

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

AB-8529

File: 20-165232 Reg: 05060088

CIRCLE K STORES, INC., dba Circle K Store # 3621
1704 Pacheco, Los Banos, CA 93635,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: January 11, 2007

Sacramento, CA

Redeliberation: February 1, 2007

ISSUED APRIL 5, 2007

Circle K Stores, Inc., doing business as Circle K Store # 3621 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 10 days, all of which were stayed for a probationary period of one year, for appellant's clerk selling an alcoholic beverage to a police 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, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Nicholas R. Loehr.

¹The decision of the Department, dated February 9, 2006, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on January 22, 1985. On June 30, 2005, the Department filed an accusation against appellant charging that, on March 31, 2005, appellant's clerk, Steven Craft-Jackson (the clerk), sold an alcoholic beverage to 19-year-old Quentin Barlow. Although not noted in the accusation, Barlow was working as a minor decoy for the Department at the time.

At the administrative hearing held on December 15, 2005, documentary evidence was received, and testimony concerning the sale was presented by Barlow (the decoy) and by Mark Gedney, a Department investigator.

Subsequent to the hearing, the Department issued its decision that the violation charged was proved and no affirmative defense pursuant to Department rule 141(b)(2) was established. Appellant then filed an appeal contending rule 141(b)(2)² was violated. Along with its opening brief, appellant filed a "Notice to Appear and Produce" (the Notice) demanding that the Department produce, at oral argument before the Appeals Board, the decoy and his original California driver's license. It also demanded the production of Exhibits 2 and 3. We will discuss the Notice first.

DISCUSSION

I

Appellant's Notice was said to be filed pursuant to Business and Professions Code section 25666, which provides:

In any hearing on an accusation charging a licensee with a violation of Sections 25658, 25663, and 25665, the department shall produce the alleged minor for examination

² References to Rule 141 and its subdivisions are to section 141 of title 4 of the California Code of Regulations, and to the various subdivisions of that section.

at the hearing unless he or she is unavailable as a witness because he or she is dead or unable to attend the hearing because of a then-existing physical or mental illness or infirmity, or unless the licensee has waived, in writing, the appearance of the minor. When a minor is absent because of a then-existing physical or mental illness or infirmity, a reasonable continuance shall be granted to allow for the appearance of the minor if the administrative law judge finds that it is reasonably likely that the minor can be produced within a reasonable amount of time. Nothing in this section shall prevent the department from taking testimony of the minor as provided in Section 11511 of the Government Code.

It is apparent from the plain language of the statute that section 25666 does not apply to oral argument before the Appeals Board and the Department cannot be compelled to produce the minor.

The "hearing" before the Appeals Board is clearly not a "hearing on an accusation charging a licensee with a violation"; that hearing occurred before an administrative law judge. An Appeals Board "hearing" is with regard to the appeal from a decision of the Department, and is more properly called "oral argument," since it is not for the taking of evidence, but for arguing legal points and authorities and their application to the facts of the case.

Section 25666 requires the Department to produce the minor "for examination at the hearing." This again makes clear that the statute does not apply to oral argument before the Appeals Board. The Appeals Board does not examine witnesses; it reviews the record made before the Department. (Bus. & Prof. Code, § 23083.)

Appellant, with its argument and its attempt to compel the Department to produce the decoy at the hearing, is seeking to have this Board sit as a trier of fact, something it is neither equipped nor authorized to do. The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In

reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.³

By asking the Appeals Board to view the decoy and make its own determination with respect to whether his appearance is that of a person under 21 years of age, appellant is simply asking this Board to reweigh the evidence, an inappropriate appellate function.

II

Appellant's argument regarding rule 141(b)(2) consists of the following statement:

[T]he Judge committed reversible error as a matter of law in ruling that the decoy complied with rule 141. The evidence set forth in the transcript pages 4 through 21 of the Administrative Transcript and Exhibits 2 through 3 establishes as a matter of law that the use of this decoy violated Rule 141(b) and as such this matter should be reversed.

(App. Br. at p. 3.)

This "argument" consists of referring the Board to the decoy's entire testimony in the hearing transcript and to exhibits 2 and 3 (photographs of the decoy). Considering this wholly inadequate reference to the record and the complete lack of legal argument and citation of authority, we consider this issue waived. (*Brown v. Professional Community Management, Inc.* (2005) 127 Cal.App.4th 532, 537 [25 Cal.Rptr.3d 617];

³The California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085; and *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control* (1970) 2 Cal.3d 85 [84 Cal.Rptr. 113].

Annod Corp. v. Hamilton & Samuels (2002) 100 Cal.App.4th 1286 [123 Cal.Rptr.2d 924]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116 [75 Cal.Rptr.2d 27]; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 589, 594.)

ORDER

The decision of the Department is affirmed.⁴

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

⁴This 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.