ISSUED APRIL 12, 2001

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

PRESTIGE STATIONS, INC. dba AM/PM Mini Mart 633 Birmingham Encinitas, CA 92007, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	))))))))))))	AB-7562 File: 20-331652 Reg: 99046951 Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria Date and Place of the Appeals Board Hearing: December 12, 2000 Los Angeles, CA

Prestige Stations, Inc., doing business as AM/PM Mini Mart (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its off-sale beer and wine license for 15 days, for its clerk, Kelly Gilchrist, having sold an alcoholic beverage (a six-pack of Coors Light beer) to Meredith Gillis, a minor, then 19 years of age, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article

[1]The decision of the Department, dated December 23, 1999, is set forth in the appendix.

XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellant Prestige Stations, Inc., appearing through its counsel, Ralph Barat Saltsman, Stephen Warren Solomon, and Joseph Budesky, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on July 9, 1997. Thereafter, the Department instituted an accusation against appellant charging the unlawful sale on January 29, 1999, of an alcoholic beverage to Kelly Gillis, a minor. Although not stated in the accusation, Gillis was acting as a police decoy.

An administrative hearing was held on November 9, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Nicholas Maryn, one of the sheriff's deputies who accompanied Gillis on the night in question, and by Gillis.

Subsequent to the hearing, the Department issued its decision which determined that the unlawful sale had occurred as alleged, and that appellant had not established any defenses to the charge.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) Rule 141(b)(2) was violated; (2) Rule 141(b)(5) was violated; (3) expert testimony was erroneously excluded; (4) appellant's right to discovery was violated; and (5) appellant was denied a transcript of the hearing on

its motion to compel discovery. Issues (1) and (3) will be discussed together, as will Issues (4) and (5).

DISCUSSION

I

Appellant contends that the 5' 7", 180-pound female decoy, who displayed no nervousness during the decoy operation, presented a mature appearance inconsistent with the requirement of Rule 141(b)(2) that her appearance be that which could generally be expected of a person under the age of 21. Appellant also contends that the ALJ erred in excluding the proposed testimony of Dr. Edward Ritvo, a psychiatrist, who would identify certain factors which would assist the ALJ in assessing the witness's appearance.

The Administrative Law Judge (ALJ), the initial trier of fact, concluded that the decoy's appearance and demeanor met the standard of the rule.

The Board, of course, has no opportunity to observe the decoy, so is not in a position to second-guess the ALJ or accept appellant's characterization of the decoy's appearance.

This Board has ruled on numerous occasions in the past that the ALJ is not obligated to hear the proposed testimony of Dr. Ritvo. Appellant has not offered anything that would warrant a change in the Board's views.

II

Appellant contends that Rule 141(b)(5) was violated because the Department did not prove that the face to face identification required by the rule took place

prior to the time the citation was issued.

The procedure that appears to be followed routinely in decoy matters which have come to this Board is for the officer involved in the operation, or one of the officers if there is more than one officer involved, to bring the decoy back into the store and have him identify the seller, after which a citation is issued. If the Board has heard an appeal where the citation preceded the identification, we are unable to recall it.

But strange and unusual things can occur. Whether they did in this case is another story.

The testimony indicates that nothing unusual happened following the sale. The "buy" money was successfully recovered [RT 13-14], which is sometimes not the case if other transactions occur between the time of the sale and the arrival of the police.

It simply defies reason to believe that the citation, prepared by the two deputies, somehow inserted itself ahead of the tasks for which the minor was returned to the store.

Appellant relies on The Southland Corporation/R.A.N. (1998) AB-6967 for its assertion that the Department has failed to satisfy its burden of presenting a prima facie case of compliance with Rule 141. It contends that, despite straightforward testimony by the deputy and the decoy that a face to face identification occurred, more is required.

We disagree. In our view, once there has been affirmative testimony that

the face to face identification occurred, the burden shifts to appellant to demonstrate why such identification did not comply with the rule, i.e., that the normal procedure, for the issuance of a citation following the identification of the accused, was not followed. We are unwilling to read our decision in The Southland Corporation/R.A.N. as expanding 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.

III

Appellant contends it was denied its right to discovery of the identity of other licensees who may have sold to the decoy on the same night, and to a transcript of the hearing on their motion to compel the production of such information.

The record indicates that there was one other sale to the minor on the night in question, but the Department refused to disclose the identity of that licensee.

This Board has ruled consistently that an appellant is entitled to such information. Therefore, the decision must be reversed and remanded to the Department for further proceedings on this issue.

The Board has also ruled consistently that the Department has no obligation to provide a transcript of the hearing on the motion to compel discovery.

ORDER

The decision of the Department is affirmed as to all issues other than discovery, and the case is remanded to the Department for such further

proceedings as may be necessary or appropriate in light of our ruling on the discovery issue.[2]

TED HUNT, CHAIRMAN
E. LYNN BROWN, 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.