**ISSUED MAY 25, 2000**

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

| | | |
|---|---|---|
| CIRCLE K STORES, INC.<br>dba Circle K Store #5223<br>3899 Riverdale<br>Anaheim, CA 92807,<br>Appellant/Licensee,<br><br>v.<br><br>DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,<br>Respondent. | ) | AB-7265<br><br>File: 21-295704<br>Reg: 98042429<br><br>Administrative Law Judge<br>at the Dept. Hearing:<br>Sonny Lo<br><br>Date and Place of the<br>Appeals Board Hearing:<br>January 20, 2000<br>Los Angeles, CA |

Circle K Stores, Inc., doing business as Circle K Store #5223 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days for appellant's employee 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).

[1]The decision of the Department, dated October 22, 1998, is set forth in the appendix.

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, David B. Wainstein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on July 15, 1994. Thereafter, the Department instituted an accusation against appellant charging that its clerk sold a six-pack of Budweiser beer to Michael Hedgpeth, who was then 18 years old.

An administrative hearing was held on August 25, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the violation had occurred as charged in the Accusation.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the Department violated Rule 141(b)(2); (2) the ALJ erroneously precluded expert testimony offered by appellant; (3) the Department violated appellant's right to discovery; and (4) the Department violated Government Code §11512, subdivision (d), when a court reporter was not provided to record the hearing on appellant's Motion to Compel.

DISCUSSION

I

Appellant contends that, in determining the decoy's apparent age, the ALJ considered only the physical attributes of the decoy as displayed in a photograph.

Finding IV states:

> "On October 4, 1997, the decoy was 6'2" tall and weighed approximately 170 pounds. A photograph of the decoy taken that day (State's Exhibit 2) shows that the decoy appeared to be under 21 years old. Respondent's argument that the Department violated its (the Department's) Rule 141(b)(2) is rejected."

Although this finding is not like the findings held defective in other appeals, it also falls short of giving any assurance that the ALJ considered more than just the decoy's physical appearance when he stated that the decoy "appeared to be under 21 years old." Even though the ALJ had the opportunity to see the decoy at the hearing, he relied for his finding entirely on the photograph taken of the decoy the night of the decoy operation. It is hard to see how he could have considered anything other than physical appearance under these circumstances.

In Circle K Stores, Inc. (1999) AB-7080, the Board stated:

> "Nonetheless, while an argument might be made that when the ALJ uses the term "physical appearance," he is reflecting the sum total of present sense impressions he experienced when he viewed the decoy during his or her testimony, it is not at all clear that is what he did in this case. We see the distinct possibility that the ALJ may well have placed too much emphasis on the physical aspects of the decoy's appearance, and have given insufficient consideration to other facets of appearance - such as, but not limited to, poise, demeanor, maturity, mannerisms. Since he did not discuss any of these criteria, we do not know whether he gave them any consideration.
>
> "It is not the Appeals Board's expectation that the Department, and the ALJ's, be required to recite in their written decisions an exhaustive list of the indicia of appearance that have been considered. We know from many of the decisions we have reviewed that the ALJ's are capable of delineating enough of these aspects of appearance to indicate that they are focusing on the whole person of the decoy, and not just his or her physical appearance, in assessing whether he or she could generally be expected to convey the appearance of a person under the age of 21 years.
>
> "Here, however, we cannot satisfy ourselves that has been the case, and are compelled to reverse. We do so reluctantly, because we share the Department's concern, and the concern of the general public, regarding

> underage drinking. But Rule 141, as it is presently written, imposes certain burdens on the Department when the Department seeks to impose discipline as a result of police sting operations. And this Board has been pointedly reminded that the requirements of Rule 141 are not to be ignored. (See Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.4th 575 [79 Cal.Rptr. 126]).”

We feel several observations are in order. First, the requirements of Rule 141 are specific. Second, we have been admonished by a court of appeal that the rule's requirements are to be complied with strictly. Third, where a Department decision deviates from the language of the rule, it conveys the idea that the specific requirements of the rule as written have not been, or cannot be, met.

It follows that, to allow a reviewing tribunal to conclude that the law enforcement agency complied with the requirements of the rule as to the apparent age of the minor decoy, the Department and its ALJ's must set forth the reasons (read “findings”) they believe justify the conclusion that the decoy presented an appearance, at the time of the transaction, which could generally be expected of a person under the age of 21 years.[2] It is these findings which provide the Board the necessary bridge between the evidence presented and the conclusions reached by

[2] We are well aware that the rule requires the ALJ to undertake the difficult task of assessing that appearance many months after the fact. However, in the absence of evidence of any discernible change in the appearance or conduct of the minor decoy between the time of the transaction and the time of the hearing, it would be reasonable to conclude that the ALJ's impression of the apparent age of the minor at the time of the hearing would also have been the case had he viewed the minor at the earlier date. A specific finding by the ALJ to the effect that the minor's appearance was substantially the same at both times shows that the ALJ was aware of, and took into consideration, the rule's requirement that the minor's apparent age must be judged as of the time, and under the actual circumstances, of the alleged sale.

the trier of fact, and permit this Board, and the courts, to ascertain whether there actually was adherence to the terms of the rule.

