

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

CIRCLE K STORES, INC.	)	AB-7112
dba Circle K	)	File: 20-284700
14141 Twin Peaks Road	)	Reg: 97041484
Poway, California 92064,)	
Appellant/Licensee,	)	Administrative Law Judge
	)	at the Dept. Hearing:
v.	)	Rodolfo Echeverria
)	
	)	Date and Place of the
DEPARTMENT OF ALCOHOLIC	)	Appeals Board Hearing:
BEVERAGE CONTROL,	)	February 3, 1999
Respondent.	)	Los Angeles, CA
)	

Circle K Stores, Inc., doing business as Circle K (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which ordered its off-sale beer and wine license suspended for 25 days, with 10 days thereof suspended for a probationary period of one year, for appellant's clerks, on two occasions, having sold alcoholic beverages to minors participating in decoy operations being conducted by the San Diego County Sheriff's Department, such sales being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from violations of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing

¹*The decision of the Department, dated April 16, 1998, is set forth in the appendix.*

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 June 23, 1993.

Thereafter, the Department instituted an accusation against appellant charging that on April 27, 1997, appellant's clerk, April C. Spahr, sold an alcoholic beverage (beer) to Jody L. Jackson, a minor who was then approximately 18 years of age, and further charging that on June 13, 1997, appellant's clerk, Richard L. Voss, sold an alcoholic beverage (beer) to Jennifer Pepka, a minor who was then approximately 18 years of age. In both instances, the minors were decoys.

An administrative hearing was held on February 25, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented concerning the transaction in question.

In both instances the decoys were asked for identification and produced driver's licenses showing them to be under the age of 21. Nevertheless, each of the two clerks went forward with the transaction after viewing the driver's license.

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.”

Appellant’s attack on the decision of the Department is directed at findings with respect to each of the decoys that:

“[The decoy] is a youthful looking female, whose physical appearance is such as to reasonably be considered as being under 21 years of age and who would reasonably be asked for identification to verify that she could legally purchase alcoholic beverages. The [decoy’s] appearance at the time of her testimony was substantially the same as her appearance on the night of the sale”

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 used the term “physical appearance,” he was reflecting the sum total of present sense impressions he experienced when he viewed the decoys during their testimony, it is not at all clear that is what the ALJ 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, and the like. 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.²

² *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

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

a writ of review of this final order in accordance with Business and Professions Code §23090 et seq.