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

AB-8900
File: 20-139377 Reg: 07067593

CIRCLE K STORES, INC., dba Circle K Store #777
1005 East Mission Road, Fallbrook, CA 92028,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: December 3, 2009
Los Angeles, CA

ISSUED MARCH 18, 2010

Circle K Stores, Inc., doing business as Circle K Store #777 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 10 days, all of which were conditionally stayed, subject to one year of discipline-free operation, for its clerk, Shawn Nicastro, having sold two 40-ounce bottles of Budweiser beer to Garrett Bardon, a 16-year-old non-decoy minor, a violation of Business and Professions Code section 25658, subdivision (a).

Appearances on appeal include appellant Circle K Stores, Inc., appearing

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[1]The decision of the Department, dated June 24, 2008, is set forth in the appendix.

through its counsel, Ralph B. Saltsman, Stephen W. Solomon, and Ryan M. Kroll, and the Department of Alcoholic Beverage Control, appearing through its counsel, Valoree Wortham.

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 the sale of an alcoholic beverage to a person under the age of 21.

An administrative hearing was held on May 2, 2008, at which time documentary evidence was received and testimony concerning the violation charged was presented by Sheriff's deputy Stephen J. Litwin, Matthew Hydar, and Garrett Bardon, the minor. Appellant presented no witnesses.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been proved.

Appellant filed a timely notice of appeal in which it contends that the decision does not provide any factual basis, evidence, observed demeanor, manner, or attitude in support of the ALJ's conclusion that Bardon is a credible witness.

DISCUSSION

There is no merit to this appeal.

Two sworn police officers testified that they observed Garrett Bardon exit from the passenger side of a pick-up truck, enter appellant's store, select from the cooler area two large brown bottles that they recognized as 40-ounce bottles of Budweiser, take the bottles to the counter, pay for them, and return to the truck. When the officers prevented the truck from leaving the parking lot, they found the two 40-ounce bottles of Budweiser beer partially hidden under a jacket on the back seat.

Bardon testified that he was 16 years of age, a tenth grade student at Fallbrook High School, that he purchased two bottles of beer and a pack of cigarettes, and was not asked to show any ID.

In the course of a very brief cross-examination, Bardon testified that he had been at the store once or twice previously, had not seen Nicastro, the clerk, on those visits, and had never possessed false identification.

Against this essentially undisputed evidence, appellant argues that the failure of the administrative law judge to explain why he found Bardon a credible witness requires the decision to be reversed. Appellant does not identify any portion of Bardon's testimony that it claims was not credible, nor does it explain why it thinks Bardon is not a credible witness. The justification appellant offers is as vacuous as the argument itself:

> Here, Garrett Bardon's credibility is clearly at issue. He is the person who allegedly illegally purchased alcohol from the Circle K clerk. Moreover, he is an essential witness, since he is the only witness able to establish that he, in fact, purchased beer from the clerk, did not show a false identification during the transaction, and that he was under the age of twenty-one at the time of the alleged transaction. In addition, pursuant to Business and Professions Code section §25666, when the Department alleges a violation of Business and Professions Code §25658, as here, the Department is required to produce the minor for examination at the hearing.
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> At the hearing, counsel for Appellants [*sic*] argued that Garrett Bardon's testimony was not credible, given that he is only sixteen years old, and *he* was the one who illegally attempted to purchase alcohol this matter. Nevertheless, the Decision discounts this issue and does nothing to address it. This is something that case law simply does not condone. As such, the Decision is defective for failing to comply with principles founded in case law that require the ALJ to fully explain why the witness's testimony should be believed. As stated in *McBail & Co. v. Solano County Local Agency Formation Commission, supra*, the ALJ's Decision must 'explain itself' in order to provide for meaningful review. (Quotation omitted.)

(App. Br., p. 6.)

No matter how many times one may read this argument, one will still wonder just

what it was about Bardon's testimony appellant thinks might be untrue. Appellant concedes that Bardon is only sixteen, virtually concedes that Bardon bought the beer by not claiming anyone else did, and says nothing at all about the testimony of the two sworn officers which by itself is enough to make the Department's case, but for the requirement of section 25666 that Bardon be produced at the hearing.

The testimony of three witnesses, consistent in all material respects, established the violation. The Department's decision explains itself to our complete satisfaction.

ORDER

The decision of the Department is affirmed.[2]

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

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[2] 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.