

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

AB-7817

File: 21-295711 Reg: 01050191

CIRCLE K STORES, INC. dba Circle K #5209
1954 North Ventura Road, Oxnard, CA 93030,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Ronald M. Gruen

Appeals Board Hearing: May 9, 2002
Los Angeles, CA

ISSUED JULY 26, 2002

Circle K Stores, Inc., doing business as Circle K #5209 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a minor decoy, 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).

Appearances on appeal include appellant Circle K Stores, Inc., appearing through its counsel, Ralph B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew Ainley.

¹The decision of the Department, dated May 3, 2001, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on February 5, 1998. Thereafter, the Department instituted an accusation against appellant charging that, on October 27, 2000, appellant's clerk, Ismael Aguilar, Jr., ("the clerk"), sold an alcoholic beverage to 18-year-old Sarah Lowe. Lowe was acting as a decoy for the Oxnard Police Department at the time of the sale.

An administrative hearing was held on March 22, 2001, at which time documentary evidence was received and testimony concerning the transaction was presented for the Department by Sarah Lowe ("the decoy") and Lucita Edison², another minor decoy who accompanied Lowe during the transaction. Appellant called Suzy Prasad, another of appellant's clerks who was present during the transaction, and Tony Bashkar, the site manager at the time of the transaction, who testified about the training provided for employees.

The testimony of Lowe and Edison established that they entered the premises together and walked to the beer cooler, where Lowe got a 24-ounce bottle of Corona beer. They walked to the register, and Lowe put the beer on the counter. Edison stood a foot or two away from Lowe at the counter, but did not participate in any way in the transaction. At the clerk's request, Lowe gave him her California driver's license, which bears a red stripe stating "AGE 21 IN 2003." The clerk looked at the license for two or three seconds, returned it to Lowe and rang up the sale. Lowe paid for the beer, received change, and left the premises with the beer, still accompanied by Edison. Shortly after exiting, the two minors re-entered the premises with an officer, and Lowe

²The proposed decision spells her name "Eidson," but the transcript shows that the correct spelling is "Edison," which we will use in this opinion.

identified the seller of the beer.

During the decoy operation, Lowe was wearing a grey turtleneck sweater and black pants, shoes, and jacket. She wore four small gemstone stud earrings in one ear and three in the other. For makeup, she wore face powder and mascara. Her short hair was combed back at the sides and forward on top.

Another of appellant's clerks, Suzy Prasad, who was working on the night in question, testified that she observed the two minors in the premises and concluded that they appeared to be over 21 based on their looks, the way they were dressed, and her impression of them as the mother of a 22-year-old daughter. She said that Lowe was wearing a little more make-up that night than she wore at the hearing, and the clothes Lowe was wearing that night, Prasad said, "made her look much older." Prasad also testified that she was sure Lowe was wearing a short skirt and thought she also wore high-heeled shoes. Although she saw the two minors go toward the cooler, approach the counter, and wait in line, Prasad said she did not see that they had any beer, since she "was not paying too much attention" [RT 71].

Subsequent to the hearing, the Department issued its decision which sustained the charge of the accusation and determined that no defense had been established.

Appellant thereafter filed a timely notice of appeal in which it raises the following issues: (1) the Department failed to consider the impact of the second decoy on the apparent age of the first decoy, and (2) the Department failed to consider the testimony of appellant's witness.

DISCUSSION

I

Appellant contends the ALJ erred in failing to make a finding regarding the apparent age of the second decoy, Edison, at the time of the sale and the impact her presence made on the appearance of the purchasing decoy, Lowe. It asserts that the circumstances of the present appeal are similar to those in 7-Eleven/Smith (2001) AB-7740, and the result reached in that appeal – reversal – should therefore be the same as well.

The ALJ was not required to make a finding regarding the apparent age of Edison. She was not the person sold to and she did not participate in the transaction. Although she accompanied Lowe, she was a mere bystander as far as the sale of alcoholic beverages was concerned. For purposes of Rule 141, she was not "the decoy."

That is not to say that her presence and appearance are necessarily irrelevant. However, the real question to be asked when more than a single decoy is used is whether the second decoy engaged in some activity intended or having the effect of distracting or otherwise impairing the ability of the clerk to comply with the law. The clerk did not testify, so there is no evidence or claim that the clerk was distracted.

