

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

CIRCLE K STORES, INC. dba Circle K Store #522
19570 Temescal Canyon Road, Corona, CA 91719,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent
AB-7498

File: 20-113622 Reg: 99045637

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 12, 2000
Los Angeles, CA

ISSUED APRIL 12, 2001

Circle K Stores, Inc., doing business as Circle K Store #522 (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 person under the age of 21, 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, John W. Lewis.

¹The decision of the Department, dated September 9, 1999, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on October 14, 1981.

Thereafter, the Department instituted an accusation against appellant charging that, on November 20, 1998, appellant's clerk sold an alcoholic beverage to Kevin Lamb, who was then 18 years of age. Lamb was working as a minor decoy for the Riverside County Sheriff's Department at the time.

An administrative hearing was held on April 23 and July 16, 1999, at which time oral and documentary evidence was received. Testimony was presented concerning the alleged violation by Lamb ("the minor") and by Edward Rose, a Riverside county deputy sheriff.

Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged in the accusation and that appellant had established no defenses.

Appellant thereafter filed a timely appeal, in which it raises the following issues: (1) Rule 141(b)(2) was violated, and (2) appellant's ability to defend was impaired by the Department's refusal to provide requested discovery and to provide a transcript of the hearing on appellant's motion to compel.

DISCUSSION

I

Appellant contends that the Administrative Law Judge (ALJ) made a "rote Finding" (APP. OPENING BR. at 7) that the decoy's appearance complied with the requirement of Rule 141(b)(2), for which there was no substantial evidence in the record.

Pertinent parts of Finding II state:

"C. The decoy is youthful looking and his appearance at the time of his testimony was substantially the same as his appearance at the time of the sale. The decoy displayed the appearance and demeanor of a person which could generally be expected of a person under 21 years of age. The photograph in Exhibit 5 which was taken on November 20, 1998 accurately depicts the decoy's appearance as of that date.

"E. It was not established that the manner in which the decoy operation was conducted rendered it 'unfair' or that there was a violation of Rule 141 of Chapter 1, Title 4, California Code of Regulations."

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 the determination whether the decoy possessed 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, as required by Rule 141.

The ALJ made an express finding that "the decoy displayed the appearance and demeanor of a person which could generally be expected of a person under 21 years of age." The Appeals Board has only appellant's assessment of the decoy's appearance and a photograph of the decoy upon which to base a judgment as to his appearance. Under such circumstances, and where the ALJ's findings indicate compliance with the rule as written, the Board is not in a position to substitute its judgment for that of the trier of fact.

Nor is the Board in a position to say that there was not substantial evidence to support this finding. The decoy himself provides the evidence of his appearance. The ALJ, as was his duty, evaluated this evidence and made a finding. His "rote Finding" assures us that he did not use an erroneous standard to evaluate the decoy's

appearance. Nothing more is required.

While a further analysis might be helpful where use of the correct standard by the ALJ is in question, that is not the case here. Appellant has not pointed to, nor do we see, anything that would lead us to believe that the ALJ did not faithfully, and using the correct standard, carry out his evaluation of the decoy's appearance. We are not prepared to expand the affirmative defense created by Rule 141 to the point where an appellant need produce no evidence whatsoever to support a contention that there was a violation of that rule.

II

Appellant contends the Department improperly refused to identify, in response to its discovery request, other licensees who sold to the decoy in this case at any time during the 30 days preceding and following the night of the sale in this case, and improperly refused to provide a transcript of the hearing on its motion to compel discovery.

This Board has addressed these issues on numerous occasion. We have uniformly ruled that the Department must produce such information, but only for the day that the sale in question took place. We have also uniformly ruled that the Department was not obligated to provide a transcript of the hearing on the discovery motion. We continue to adhere to those positions.

ORDER

The decision of the Department is affirmed with respect to all issues, subject to our remand to the Department for compliance with appellant's discovery request as limited by this Board's prior decisions.²

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

²This 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.