

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

AB-7977

File: 20-197895 Reg: 01051764

CIRCLE K STORES, INC., dba Circle K Store # 8843
1640 Carpenter, Modesto, CA 95351,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Michael B. Dorais

Appeals Board Hearing: March 13, 2003
San Francisco, CA

ISSUED APRIL 30, 2003

Circle K Stores, Inc., doing business as Circle K Store # 8843 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for five days for appellant's clerk selling an alcoholic beverage to a minor decoy, in 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, Stephen W. Solomon, and James S. Eicher, Jr., and the Department of Alcoholic Beverage Control, appearing through its counsel, Thomas Allen.

¹The decision of the Department, dated May 9, 2002, is set forth in the appendix.

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, on July 11, 2001, appellant's clerk, Joyce Lobue ("the clerk") sold an alcoholic beverage to 18-year-old Alejandro Fernandez. Fernandez was working as a minor decoy for the Modesto Police Department at the time.

An administrative hearing was held on February 21, 2002, at which time documentary evidence was received, and testimony concerning the transaction was presented by Fernandez ("the decoy"), Modesto police officer Jason Grogan, the clerk, and appellant's assistant store manager, Wendy Trotter.

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

Appellant thereafter filed a timely notice of appeal in which it raises the following issues: (1) Rule 141(b)(5)² was violated; (2) Rule 141(b)(2) was violated; and (3) there are no findings explaining why the administrative law judge (ALJ) accepted the decoy's testimony as credible.

DISCUSSION

I

Rule 141(b)(5) requires, after a sale to a minor decoy, that the "officer directing the decoy shall make a reasonable attempt to enter the licensed premises and have the minor decoy make a face to face identification of the alleged seller of the alcoholic beverages."

²Rule 141 is found in title 4 of the California Code of Regulations, section 141.

Appellant contends that the officers violated Rule 141(b)(5) by bringing the clerk to the decoy for identification. They equate this situation with that in the Appeals Board's decision in *Keller* (2002) AB-7848, in which the decoy remained outside the store after making a purchase of an alcoholic beverage, and the officer brought the clerk outside for the decoy to identify.³

The ALJ made the following finding regarding the face-to-face identification (Finding of Fact III, 3rd ¶):

After exiting [appellant's] store, the decoy met with police officers and gave them the beer. The decoy then reentered the premises with police officers and accompanied them to a back room in the store where he verbally identified Joyce Lobue as the clerk who sold him the beer. At the time of the identification, the decoy and the sales clerk stood approximately two feet from each other and were part of a group which included police officers and the store's assistant manager. A citation was then issued by Modesto Police Officer Jason Grogan to [appellant's] clerk, Joyce Lobue.

Appellant contends that "This type of identification has been frowned upon" by this Board, citing the Board's decision in *Keller, supra*. Appellant is in error; the Board did not frown upon this type of identification, but upon the particular factual situation in *Keller*.

In *Keller*, the Appeals Board reversed the Department because the decoy made a face-to-face identification only after the police brought the clerk outside, where the decoy had remained since leaving the store. This case is different from *Keller*. Here, the decoy re-entered the store with officers and made a proper face-to-face identification of the seller of alcoholic beverages.

Appellant argues that the identification was "tainted" by the officer pointing out

³The Fourth District Court of Appeal, Division One, issued a writ of review in the *Keller* case on November 27, 2002. At the time the Appeals Board decided this matter, *Keller* was not yet scheduled for appellate oral argument.

the clerk to the assistant manager and having her brought to the back room for the decoy to identify. It asserts that the officer identified the clerk, not the decoy.

We reject appellant's contention. The rule imposes two separate duties on the officer - to attempt to reenter,⁴ and to conduct a face-to-face identification. In this case, both duties were performed.

The officer and the decoy both went into the store after the sale and went to the back room, where they informed the assistant manager of the unlawful sale. The officer pointed out the clerk to the assistant manager, who brought the clerk into the back room, where the decoy made his identification of the clerk as the seller. The actions of the officer prior to the identification by the decoy are not alleged, and do not appear, to have had any effect on the identification. The decoy made a face-to-face identification of the seller, and there is no proof that the police misled the decoy into making a misidentification or that the identification was otherwise in error. We do not believe that the officer's action in pointing out the clerk before the identification took place caused the rule to be violated.

