

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

AB-7336b

File: 47-243016 Reg: 98043001

GMRI, INC. dba The Olive Garden
5526 Philadelphia Street, Chino, CA 91710,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: October 4, 2001 Redeliberation: February 7, 2002
Los Angeles, CA

ISSUED MAY 14, 2002

GMRI, Inc., doing business as The Olive Garden (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for its waitress having served an alcoholic beverage (beer) to a nineteen year-old police decoy, 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). This is the third appeal in this matter.

Appearances on appeal include appellant GMRI, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated May 24, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

An administrative hearing was held on November 9, 1998, following which the Department, in a decision dated December 31, 1998, sustained the charge of the accusation.

On March 30, 2000, the Appeals Board reversed the decision of the Department, citing and quoting from its decision in Circle K Stores, Inc. (1999) AB-7080, and concluding that, by his failure to consider age indicia other than physical appearance, the Administrative Law Judge (ALJ) had misapplied Department Rule 141(b)(2). (GMRI, Inc. (2000) AB-7336.)

Following the Board's order of reversal, the Department, on June 13, 2000, in a Decision Following Appeals Board Decision, remanded the matter to the ALJ for decision and clarification as he deemed appropriate including the submission of any further evidence in his exclusive discretion. Appellant's appeal from this order was dismissed by the Appeals Board for lack of jurisdiction. (GMRI, Inc. (March 1, 2001) AB-7336a.)

Thereafter, the ALJ submitted a new proposed decision which the Department adopted on May 24, 2001, in which he reiterated the findings of the original decision on those issues other than the issue involving the appearance of the decoy and Rule 141(b)(2), and added the following with respect to the decoy's appearance:

“The Administrative Law Judge did consider the overall appearance of decoy #1 including his demeanor, his poise, his mannerisms, his maturity, his clothing, his size and his physical appearance in assessing whether the decoy displayed the appearance which could generally be expected of a person under the age of 21 years. The appearance of decoy #1 at the time of the

hearing was substantially the same as his appearance on the day of the decoy operation except that he weighed five pounds less on December 12, 1997. Although the waitress testified at the hearing that decoy #1 looked pretty much the same at the hearing as he did on the date of the sale, she was not asked at the hearing whether or not decoy #1 looked under or over the age of 21. Decoy #1 is six feet one inch in height, he weighed about one hundred seventy-five pounds, he had a military-type haircut with about one quarter of an inch growth on the top of his head and he was clean shaven on the date of the sale. On that date, decoy #1 wore the exact same clothes which he wore to the hearing which consisted of blue jeans, a plaid shirt, and brown dress shoes which did not add very much height to him. At the hearing the decoy answered questions in a straightforward manner. The decoy also testified that he had participated in two prior decoy operations, that he was a college student as of the date of the sale and that he had been working as a police cadet for about eleven months as part of an internship program as of the date of the sale. After considering the decoy's overall appearance when he testified and the way he conducted himself 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."

Appellant has now appealed the new decision of the Department, contending that the Department lacked the power to remand the matter to the ALJ, and that the ALJ relied upon evidence not in the record.

DISCUSSION

I

Appellant contends that the Department lacked jurisdiction to remand the matter to the ALJ for further proceedings.

Appellant has not raised any issue regarding jurisdiction that has not already been considered and rejected by this Board. The question of the effect of an unqualified reversal by the Appeals Board was considered at length in its decision in Circle K Stores, Inc. (1999) AB-7080a, in which the Board ruled that the Department was acting within its power when, after an Appeals Board reversal, it

remanded the case to an administrative law judge for further proceedings with respect to the issue involving the appearance of the decoy under Rule 141 (b)(2).²

The thrust of that decision was that the Board considered it impermissible for a Board ruling on an issue of law - in that case, as here, the question of the proper application of Rule 141 (b)(2) - to be determinative of the merits of a Department disciplinary proceeding. This Board remains of that view.

II

As an adjunct to its challenge to the Department's jurisdiction, appellant challenges the finding by the ALJ that the decoy's appearance complied with Rule 141(b)(2). Appellant's principal contention appears to be that the ALJ could not possibly conduct a full and fair analysis of the apparent age of a decoy after the passage of such a considerable length of time, in this case, approximately two and one-half years.

As we have said on other occasions, Rule 141(b)(2) requires an ALJ to make a subjective judgment, on the evidence presented, whether the decoy displayed the appearance which could generally be expected of a person under the age of 21. In our initial decision in this case, we acknowledged that for the Board to be assured

² A petition for a writ of review filed by Circle K Stores, Inc., was denied by the Court of Appeal for the Second Appellate District on April 18, 2000, after that court's direction to the Department on February 29, 2000, that it file a preliminary opposition which was to include:

“a discussion of the question whether further proceedings may take place after a decision of the Alcoholic Beverage Control Appeals Board if the Board does not ‘direct reconsideration of the matter in light of its [decision]’ or ‘direct the department to take further action as is especially enjoined upon it by law.’”

Circle K Stores, Inc. v. Department of Alcoholic Beverage Control et al. B 138381.

that such a decision was not made arbitrarily, there must be a showing that the ALJ applied the standard set forth in the rule, and not a truncated standard which failed to take into account indicia of age other than mere physical appearance.

Despite our belief that the Department was not barred from reconsidering the matter following the Board's unqualified reversal of the Department's original decision, we continued to entertain the doubts originally expressed in Circle K Stores, Inc.:

“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.”

With the benefit of hindsight, it is apparent to this Board that the manner in which the cases were resolved offends our sense of fairness.

We did not expect the Department, and more particularly the ALJ, to simply declare, without further hearing and input from the parties, that he had in fact done exactly what the Board had said should have been done, even though there is no hint in his original decision that he had done so.

The Board, it can be said, envisaged something more, where the parties could have addressed the various indicia of age displayed by the decoy.

That did not happen. Instead, it may be said that the ALJ simply culled the record for evidence bearing on appearance, leaving all concerned with nothing more to go on than his assertion that he had really considered the various factors with respect to which his original proposed decision was lacking. While we do not question his good faith, we do feel that there are enough questions about the his

ability to isolate this particular decoy from all the decoys he may have seen before and since this case was heard, that the procedure which was utilized was flawed and inherently unfair.

Now even more time has elapsed. We think it is time for the Department to recognize that these have become cases in which, as a result of a procedural error early on, no fair result is ever likely to be attained. While we may lack the ability to compel a dismissal, we do believe the Department, in an appropriate exercise of its discretion, should dismiss the accusation in this matter.

ORDER

The decision of the Department is reversed.³

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

³ 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.