

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

AB-7630

PRESTIGE STATIONS, INC. dba Arco AM/PM
2101 South Harbor Boulevard, Anaheim, CA 92801,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-333426 Reg: 99047238

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: May 3, 2001
Los Angeles, CA

ISSUED JUNE 21, 2001

Prestige Stations, Inc., doing business as Arco AM/PM (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for its clerk, German Medel, having sold an alcoholic beverage (beer) to Joseph DiBenedetto, 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 Prestige Stations, Inc., appearing through its counsel, Ralph Barat Saltsman and Stephen Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

¹The decision of the Department, dated April 13, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on April 29, 1998. On September 20, 1999, the Department instituted an accusation against appellant charging that, on May 7, 1999, appellant's clerk, German Medel, sold an alcoholic beverage, described as a six-pack of Bud Light beer, to Joseph DiBenedetto, a minor. At the time, DiBenedetto was acting as a decoy for the Anaheim Police Department, and was then 19 years of age.

An administrative hearing was held on March 8, 2000, at which time oral and documentary evidence was received, following which the Department entered its decision and order from which this timely appeal has been taken.

Appellant contends that the decoy lacked the appearance required by Rule 141(b)(2) (Title 4, Cal. Code Regs., §141(b)(2)), that he display the appearance which could generally be expected of a person under 21 years of age, under the actual circumstances at the time of the transaction alleged. Appellant further contends that it was denied its right to discover the identity of other licensees who made sales to the decoy in question on the same day.

DISCUSSION

I

The Administrative Law Judge made the following finding (Finding of Fact 7) with respect to the appearance of the decoy:

"The decoy is five feet nine inches in height and weighs about one hundred sixty-five pounds. The decoy's appearance at the time of his testimony was substantially the same as his appearance at the time of the sale except that his sideburns were shorter on May 7, 1999. At the hearing, his sideburns were down to the bottom of his ears. As of May 7, 1999, the sideburns were down to

the middle of his ears. After considering the decoy's appearance, his demeanor, and the way he conducted [himself] at the hearing, a finding is made that the decoy displayed the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller at the time of the alleged offense. The fact that the decoy had worked as a cadet assigned to the jail for approximately three months prior to May 7, 1999, and the fact that he had participated in an alcoholic beverage decoy operation on one or two occasions were considered in making this finding. The photograph in Exhibit 2 accurately depicts what the decoy looked like on May 7, 1999."

Appellant contends (App.Br., at page 6) that the ALJ's finding "is a manifestation of the inabilities of this Administrative Law Judge, rather than an accurate assessment and analysis of the decoy's apparent age." Appellant points to the decoy's testimony that he was responsible for caring for and transporting inmates to and from the jail to the courthouse, and argues that his scope of responsibilities was sufficiently significant as to overshadow any other indicia of age.

Appellant's brief characterizes the decoy as a "jailer," using that term at least three times in its brief, and once even calling him a "paid jailer," as if the decoy's police cadet assignment carries with it a more mature appearance.

While the Board has often said it is error for an ALJ to consider only the physical appearance of a decoy in assessing his appearance under the rule, it has never said it is wrong for an ALJ to consider a decoy's physical appearance along with other age indicia. Indeed, it would be just as improper for an ALJ to ignore a decoy's appearance and rely only on other factors.

It is apparent that the ALJ looked at both physical appearance and other considerations, including the decoy's demeanor, his poise while on the witness stand, and his police cadet assignment in making his factual determination that the

decoy presented the correct appearance under Rule 14 1(b)(2).

This is simply another case where an appellant is asking the Board, which has not seen the decoy, to substitute its judgment of the decoy's appearance for that of the ALJ.

The scope of the Appeals Board's review is limited by the California Constitution, by statute, and by case law. In reviewing the Department's decision, the Appeals Board may not exercise its independent judgment on the effect or weight of the evidence, but is to determine whether the findings of fact made by the Department are supported by substantial evidence in light of the whole record, and whether the Department's decision is supported by the findings.

The ALJ saw and heard the decoy, and weighed the relevant considerations reflected in the evidence. His finding is supported by substantial evidence, and should not be disturbed.

II

The ALJ denied that part of appellant's motion which sought the identity of licensees who made sales to the decoy involved in this case during specified periods of time. Appellant appeals from that ruling, and from the Department's refusal to provide a transcript of the hearing on appellant's discovery motion.

The Board has ruled in numerous cases, in some of which review has been sought unsuccessfully, that it was error for the Department not to provide such discovery for the day on which the sale occurred. It has also routinely ruled that the hearing was not the kind for which the Department was required to provide a transcript.

We adhere to our prior rulings and remand the case to the Department so that such information can be provided.

ORDER

The decision of the Department is affirmed except as to the issue involving discovery, and the case is remanded to the Department for such further proceedings which may be appropriate in light of the comments herein.²

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

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.