Appellant argues, however, that distraction is not the issue it is raising. Rather, it is asserting that the ALJ should have addressed the "impact" Edison had on how Lowe appeared to the clerk at the time of the sale.³ It does not, however, make any assertion

³Appellant asserts that its counsel "framed" this issue at the hearing. In reality, counsel's "framing of the issue" during closing argument was less than clear [RT 91-92]:

as to what impact it believes Edison had on Lowe's appearance; in fact, it does not even assert that Edison actually had any impact on Lowe's appearance.⁴ It merely asserts that the ALJ did not make a finding regarding what impact, if any, Edison had on Lowe's appearance, and concludes that the decision must, therefore, be reversed.

This argument, if it may be called such, fails. The ALJ had no obligation to discuss a hypothetical "impact" Edison may have had on the appearance presented by Lowe to the clerk. The cases appellant cites are inapposite. In Hurtado (2000) AB-7246, the 27-year-old undercover police officer shared a table with the decoy and both the officer and the decoy ordered beers. In 7-Eleven, Inc./Smith (2001) AB-7740, the second decoy's appearance as a person under the age of 21 was in serious question, and there was evidence that she had some involvement in the transaction.

Here, on the other hand, Edison's only involvement was to stand next to the decoy who made the purchase. The ALJ specifically found that Edison's appearance was that of a person under the age of 21. Appellant has not made any effort to explain how her appearance or presence made this decoy operation unfair. Appellant's simple assertion that it did does not make it so.

II

THE COURT: There's a lot that has been put here in this issue of looks, but she [Edison] participated very little in this transaction. So I may be missing something.

MR. BUDESKY: The police department is sending two people in. And the clerk looks at both of them. And I think the age determination is based on what both of the people look like. They're both in his field of vision. And if they both look mature, then I think that figures into the clerk's decision.

⁴In its brief on appeal, it does not contest the ALJ's finding that the decoy, Lowe, displayed the appearance of a person under the age of 21 at the time of the sale. This, by itself, is really enough to make moot the issue raised by appellant.

Appellant contends that the ALJ erroneously disregarded the testimony of one of appellant's witnesses, Suzy Prasad. It asserts that the ALJ was required to make a finding regarding that testimony, even if the finding is to reject that testimony as not credible. Appellant contends that the failure to make such a finding is reversible error.

Appellant cites no authority, and we know of none, that requires an ALJ to make a finding regarding the testimony of every witness who testifies. Findings are made as to facts, and the factual question Prasad's testimony addressed was that of the apparent age of the decoy. The ALJ found that the decoy displayed the appearance of a person under the age of 21, and he provided his reasons for that finding. He did not need to review in his findings all the evidence presented with regard to the decoy's appearance, and explain why he rejected some and accepted others.⁵

In any case, the ALJ explained during closing argument the reason he would not accord weight to the testimony of Prasad regarding the decoy's apparent age. Appellant's counsel was expounding on Prasad's credibility and her ability to judge the decoy's age since she is a mother of a 22-year-old daughter. The ALJ interrupted him, saying [RT 93-94]:

"And I would have sustained an objection on the part of Mr. Ainley. [Prasad]'s not an expert, because what she was testifying to was a common thing. I think there are millions of people who have children who will testify. It's an issue of commonality, not an issue of specialty. [¶] Mr. Ainley didn't object, so the testimony came in. But I still have to give her testimony the weight to which it is entitled, and that is just an ordinary percipient witness, without any special training at all, testifying on an item that might be specialized. I don't know for the life of me who can testify to the expertise on something like that."

If ALJ's were required to discuss in their decisions all the testimony they heard,

⁵"If a full finding is made on an issue, it is not necessary expressly to negative contradictory issues, for the finding made is an implied negation of all facts to the contrary that are not found." (59 Cal.Jur.3d §145.)

even if irrelevant, immaterial, or incredible, very few matters would be adjudicated.

Appellant's argument makes no sense, either theoretically or practically.

ORDER

The decision of the Department is affirmed.⁶

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

⁶This 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.