

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

AB-7319a

File: 20-357160 Reg: 98043516

LUCKY STORES, INC. DELAWARE, dba Sav-On Drugs
731 Weir Canyon Road, Anaheim, CA 92808,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: October 4, 2001 Redeliberation: February 7, 2002
Los Angeles, CA

ISSUED MAY 14, 2002

Lucky Stores, Inc. Delaware (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 25 days for appellant's clerk, Kevin Robertson, having sold an alcoholic beverage (a six-pack of Coors beer) to Kory Dwayne McGranahan, a minor, 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 Lucky Stores, Inc., appearing through its counsel, John A. Hinman and Beth Aboulafia, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated September 14, 2000, is set forth in the appendix.

Appellant's off-sale beer and wine license was issued on October 25, 1990.

Thereafter, the Department instituted an accusation against appellant charging the sale referred to above. Although not noted in the accusation, McGranahan was acting as a police decoy.

An administrative hearing was held on November 19, 1998. Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged in the accusation, and ordered appellant's license suspended for 25 days.

Appellant thereafter filed a timely appeal in which they contended, among other things, that the Department erred in its application of Department Rule 141(b)(2). (Title 4, Cal. Code Regs. §141(b)(2).) Specifically appellant challenged the following finding with respect to the appearance presented by the decoy:

“Although Kory Dwayne McGranahan (hereinafter the ‘minor’) was six feet in height and weighed two hundred forty-five pounds, as of January 17, 1998, his youthful looking face is such that it would be reasonable to consider him as being under twenty-one years of age and reasonable to ask him for identification to verify that he could legally purchase alcoholic beverages. The minor's appearance at the time of his testimony was substantially the same as his appearance at the time of the sale. The photograph depicted in Exhibit 2 was taken on January 17, 1998 and it accurately depicts his appearance on that date.”

The Appeals Board, in a decision dated April 19, 2000, reversed, because, in its view, the ALJ had not demonstrated that he considered anything other than the decoy's physical appearance in determining whether he displayed the appearance of a person under the age of 21, as required by the rule. In so doing, the Board stated:

“The problem with [the ALJ's] finding is that the ALJ appears to focus solely on the decoy's physical appearance, a circumstance that has resulted in reversal in a number of cases. Exacerbating this, the determining factor seems to be on the

decoy's face alone. The ALJ's characterization of the decoy's face as 'youthful looking' is no help, since a 40-year-old could be said to be youthful looking.

Following the Board's reversal, the Department, in its Decision Following Appeals Board Decision, dated June 30, 2000, ordered the case remanded to Administrative Law Judge Echeverria "for decision and clarification as he deems appropriate including the submission of any further evidence he may require in his exclusive discretion."

Thereafter, Administrative Law Judge Echeverria, without conducting any further hearing, issued a new proposed decision, which the Department adopted on September 14, 2000. In that decision, Administrative Law Judge Echeverria reaffirmed his original determination that appellants had violated Business and Professions Code §25658, subdivision (a), and expanded upon his reference to the appearance of the decoy, finding as follows:

"The Administrative Law Judge did consider the decoy's overall appearance including his demeanor, his poise, his mannerisms, his maturity, his clothing, his size and his physical appearance in assessing whether the decoy displayed the appearance which would generally be expected of a person under the age of 21 years. The decoy's appearance at the time of the hearing was substantially the same as his appearance on the day of the decoy operation other than his clothing. The decoy is six feet in height and weighs two hundred forty-five pounds. On the date of the sale, he wore blue jeans and a light colored polo shirt. The decoy testified that this was the first time that he had acted as a decoy, that he was a volunteer Explorer with the Anaheim Police Department, that his goal is to be a police officer, that he felt very nervous when he was at the premises on the day of the sale and that he thought he was shaking a little at the premises. Two photographs (Exhibits 2 and 5) were taken on January 17, 1998 and they depict the decoy's appearance as of that day. After considering the photograph's [sic] (Exhibits 2 and 5), the decoy's overall appearance when he testified and the way he conducted himself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense."

Appellant has filed a timely appeal of the Department's decision and now contends that it must be reversed for the following reasons: (1) the Department exceeded its jurisdiction in remanding the case to itself after reversal by the Appeals Board; and (2) the Department's decision fails to correct the deficiencies in the earlier decision.

DISCUSSION

I

Appellant contends that the Department lacked jurisdiction to proceed any further in the case following the Appeals Board's reversal, arguing that conditions which would have permitted a remand by the Appeals Board were not present, and that the unqualified reversal, without express remand language, does not remand the case to the Department for further proceedings.

Appellant contends that the Board's decision in Circle K Stores, Inc. (1999) AB-7080a, which holds to the contrary, is wrong. It argues that a different rule applies in administrative proceedings, contrary to the rule which prevails in civil and criminal proceedings.

