

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

AB-7742

File: 20-237565 Reg: 00049065

PRESTIGE STATIONS, INC. dba AM/PM #5354
44239 Margarita Road, Temecula, CA 92590,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Rodolfo Echeverria

Appeals Board Hearing: September 6, 2001
Los Angeles, CA

ISSUED OCTOBER 30, 2001

Prestige Stations, Inc., doing business as AM/PM #5354 (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended its license for 15 days for appellant's clerk selling an alcoholic beverage to a minor decoy, 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 B. Saltsman and Stephen W. Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

FACTS AND PROCEDURAL HISTORY

¹The decision of the Department, dated November 16, 2000, is set forth in the appendix.

Appellant's off-sale beer and wine license was issued on July 1, 1993.

Thereafter, the Department instituted an accusation against appellant charging that, on January 27, 2000, appellant's clerk, Timothy Robert Bell ("the clerk"), sold an alcoholic beverage to 18-year-old Magdalena Kouroueacalis. At the time of the sale, Kouroueacalis was acting as a minor decoy for the Riverside Sheriff's Department.

An administrative hearing was held on September 26, 2000, at which time documentary evidence was received, and testimony was presented by Kouroueacalis ("the decoy") and by Riverside deputy sheriff Earl Quinata.

Subsequent to the hearing, the Department issued its decision which determined that the charge of the accusation had been sustained and no defenses had been established.

Appellant thereafter filed a timely notice of appeal. In its appeal, appellant raises the following issues: (1) the ALJ did not correctly analyze the decoy's appearance for purposes of Rule 141(b)(2) (4 Cal. Code Regs. §141, subd. (b)(2)), and (2) the Department did not establish that Rule 141(b)(5) (4 Cal. Code Regs. §141, subd. (b)(5)) was complied with.

DISCUSSION

I

Appellant contends the ALJ did not correctly analyze the decoy's appearance because he simply "list[ed] general characteristics and then a conclusion," and did not explain how the characteristics he considered would indicate that the decoy was under 21 years of age.

The ALJ made the following finding regarding the appearance of the decoy

(Finding II-D):

"The decoy's overall appearance including her demeanor, her poise, her mannerisms, her size and her physical appearance were consistent with that of an eighteen year old and her appearance at the time of the hearing was substantially the same as her appearance on the day of the decoy operation except that her hair had blond tips on the day of the hearing. On the date of the sale, the decoy was five feet five inches in height, she weighed approximately one hundred forty pounds and she wore no makeup and no jewelry. The decoy was wearing the same clothes on the day of the sale and at the hearing. The clothing consisted of beige cargo pants, a pearl-colored sweater and white tennis shoes. The photograph depicted in Exhibit 2 was taken on the day of the sale and it depicts how the decoy appeared on the day of the sale. At the hearing, the decoy was observed to be fidgeting in her chair, she was swiveling in her swivel chair and she appeared nervous. The decoy testified that she had participated in approximately five prior decoy operations, that she was a police Explorer in Temecula and that she was nervous both at the hearing and during the decoy operation. After considering the photograph (Exhibit 2), the decoy's overall appearance when she testified and the way she conducted herself at the hearing, a finding is made that the decoy displayed an overall appearance which could generally be expected of a person under twenty-one years of age under the actual circumstances presented to the seller at the time of the alleged offense."

The ALJ is not required to explain how the characteristics he considered indicated that the decoy appeared to be under 21. This Board has expressed its concern about the failure of some ALJ's to adequately address the appearance of decoys because, in a number of cases, the Board had no assurance that the ALJ's had applied the correct standard in evaluating the decoys' apparent age. But the Board has not required the kind of extensive analysis that appellant is asking for. Rather, "[w]e made it clear that we did not expect an exhaustive discussion of every possible consideration, but simply enough to satisfy this Board that the correct legal standard had been applied and that sufficient indicia of age, in addition to physical characteristics, were considered in order to show that, in reaching a conclusion as to the decoy's appearance, the whole person had been considered."

(Prestige Stations, Inc. (1/4/00) AB-7260.)

The ALJ's finding in the present case satisfies us that he considered the whole person when he evaluated the decoy's appearance.

II

Appellant contends that it was not established that the identification of the seller by the decoy was face to face as required by Rule 141(b)(5). Appellant bases this contention on the testimony of the decoy and deputy Quinata which, appellant argues, does not establish where the decoy was and what the clerk was doing at the time the decoy made the identification.

The decoy testified that she could not recall how far away from the clerk she was when she identified him or what the clerk was doing at the time. [RT 13.] She also testified that Quinata asked her to identify the person who sold the alcoholic beverage to her, and she pointed at the clerk and said "That's him." [RT 13-14.]

Quinata testified that after the decoy left the premises with the beer, he identified himself and told the clerk he had sold to a minor. [RT 35-36.] He then had the clerk move away from his cash register to the area of the other cash register right behind him. [RT 36-37.] When the decoy re-entered the premises, the clerk was standing near Quinata. [RT 36.] The decoy approached the area where Quinata and the clerk were, and Quinata asked her to identify the person who sold to her. In response, the decoy pointed to the clerk and said "That's the gentleman." [RT 38.]

The decoy must have been in reasonable proximity to the clerk when she made the identification because, after she approached the area where the clerk was standing near Quinata, she was close enough to hear Quinata ask her to make the identification

and for Quinata to see and hear her answer. Since the clerk was near Quinata, it is reasonable to infer that he was also close enough to have the opportunity to see and hear the identification being made. Since Quinata had just told the clerk he had sold an alcoholic beverage to a minor, and the clerk must have heard Quinata ask the decoy to make the identification, it is difficult to imagine that he would be unaware of the decoy's re-entry into the premises and the significance of her pointing at him and saying "That's the gentleman." (See Southland & Meng (1/4/00) AB-7158a, in which the Board found a face-to-face identification under similar circumstances.) Since the clerk did not testify, and appellant did not present any evidence in contradiction, we must accept the reasonable inference that the clerk knew or should have known that the decoy was identifying him as the seller.

The ALJ was not in error in finding that the identification was face to face.

ORDER

The decision of the Department is affirmed.²

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

²This 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.