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

AB-7647

PRESTIGE STATIONS, INC. dba AM/PM Mini Mart
27691 Ynez Road, Temecula, CA 92591,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

File: 20-285050 Reg: 00048125

Administrative Law Judge at the Dept. Hearing: John P. McCarthy

Appeals Board Hearing: March 1, 2001
Los Angeles, CA

ISSUED APRIL 30, 2001

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 license for 15 days for its clerk, Kathy Shirley, having sold an alcoholic beverage (a six-pack of Bud Light beer) to Rhiannon Fernandez , an 18-year-old minor, 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). Fernandez was acting as a police decoy for the Riverside County Sheriff's Department at the time of the transaction.

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, John W.

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[1]The decision of the Department, dated May 18, 2000, is set forth in the appendix.

Lewis.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale beer and wine license was issued on February 16, 1994. Thereafter, on January 26, 2000, the Department instituted an accusation against appellant charging that appellant, through its clerk, sold an alcoholic beverage to a minor.

An administrative hearing was held on April 7, 2000, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Rhiannon Fernandez ("the decoy") and Jon Anderson, a Riverside County Deputy Sheriff, concerning the transaction. No witnesses testified on appellant's behalf.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained and ordered a 15-day suspension.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) The police violated Rule 141 by conducting the decoy operation at a time when the store was extremely busy; (2) Rule 141(b)(2) was violated because the decoy lacked the appearance required by the rule; and (3) Rule 141(b)(5) was violated in two respects: (a) there was no face to face identification; and (b) the evidence and the findings do not establish that the face to face identification, if any, preceded the issuance of the citation.

DISCUSSION

I

Appellant contends that the decoy operation violated the faimess requirement of

Rule 141 because it was conducted during a time when the store was extremely busy and the clerk distracted.

The Administrative Law Judge (ALJ) rejected this contention, stating:

> "The only evidence in the record on this point is the number of patrons in line. It was not established that this was 'rush hour' traffic or that clerk Shirley was overwhelmed by the amount of customers. There was at least one other employee in the store who potentially could have helped if need be. It was not established that the Sheriff's Deputies chose a time for the operation when respondent's clerk would be so busy she could not be expected to properly perform her duties. It did not appear that the premises was so busy the decoy operation could be considered to have been unfairly conducted. Finally, violation of a guideline, itself, does not create a defense to a violation of Section 25658(a)."

Appellant argues that the number of people ahead of and behind the decoy when she was in the line at the register is enough by itself to establish unfairness.

This Board, on the other hand, has said that, in the absence of some affirmative evidence that the clerk was unfairly distracted, it could not be said that the decoy operation violated the fairness requirement of Rule 141.

In Tran (2000) AB-7454, the Board said:

> "The guideline at issue, which discourages the conduct of decoy operations during rush hour, is an example of imprecision. 'Rush hour' is a term ordinarily used in connection with freeway traffic, and associated with commuters traveling to and from their workplace and residence. As applied to individual premises, the term has no practical meaning, and is of little use as a guideline.
>
> "The prevention of sales to minors requires a certain level of vigilance on the part of sellers. It is nonsense to believe a minor will attempt to buy an alcoholic beverage only when the store is not busy, or that a seller is entitled to be less vigilant simply because the store is busy.
>
> "We believe it is asking too much of law enforcement to require it to know in advance the time of day or evening that, for any particular establishment, would fairly be considered 'rush hour.'

> "It is conceivable that in a situation which involved an unusual level of patron activity that truly interjected itself into a decoy operation to such an extent that a seller was legitimately distracted or confused, and the law enforcement officials sought to take advantage of such distraction or confusion, relief would be appropriate. This was not such a situation."

The clerk did not testify. The record contains no evidence concerning the amount of time anyone waited in line, or that there was pressure from other patrons or management that the clerk speed up her level of activity. For all that the record shows, the clerk treated the transaction with the decoy in the same manner she treated any other transaction. Most significantly, she neither asked for identification or for the decoy's age.

There is no basis to find that Rule 141 was violated because of the timing of the decoy operation.

II

Describing the 18-year-old decoy as "a tall, well appointed, sophisticated and self assured woman wearing make-up," appellant contends she lacked the appearance which is required by Rule 141(b)(2), that she display the appearance which could generally be expected of a person under 21 years of age under the actual circumstances presented to the seller.

The ALJ described the 18-year-old decoy in the following manner:

> "[The decoy] was, at the time of the sale, wearing light colored pants and a black top with straps over her shoulders. (Exhibit 3.) She stood about 5 feet, 9 inches tall, although the low-cut black boots she wore may have added as much as 3/4 of an inch to her height. Her weight was not determined. [The decoy] wore no jewelry and her brunette hair was worn clipped back from her face. (Id.) It fell to her mid-back. She wore powder on her face, some lip gloss and a bit of mascara. [The decoy] appeared at the hearing and, despite having added about 10 pounds since August 1999, she appeared quite slender. She wore about the same makeup at the hearing as

> she wore in respondent's store and it was not noticeable. Her overall appearance at the hearing, that is, her physical appearance, her poise, demeanor, maturity and mannerisms, was that generally expected of a person her age. She gave the appearance of a teenager, constantly moving about in her chair as she testified. Her testimony was not given confidently, but hesitantly. The appearance of [the decoy] at the hearing was substantially the same as her appearance before respondent's clerk on August 19, 1999."

Appellant asserts, in apparent contradiction to the ALJ's findings, that the decoy "exhibited a noticeable level of sophistication," and that "it should also be clear, to even the casual observer, that at the time of the Administrative Hearing, the decoy did not display the appearance one could generally expect of a person under twenty-one years of age."

This is another instance where appellant's counsel would have the Board accept his conclusion regarding the decoy's appearance rather than the conclusion reached by the ALJ, who, unlike the Board, was in a position to observe the decoy when she testified. Appellant has pointed to nothing which, if present, might suggest some aspect of the decoy's appearance so far from the norm that it no longer could generally be considered that of a person under the age of 21.

The ALJ is the primary finder of fact. Unless it can be said that his finding is a clear and obvious departure from the evidence, this Board will not interfere.

III

Appellant contends that Rule 141(b)(5) was violated in two respects: (a) there was no face to face identification; and (b) the evidence and the findings do not establish that the face to face identification, if any, preceded the issuance of the citation.

There is little or no support in the record for either of these contentions.

Both the decoy and Deputy Anderson testified that the decoy identified the clerk as the seller. The decoy testified [RT 12] that the clerk was 15 feet away when she identified her, and was facing her [RT 19]:

"Q. Was [the clerk] facing in your direction or –

A. Yes

Q. Okay. Did [the clerk] turn to face you after – just like right after you identified her?

A. Yes.

Q. Right before you identified her?

A. Yes. "

Deputy Anderson testified in similar fashion.

Appellant's suggestion that the identification process was flawed because the clerk might not have been aware she was being identified is pure conjecture.

Appellant's alternative contention, that both the decision and the record are silent as to the sequence of the identification/issuance of citation process, is contrary to the record. Deputy Anderson's testimony [at RT 34-35] could not have been clearer. The clerk was given a citation after the decoy had identified her as the seller. There is no evidence suggesting the contrary.

Since appellant did not raise this issue at the hearing, it is understandable that the ALJ did not make a specific finding that the face to face identification preceded the issuance of the citation. However, a fair reading of Finding of Fact III-D, which narrates the series of events which followed the sale, indicates that the

ALJ had concluded that the issuance of the citation occurred after the decoy had identified the clerk as the seller.

ORDER

The decision of the Department is affirmed.[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.