. And, there can be times when the Board's decision reversing the Department leaves no room for any further consideration by the Department other than to dismiss the accusation, in whole or in part. But, ordinarily, it seems more appropriate to leave

to the Department its ability to fulfill its regulatory role.[5]

Thus, in keeping with the rule to be gleaned from the authorities, that "the decisions of the board are final, subject to review for excess of jurisdiction, errors of law, abuse of discretion and insufficiency of the evidence, and that where there is error, the matter should ordinarily be remanded to the board for further proceedings," it would appear that the appropriate course is for this case to be returned to the Department for such further proceedings as may be appropriate in keeping with the decision of the Board.

Since we have concluded that the Department acted within its power, we must of necessity affirm the order remanding the matter to the ALJ.

[5] *We have seen, in the Department's initial brief to the Board in this case, and in several of its briefs in other cases, its disagreement with the Board's rulings in cases where Rule 141(b)(2) has been at issue, and its criticism of the Board's rulings, but this is the first case in which the Board has become aware that the Department has taken any steps to revisit the matter after this Board's decision was rendered. Indeed, we are unaware of any prior instance where the Department has reopened a matter after an unqualified reversal by this Board. Admittedly, this could have occurred without our being aware of it, but neither appellant nor the Department has brought to our attention any such instance. While the absence of any such attempt by the Department could be construed as an awareness on its part that it lacked the ability, we are forced by the logic and precedent of prior case law to adopt the contrary conclusion.*

ORDER

The decision of the Department is affirmed.[6]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[6] 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.