The Department has sometimes argued that we are "stretching" the rule to include not only how law enforcement does its job, but how the ALJ must word his opinion. The Department is correct in its assertion that we are telling the ALJ's they need to consider certain things and to include necessary elements in their decisions. What the Department does not seem to understand is that we cannot justifiably conclude that the ALJ's determination that subdivision (b)(2) was complied with was sound unless we know that the right standard was used and it was applied properly. When the ALJ indicates by the words he uses that he applied the wrong standard, we cannot sustain the decision. It is the same as if the ALJ had used the standard of "beyond a reasonable doubt" to judge whether a party had met its burden of proof, instead of using the proper "preponderance of the evidence" standard. We also need to know what facts caused the ALJ to reach his or her conclusion that the rule was complied with. Without that, we are left to guess at what evidence led to the conclusion and, therefore, cannot know whether substantial evidence supports the finding.

The court in Topanga Assn. For a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 516-517 [113 Cal.Rptr. 836], discussed the importance of administrative findings which are supported by the agency's analysis of the relevant facts:

> "Our ruling in this regard finds support in persuasive policy considerations. ... [T]he requirement that administrative agencies set forth findings to support their adjudicatory decisions stems primarily from judge-

> made law, and is 'remarkably uniform in both federal and state courts.' As stated by the United States Supreme Court, the 'accepted ideal . . . is that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." (S.E.C. v. Chenery Corp. (1943 318 U.S. 80, 94.)'
>
> "Among other functions, a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. In addition,[3] findings enable the reviewing court to trace and examine the agency's mode of analysis.
>
> "Absent such road signs, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Moreover, properly constituted findings enable the parties to the agency proceeding to determine whether and on what basis they should seek review. They also serve a public relations function by helping to persuade the parties that administrative decision-making is careful, reasoned, and equitable."

[Internal citations and footnotes have been omitted.]

It is disingenuous of the Department to contend that Rule 141 "was never intended to serve as guidance on how an Administrative opinion is worded." ***Every*** relevant statute and regulation is intended to serve as guidance on how an adjudicatory opinion is worded. The particular words used in a statute or regulation are assumed to be chosen to convey a certain meaning. Other words cannot be indiscriminately substituted for the statutory terms without the great risk of meaning something other than what the statute was designed to mean.

---

[3] In footnote 14 of the Topanga decision, the court cited the words of Mr. Justice Cardozo: "We must know what [an administrative] decision means ... before the duty becomes ours to say whether it is right or wrong."

II

Appellant contends the ALJ improperly denied appellant's request to call Edward Ritvo, M.D., a psychiatrist, as an expert witness. Appellant proposed to have Dr. Ritvo called as a witness to testify as to indicia of the decoy's age.

Evidence Code §801 states that an expert may testify as to his or her opinion if the opinion is on "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact."

We agree with the ALJ that the determination of the decoy's apparent age is not an issue that requires the opinion of an expert, but is made "from common knowledge, common experience" [RT 35]. The ALJ appropriately denied appellant's request.

III

Appellant claims it was prejudiced in its ability to defend against the accusation by the Department's refusal and failure to provide it discovery with respect to the identities of other licensees alleged to have sold, through employees, representatives or agents, alcoholic beverages to the decoy involved in this case, during the 30 days preceding and following the sale in this case.

This is but one of a number of cases which this Board has heard and decided in recent months. (See, e.g., The Circle K Corporation (Jan. 2000) AB-7031a; The Southland Corporation and Mouannes (Jan. 2000) AB-7077a; Circle K Stores, Inc. (Jan. 2000) AB-7091a; Prestige Stations, Inc. (Jan. 2000) AB-7248; The Southland Corporation and Pooni (Jan. 2000) AB-7264.)

In these cases, and many others, the Board reviewed the discovery provisions of the Civil Discovery Act (Code of Civ. Proc., §§2016-2036) and the Administrative Procedure Act (Gov. Code §§11507.5-11507.7). The Board determined that the appellants were limited to the discovery provided in Government Code §11506.6, but that "witnesses" in subdivision (a) of that section was not restricted to percipient witnesses. We concluded that:

> "We believe that a reasonable interpretation of the term "witnesses" in §11507.6 would entitle appellant to the names and addresses of the other licensees, if any, who sold to the same decoy as in this case, in the course of the same decoy operation conducted during the same work shift as in this case. This limitation will help keep the number of intervening variables at a minimum and prevent a "fishing expedition" while ensuring fairness to the parties in preparing their cases."

We believe the "discovery issue" in the present appeal must be disposed of in accordance with the cases listed above.

IV

Appellant also contends that the decision of the ALJ to conduct the hearing on its discovery motion without a court reporter present also constituted error, citing Government Code §11512, subdivision (d), which provides, in pertinent part, that "the proceedings at the hearing shall be reported by a stenographic reporter." The Department contends that this reference is only to the evidentiary hearing, and not to a hearing on a motion where no evidence is taken.

This issue has also been decided in the cases mentioned in II, above. The Board held in those cases that a court reporter was not required for the hearing on the discovery motion. We have not been persuaded to change our mind.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for reconsideration in light of the comments herein with respect to Rule 141(b)(2), for compliance with appellant's discovery request as limited by this opinion, and for such other and further proceedings as are appropriate and necessary.[4]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

---

[4]This 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.