

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

AB-8918

File: 20-295702 Reg: 07067427

CIRCLE K STORES, INC., dba Circle K 5202
4555 West Pacific Coast Highway, Newport Beach, CA 92663,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: December 3, 2009
Los Angeles, CA

ISSUED MARCH 17, 2010

Circle K Stores, Inc., doing business as Circle K 5202 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days for its clerk, Scott Benson, having sold a six-pack of Heineken beer to Peter Chang, a 16-year-old Department 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 B. Saltsman and Alicia R. Ekland, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 15, 1994.

¹The decision of the Department, dated August 6, 2008, is set forth in the appendix.

Thereafter, the Department instituted an accusation against appellant charging the sale of an alcoholic beverage to a person under the age of 21.

An administrative hearing was held on June 10, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Department investigator Mackenzie Polidori and the decoy, Peter Chang.

Subsequent to the hearing, the Department issued its decision which determined that the sale-to-minor violation had been proved and that there had been no violation of Rule 141(b)(2).

Appellant filed a timely notice of appeal in which it contends that the decoy did not display the appearance required by Rule 141(b)(2).

DISCUSSION

Rule 141(b)(2) (4 Cal. Code Regs., §141, subd. (b)(2)) requires that a minor decoy "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." In this case, appellant argues that the decoy did not display the requisite appearance because of a body build of one in his mid-twenties, his background as a police Explorer, and the fact that he was able to purchase alcoholic beverages at five of the seven locations visited.

As this Board has said on many occasions,

the ALJ is the trier of fact, and has the opportunity, which this Board does not, of observing the decoy as he or she testifies, and making a determination whether the decoy's appearance met the requirement of Rule 141. ... The Board is 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 did not have the appearance required by the rule, and an equally partisan response that [he] did.

(Idress (2001) AB-7611.)

The administrative law judge (ALJ) in this case set forth at length his assessment of the decoy's appearance:

FF 5: Decoy Chang appeared at the hearing. He stood 5 feet, 7 inches tall and weighed about 183 pounds. When he visited Respondent's store on September 20, 2006, he was dressed as is shown in Exhibits 4 and 5, with just a gray shirt on top. His dark brown or black hair was worn shaggy, coming almost to his eyes and just over the top of his ears. (Exhibits 4 and 5.) His height was about the same as it was at the hearing, but he had gained almost 10 pounds. Chang appeared substantially the same at the hearing as he did at Respondent's Licensed Premises on September 20, 2006. By the time of the hearing, decoy Chang had become 17 years of age.

FF10: This decoy operation was not the first for Peter Chang. He had worked 4 or 5 times before. He has also been an Explorer with the Los Angeles County Sheriff's Cerritos office since June 2005. There were no remarkable aspects to his Explorer work or training. He claimed to have been nervous the first time he worked as a decoy and never to have become totally free of nervousness. Chang received a \$40 gift card for working as a decoy on September 20, 2007 [sic]. The decoy operation visited 7 establishments that night and of the 7, 5 sold to decoy Chang. (See Exhibit A.) Four of the 7 locations visited, requested identification of the decoy, according to the Exhibit, and 2 of those sold him an alcoholic beverage.

FF 11: Decoy Chang is a male juvenile who appeared his age, or slightly older. Based on [his] overall appearance, *i.e.*, his physical appearance, dress, poise, demeanor, maturity, and mannerisms shown at the hearing and the photographs, Exhibits 4 and 5, decoy Chang displayed the appearance that could generally be expected of a person less than 21 years of age under the actual circumstances presented to the clerk.

The ALJ also addressed, and rejected, the licensee's argument that the decoy's purchases at five of the seven premises he visited compelled a finding that he did not possess the appearance required by the rule (Conclusion of Law 4):

Respondent argued that decoy Chang must have appeared too old to comply with the rule because of the high percentage , 71%, of sales made to him on September 20, 2007. No other characteristic of his appearance, either at the hearing or in front of Respondent's clerk, was mentioned. While the rate of sale is one indication of the apparent age of a decoy, the court has observed decoy Chang, both in person and as he appears in Exhibits 4 and 5, taken the date of the decoy operation. His apparent age was discussed above in Findings of Fact,

paragraphs 5, 10 and 11. While he may have appeared a bit older than his actual 16 years of age, Chang's appearance on September 20, 2007, at Respondent's store complied with the Rule.

There are any number of reasons unrelated to the appearance displayed by a minor decoy that could lead to a purchase ratio of the size seen in this case. For example, this Board knows from the many cases it has heard that retail clerks often appear to be more focused on making the sale than observing the person to whom they are selling. What else explains the occasions where a decoy presents identification clearly establishing his or her status as a minor, and yet is permitted to purchase an alcoholic beverage? Two of the sales to this decoy were of that kind.

We said, in *7 Eleven, Inc./Mohammad* (2007) AB-8535, that while a high purchase rate (in that case 80 percent) raises questions in reasonable minds as to the fairness of a decoy operation, that in itself is not enough to show that Rule 141(a) or (b)(2) was violated - "Such a per se rule would be inappropriate."

ORDER

The decision of the Department is affirmed.²

FRED ARMENDARIZ, CHAIRMAN
SOPHIE C. WONG, MEMBER
TINA FRANK, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² 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.