II

Appellant contends that the decoy used by the Modesto Police Department violated Rule 141(b)(2) because, "considering the decoy's testimony, he could not have displayed the appearance of a person under 21 years of age at the time of the sale of alcohol."

⁴ Although the rule uses the term "reenter," in many cases the officer has observed the transaction from outside the premises, so can only attempt to "enter." The Board has always considered this to comply with the rule.

The decoy was described by the ALJ as follows (Finding IV):

On July 11, 2001, [the decoy] was 5 feet 9 inches tall and weighed about 185 pounds. His hair was closely cut with slight sideburns and he wore jeans and a dark short-sleeve shirt. He did not wear a hat, sunglasses or any jewelry.

At the hearing, the decoy testified he weighed 190 pounds, was now perhaps "a little taller," and that his hair had the same appearance as on July 11, 2001. He testified in a calm and credible manner, not hesitating to acknowledge when he was unable to recall something.

The decoy is an Explorer Scout and has served in this volunteer organization with the Modesto Police Department for about six months. He has not received law enforcement training other than instructions on how to properly conduct himself as a decoy.

After observing the decoy's overall appearance, including his demeanor and taking into consideration all of the evidence surrounding his appearance on July 11, 2001, it is found that the minor decoy displayed the appearance of a person who could generally be expected to be under the age of 21 years when the sale of beer was made to him by [appellant's] clerk on July 11, 2001. The minor's appearance at the hearing was substantially the same as his appearance presented to [appellant's] clerk on July 11, 2001.

Appellant's "argument" is nothing more than the assertion that the evidence showed the decoy to have "the maturity, size, and demeanor of an individual 21 years of age or older." The only specifics appellant points out are the decoy's experience and "the lack of evidence that would indicate that the decoy was ever timid or nervous throughout the operation."

This Board has repeated many times that it will not second-guess the determination of the ALJ as to the apparent age of the decoy. The ALJ actually sees and hears the decoy, putting the ALJ in a much better position to make that determination than this Board, which has nothing but the record to review. There is no reason to depart from our position in this instance.

Appellant also asserts that the ALJ failed to make a finding about how the

decoy's experience affected his appearance on the night of the decoy operation. Obviously, the ALJ did not think the decoy's experience affected his appearance at all. He was not required to make a finding explaining this.

III

Appellant asserts that the ALJ committed reversible error in not making explicit findings regarding the credibility of the decoy's testimony. It bases this contention on Government Code section 11425.50 and federal case law requiring credibility findings in certain administrative adjudicatory decisions. We have rejected this contention previously. (See, e.g., *7-Eleven, Inc./ C Bar J Ranch, Inc.* (2002) AB-7800.)

Government Code section 11425.50, subdivision (a), requires a written decision that includes "a statement of the factual and legal basis for the decision." Subdivision (b) provides, in pertinent part:

If the factual basis for the decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner, or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

In *7-Eleven, Inc./ C Bar J Ranch, Inc.*, *supra*, we said:

The code section is silent as to the consequences which flow from an ALJ's failure to articulate the factors mentioned. However, we do not think that any failure to comply with the statute means that the decision must be reversed. It is more reasonable to construe this provision as saying simply that a reviewing court may give greater weight to a credibility determination in which the ALJ discussed the evidence upon which he or she based the determination. We do not think it means the determination is entitled to no weight at all. [Fn. omitted.]

This Board has consistently rejected counsel's insistence that the federal appeals court case of *Holohan v. Massanari* (9th Cir. 2001) 246 F.3d 1195 requires reversal of a decision that does not explicitly explain the basis of a credibility

determination. (See, e.g., *7-Eleven and Huh* (2001) AB-7680.) There is no reason to decide differently in the present appeal.

ORDER

The decision of the Department is affirmed.⁵

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

⁵This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 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 section 23090 et seq.