We still believe the rule established in Circle K Stores, Inc. is the correct one, appellant's protestations to the contrary notwithstanding. That decision has already withstood one appellate challenge, Circle K's petition for review having been denied by the Court of Appeal for the Second Appellate District.²

² The petition was denied after that court's consideration of a preliminary opposition by the Department, filed at the court's direction, and including, pursuant thereto,

(continued...)

As this Board said in Circle K Stores, Inc., it is not the Board's role to terminate disciplinary proceedings where the most the Department has done is commit a procedural error:

"It is tempting to an administrative agency such as this Board to agree with arguments which, if accepted, would enlarge the powers already granted to it by the Constitution and the Legislature. But for this Board to do so, we think, would be for it to substitute itself for the Department as the agency ultimately responsible for whether or not a licensee has engaged in conduct deserving of discipline. For example, when the Board reverses a decision of the Department because it applied an incorrect standard, or incorrectly applied a correct standard, or erred on an evidentiary issue, acceptance of appellant's position would mean that, no matter how egregious the conduct of the licensee may have been, he or she would escape discipline simply because the Board did not include an express order of remand in its own decision. This, we think, would conflict with the admonition in the Board's constitutional and legislative charter that its order 'shall not limit or control in any way the discretion vested by law in the department.'

"There are times, most frequently with respect to the penalty which the Department has imposed, where the Board has remanded the matter with instructions to reconsider the matter in light of the Board's comments. And, there can be times when the Board's decision reversing the Department leaves no room for any further consideration by the Department other than to dismiss the accusation, in whole or in part. But, ordinarily, it seems more appropriate to leave to the Department its ability to fulfill its regulatory role.

II

²(...continued)

"a discussion of the question whether further proceedings may take place after a decision of the Alcoholic Beverage Control Appeals Board if the Board does not 'direct reconsideration of the matter in light of its [decision]' or 'direct the department to take further action as is especially enjoined upon it by law.'"

Circle K Stores, Inc. v. Department of Alcoholic Beverage Control et al. B 138381.

Appellant's remaining contention is that the Department's current decision fails to correct the deficiencies of its predecessor. Appellant contends that, when the matter was heard originally, the ALJ would have considered, and did, consider only the physical appearance of the decoy, and not other aspects of his appearance such as poise, demeanor, mannerisms, etc. as required by the rule. Now, appellant argues, the ALJ simply looked at the transcript to find elements of appearance to justify his original conclusion that the decoy displayed the appearance which could generally be expected of a person under 21 years of age.

Appellant's principal contention appears to be that an ALJ could not possibly conduct a full and fair analysis of the apparent age of a decoy after the passage of such a considerable length of time, in this case, approximately two years.

As we have said on other occasions, Rule 141(b)(2) requires an ALJ to make a subjective judgment, on the evidence presented, whether the decoy displayed the appearance which could generally be expected of a person under the age of 21. In our initial decision in this case, we acknowledged that for the Board to be assured that such a decision was not made arbitrarily, there be a showing that the ALJ applied the standard set forth in the rule, and not a truncated standard which failed to take into account indicia of age other than mere physical appearance.

When this Board upheld the action of the Department in Circle K Stores, Inc., supra, in ordering a remand to the Administrative Law Judge, it did so because it believed such action consonant with the Board's earlier view, that the Department was not barred from reconsidering the matter following the Board's unqualified reversal of the Department's original decision. Nonetheless, the Board continued to

entertain the doubts it originally expressed:

“Even though we may entertain doubts as to whether the Department can rectify the defects in its earlier decision, in part as a result of the passage of time, those doubts are not so conclusive as to persuade us that the Department’s order providing the ALJ an opportunity to do so was not within its jurisdiction.”

With the benefit of hindsight, it is apparent to this Board that the manner in which this and the related cases were resolved by the Department offends our sense of fairness.

We did not expect the Department, and more particularly the ALJ, to simply declare, without further hearing and input from the parties in the various cases, that he had in fact done exactly what the Board had said should have been done, even though there is no hint in his original decision that he had done so.

The Board, it can be said, envisaged something more, where the parties could have addressed the various indicia of age displayed by the decoy.

That did not happen. Instead, it may be said that the ALJ simply culled the record for evidence bearing on appearance, leaving all concerned with nothing more to go on than his assertion that he had really considered the various factors with respect to which his original proposed decisions were lacking. While we do not question his good faith, we do feel that there are enough questions about his ability to isolate this particular decoy from all the decoys he may have seen before and since this case was heard, that the procedure which was utilized was flawed and inherently unfair.

Now even more time has elapsed. We think it is time for the Department to recognize that these have become cases in which, as a result of a procedural error

early on, no fair result is ever likely to be attained. While we may lack the ability to compel a dismissal, we do believe the Department, in an appropriate exercise of its discretion, should dismiss the accusation in this matter.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for such further proceedings as may be appropriate in light of the Board's comments.³

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

³ 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.